

**IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA**

MARVIN SILVERSTEIN,

Appellant,

v.

CASE NO.: CVA1 07-11

Lower Court Case No.: 06-CC-13325

**THE HORNE CORPORATION d/b/a
MAGNOLIA ESTATES OF CENTRAL
FLORIDA AND ERNEST L. HORNE,**

Appellee.

Appeal from the County Court,
for Orange County,
Deb. S. Blechman, Judge.

Michael L. Resnick, Esquire,
for Appellant.

David J. Pederson, Esquire,
for Appellee.

Before THORPE, SPRINKEL, J. ADAMS, J.J.

PER CURIAM.

FINAL ORDER AND OPINION AFFIRMING TRIAL COURT

Appellant Marvin Silverstein (Silverstein) timely appeals the lower court's final judgment for possession removing him from his mobile home located on property owned by Appellee The Horne Corporation d/b/a Magnolia Estates of Central Florida (Park Owner). This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument per Florida Rule of Appellate Procedure 9.320.

Silverstein, a mobile home owner, leased the lot located at 5429 Leon Circle, Orlando,

Florida, from Park Owner. On July 5, 2006, Silverstein received a Notice of Initial Violation of Park Rule for failure to keep lawn trimmed and weed free. The notice stated that failure to correct the noncompliance within seven days could result in notice of a second violation and termination of the rental agreement. Park Owner specifically noted that since Silverstein relocated to Lakeland and became an absentee owner, the yard deteriorated to the point where there was no grass, only weeds and wild trees up to two feet tall.

Thereafter, on July 31, 2006, Silverstein received notice that his rental agreement was terminated in accordance with section 723.061(1)(c)(2), Florida Statutes, for failure to comply with the notice of initial violation. The notice of termination informed Silverstein that he had 30 days to vacate the park or an eviction proceeding would be initiated against him.

On September 6, 2006, Silverstein filed a complaint for declaratory relief and monetary damages against Park Owner. Count I sought a declaratory judgment determining the right of Park Owner to terminate Silverstein's residency and the legal validity of park rule 16. Count II requested a declaratory judgment determining the right of Silverstein and other owners to hire private contractors of their own choosing and the right of Park Owner to insist that Silverstein and other owners hire private contractors of Park Owner's choosing. Count III sought a declaratory judgment determining the right of Silverstein and other owners to allow neighbors or other home owners to care for the mobile homes and lots in the park as opposed to a private contractor of Park Owner's choosing. Lastly, Count IV sought money damages because Park Owner allegedly interfered with the sale of Silverstein's mobile home by making derogatory and defamatory comments about him and his mobile home.

Park Owner filed an answer asserting affirmative defenses, a counter-complaint for possession/eviction, and a motion to proceed under the rules of summary procedure as to the

eviction. Following a hearing on Park Owner's motion to dismiss Count IV and motion to proceed under summary procedure, Silverstein filed an amended complaint amending Count IV for monetary damages and adding Count V requesting a declaratory judgment determining the right of Park Owner to charge a transfer fee upon the sale of Silverstein's mobile home. In response to Silverstein's amended complaint, Park Owner filed an answer with affirmative defenses as well as a motion to dismiss and/or for a more definite statement.

In November 2006, Park Owner filed a motion to compel payment of rents into the court registry alleging that Silverstein had not paid rent for the months of August, September, October and November, in the amount of \$1,100, or \$275.00 per month. The lower court entered an order granting Park Owner's motion to compel rents and ordered Silverstein to deposit \$1,100 into the court registry and to continue to deposit \$275 on or before the first of each month thereafter. Silverstein filed an objection to the Court's order requiring payment of rent into the court registry arguing that the rent deposit statute only applies to actions based on non-payment and even if it applied to this action for possession, the statute does not require the payment of accrued rent into the registry.

At trial, Silverstein testified that he received a copy of the park rules when he moved into the mobile home park approximately nine years ago. Silverstein also testified that even though he agrees that a homeowner has an obligation to maintain his yard in a reasonable and nice manner, he does not agree with park rule 16 because there is no definition of "lawn." Silverstein further testified that he could not recall if his yard was maintained during the months of May, June, and July, and his check for lawn maintenance in August was returned by Park Owner. Thereafter, Park Owner testified that he did not have an agreement with Silverstein regarding lawn maintenance and no one maintained the subject property during May, June, July, August, or

September.

A county health inspector testified that while performing a routine inspection of the mobile home park on September 21, 2006, she issued a citation for overgrown grass on Silverstein's lot. When questioned about the length of the grass, she could not recall how tall it was but stated that it was different than the other lots. Another witness, Yvan Laine, a resident of Magnolia Estates Mobile Home Park, testified that shortly before trial Park Owner issued him a notice of violation for overgrown grass. Laine stated that he should not have received a notice of violation because the grass only extended to the height of his shoes with the tallest weed being about one foot high. Laine further testified that although he is familiar with Silverstein's yard, he could not recall the condition of the yard in July.

