1 08-29-06

IN THE COURT OF APPEALS OF THE STATE OF OREGON

PCRI, Plaintiff-Respondent, v. BARRY JOE STULL, Defendant-Appellant.	)	Multnomah County Circuit Court Case No. 05F015732 CA No. A130567 PLAINTIFF'S RESPONSE TO ORDER TO SHOW CAUSE

The Court of Appeals has required that plaintiff show cause ". . . why it should not be held in contempt of court for wilfully failing to comply with the court's orders of March 9, 2006 and March 16, 2006." In issuing this order the Court ignored plaintiff's motion to strike defendant's exhibits and failed to mention the affidavits that plaintiff has already filed in opposition to defendant's motion.

The Court of Appeals states that ". . . it appears that the entity with whom respondent contracted to remove appellant's personal belongings from the dwelling unit continued to remove appellant's belongings until March 15, 2006." In fact, according to the sworn statement of the contractor who actually performed the work, everything was removed from the apartment and had been hauled away as of the close of the day on March 7, 2006 (Flannel Affidavit). This was confirmed by the sworn affidavit of Lucero, the manager of the apartment complex (Supplemental Lucero Affidavit). This evidence is the only properly submitted evidence on the issue.

Defendant has made unsworn statements in his pleadings in which he asserts that some of his property was removed as late as March 15, 2006. Such unsworn allegations are not evidence.

Defendant also submitted a statement which purports to be from another tenant Armando Aguila. This statement is not notarized and does not contain the requirements for a declaration under oath. Plaintiff has already moved that this exhibit be struck from the record. Even if it is considered by this court, Mr. Aguila states only that items were removed from the apartment on March 11, 2006, two days prior to the date on which, according to the Court of Appeals order, defendant had notice of the court's order. Finally, defendant submitted a statement which purports to be that of Jasmine Gamble. Again the statement was not notarized, does not contain the requirements for a declaration under oath and plaintiff has already moved that it be struck. Ms. Gamble does state that she observed some unspecified items being removed from the apartment on March 15.

As previously moved by plaintiff, the Court of Appeals should strike the statements of Gamble and Aguila since they do not comply with the requirements for either an affidavit or a declaration under oath. Even if the statements are considered by this court, only the statement of Aguila supports the allegations of defendant. This statement is directly contradicted by the affidavit of Flannel (who actually removed the contents of the apartment) and the affidavit of Lucero (the apartment manager who oversaw the removal). The admissible evidence in this case supports the conclusion that nothing was removed from the apartment after March 13, 2006, the date on which the Court of Appeals found that plaintiff became aware of the order of the Court of Appeals.

The Court of Appeals also found that plaintiff ". . . has not explained why it would have been impracticable to restore appellant to the premises in less than seven days." The previously submitted supplemental affidavit of Ms. Lucero establishes that plaintiff was ready to deliver the

keys to the apartment to defendant at any point after March 16, 2006. Plaintiff ". . . held the apartment open and did nothing to prevent [defendant] from moving in." According to Ms. Lucero, defendant did not contact plaintiff for almost two weeks and when he did contact plaintiff he was immediately given a key and allowed to move back into the apartment (Supplemental Lucero Affidavit).

There is no evidence that plaintiff had any way to contact defendant until he chose to contact them. There is no evidence that they had a telephone number or even a residential address where he could be reached. According to the submission of defendant, his post office box was ". . . closed down by accident of staff" of the post office prior to March 16, 2006. Defendant did not receive the Court of Appeals order until March 24, 2006 due to this problem. There is no evidence that plaintiff could have contacted defendant prior to this date. All plaintiff could do is wait for defendant to contact it.

Defendant asserts that when he contacted PCRI he was refused access and that he consulted an attorney regarding this refusal. Defendant also stated in a letter to PCRI (not in his motion to this court) that he was not given full access to the laundry room and a parking permit. However, defendant has submitted no evidence whatsoever of any of these assertions, not even his own affidavit. Defendant's argument with no evidence cannot be sufficient to support the serious conclusion that plaintiff has acted in contempt of this Court.

The only evidence on the issue of access is the Supplemental Affidavit of Lucero which establishes that PCRI allowed defendant to move back into the apartment as soon as he contacted PCRI after the March 13 date on which it received the Court of Appeals order. Since defendant did not assert in his motion that he was denied access to the laundry room or was not given a

parking permit, these issues are not addressed in the Supplemental Affidavit of Lucero. However, there is no evidence to support either statement. The evidence establishes that PCRI complied with all orders of the Court of Appeals and should not be found in contempt of court.

DATED: August 29, 2006.

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