At the conclusion of the trial, the trial court made the following oral findings: (1) there was no waiver by Park Owner for accepting the July rent because there was no proof of when the noncompliance became a concern; (2) Silverstein's August rent check with an additional \$20 was not sufficient compliance because there was no agreement between the parties; and (3) there was no showing of arbitrary enforcement.

On January 9, 2007, the trial court entered a Final Judgment for Possession granting Park Owner's petition for tenant eviction and denying Silverstein's affirmative defenses. Thereafter, Silverstein filed a motion for new trial, motion for stay of writ of possession, and motion for stay of enforcement of final judgment. On February 2, 2007, the trial court entered an order denying all three motions. Park Owner then filed a motion for partial summary judgment as to Count II of the counter-complaint, a motion to release funds held in court registry, and a motion to tax attorney's fees and costs.

On March 1, 2007, Silverstein filed a Notice of Appeal of Final Judgment; however,

Silverstein's initial brief addressed both the rent deposit order entered on November 21, 2006, and the Final Judgment for Possession entered on January 10, 2007. Accordingly, this Court entered an Order granting Park Owner's "Motion to Dismiss Appeal of Court Order Dated November 21, 2006" because it was not properly appealed as it was not listed in the Notice of Appeal.

A decision in a nonjury case based on a finding of fact from disputed evidence is subject to the competent, substantial evidence standard of review on appeal because the trial judge is in the best position to "evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor and credibility of the witnesses." Shaw v. Shaw, 334 So. 2d 13, 16 (Fla. 1976). A trial court's factual findings are presumed correct and will not be reversed unless the court's decision is unsupported by competent substantial evidence. City of Cocoa v. Leffler, 803 So. 2d 869, 872 (Fla. 5th DCA 2002).

This appeal pertains to a mobile home eviction governed by the Florida Mobile Home Act, Chapter 723, Florida Statutes. Section 723.061(1)(c), Florida Statutes, allows a mobile home park owner to evict a mobile home owner for violation of a park rule or regulation. Specifically, section 723.061(1)(c)(2), Florida Statutes, states that:

For a second violation of the same properly promulgated rule or regulation . . . the mobile home park owner may terminate the tenancy if she or he has given the mobile home owner, tenant, or occupant written notice within 30 days of the first violation, which notice specified the actions of the mobile home owner, tenant, or occupant which caused the violation and gave the mobile home owner, tenant, or occupant 7 days to correct the noncompliance. The mobile home owner, tenant, or occupant must have received written notice of the ground upon which she or he is to be evicted at least 30 days prior to the date on which she or he is required to vacate. A second violation of a properly promulgated rule or regulation . . . within 12 months of the first violation is unequivocally a ground for eviction, and it is not a defense to any eviction proceeding that a violation has been cured after the second violation.

Silverstein asserts that Park Owner was without any legal right to initiate the eviction

proceeding and the trial court erred by finding that Park Owner proved by competent substantial evidence that Silverstein had violated the rules and regulations regarding lot maintenance. Silverstein also asserts that the trial court erred by failing to hold that Park Owner waived the right to evict by accepting rent for the month of July. Lastly, Silverstein argues that the trial court erred by failing to hold that Park Owner is arbitrarily enforcing the mobile home park rules and regulations.

Alternatively, Park Owner maintains that there was competent substantial evidence to support the trial court's finding that Silverstein did not maintain his lot in a reasonable manner in accordance with the park rules and regulations. Moreover, Park Owner contends that Silverstein failed to present evidence to support the defenses of waiver and arbitrary enforcement.

Competent Substantial Evidence of Violation of Park Rule

Section 723.023, Florida Statutes, provides that “[a] mobile home owner shall at all times . . . (3) [c]omply with properly promulgated park rules and regulations.” Specifically at issue in this case is Rule 16 of the Magnolia Estates of Central Florida Rules and Regulations which states that “lawns must be kept neat, trimmed and weed free.”

Silverstein admits that there was high grass and weeds on his lot on September 13, 2006, as illustrated in the pictures introduced by Park Owner at trial; however, Silverstein argues that the trial court erred in its findings of fact when it concluded that he was in violation of the park rules and regulations on July 5, 2006.

At trial, Park Owner testified that Silverstein's grass gradually grew out of control from the time he cancelled his lawn service on May 5, 2006, to the date the initial notice of violation was posted on July 5, 2006. Park Owner further testified that after Silverstein failed to correct the noncompliance or even respond to the initial notice of violation, Park Owner posted a notice

of termination on July 31, 2006.

Additionally, Park Owner testified that he did not see anyone maintain the subject property for the months of May, June, July, August, and September 2006. Moreover, Silverstein testified that he was unable to recall whether he or anyone else maintained the yard during the months of May, June, and July, after he terminated the lawn maintenance services of Handy Andy Maintenance, Inc. on May 5, 2006.

Accordingly, despite the absence of pictures of the condition of the lot on July 5, 2006, the trial court's finding that Silverstein failed to maintain his yard is supported by competent substantial evidence.

Park Owner's Waiver by Acceptance of July Rent

The Florida Mobile Home Act, Chapter 723, Florida Statutes, does not provide for waiver; however, the common law principle of waiver does apply to mobile home park tenancies. In Woodlands Civic Ass'n, Inc. v. Darrow, the Fifth District Court of Appeal noted that:

Waiver is the intentional or voluntary relinquishment of a known right, or conduct which infers the relinquishment of a known right . . . The essential elements of waiver are (1) the existence at the time of the waiver of a right, privilege, advantage or benefit which may be waived; (2) the actual or constructive knowledge of the rights; and (3) the intention to relinquish the right . . . Waiver may be express, or implied from conduct or acts that lead a party to believe a right has been waived.

765 So. 2d 874, 877 (Fla. 5th DCA 2000)(quoting Taylor v. Kenco Chemical & Mfg. Corp., 465 So. 2d 581, 587 (Fla. 1st DCA 1985)); see Village Green Park, LTD., v. Jeffcoat, 10 Fla. L. Weekly Supp. 532a (Fla. 6th Cir. Ct. May 7, 2003)(holding that landlord's collection of rent after knowledge of alleged material breach of the park's rules and regulations constituted common law waiver).

On July 3, 2006, Silverstein paid July rent by sliding his rent check into Park Owner's door. Two days later, Silverstein's rent check was deposited and Park Owner served Silverstein with a notice of initial violation. After Silverstein failed to address the violation, Park Owner issued a notice of termination at the end of July. Of particular importance is the fact that Park Owner returned Silverstein's August rent check which was submitted after service of the notice of termination.

Silverstein asserts that Park Owner's knowledge of the violation at the time of acceptance is all that is required to have waived the right to evict. However, Silverstein failed to provide evidence regarding Park Owner's actual knowledge or course of conduct prior to accepting July's rent and posting the notice of initial violation. The trial court correctly noted that a waiver of Park Owner's right to evict might have resulted had the Park Owner commenced an eviction action prior to accepting the July rent payment. Based upon the record, the Court finds that the trial court's finding of no waiver by Park Owner is supported by competent substantial evidence.

Arbitrary Enforcement of Park Rules and Regulations

Section 723.061(c), Florida Statutes, states that "[n]o properly promulgated rule or regulation may be arbitrarily applied and used as a ground for eviction."

Silverstein argues that Park Owner is arbitrarily enforcing the park rules and regulations in violation of section 723.061(c), Florida Statutes, and not complying with section 723.022(5), Florida Statutes, which requires mobile home park owners to comply with properly promulgated park rules and regulations.

At trial, Silverstein introduced a number of photographs in an effort to support his assertion that Park Owner failed to properly care for common park areas. However, the pictures introduced by Silverstein were either of the outer fringes of the mobile home park, property

outside of the park, or areas not of common use. Additionally, Laine's testimony failed to demonstrate that Park Owner is arbitrarily enforcing the park rules and regulations. The trial court also indicated that Silverstein's argument regarding Park Owner's alleged motivation was based on speculation.

The Court finds that the trial court did not err by failing to find that Park Owner arbitrarily enforced the park rules and regulations because Silverstein failed to provide competent and substantial evidence in support of his defense of arbitrary enforcement.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the trial court's Final Judgment for Possession entered on January 10, 2007, is **AFFIRMED**; "Appellee's Motion for Attorney's Fees" is **GRANTED**, the assessment of which is **REMANDED** to the trial court; and this case is **REMANDED** for further proceedings consistent with this opinion.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the ___18 day of ___July_____, 2008.

_____/S/_____
JANET C. THORPE
Circuit Judge

_____/S/_____
GEORGE A. SPRINKEL, IV
Circuit Judge

_____/S/_____
JOHN H. ADAMS, Sr.
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished via U.S. mail to: **Michael Resnick, Esquire**, 100 East Robinson Street, Orlando, Florida 32801 and **David J. Pederson, Esquire**, 1516 East Colonial Drive, Suite 305, Orlando, Florida 32803 on the ___18___ day of ___July_____, 2008.

_____/S/_____
Judicial Assistant