1949
Jan. 28

KARABET TERZIAN
v.
IOANNIS TH. MICHAELIDES.

[JACKSON, C.J., AND MELISSAS, J.]

(January 20 and 28, 1949)

KARABET TERZIAN, *Appellant*,

v.

IOANNIS TH. MICHAELIDES. *Respondent.*

(*Civil Appeal No.* 3831.)

Landlord and tenant—Restrictive covenant—Sub-tenant's constructive notice—Breach of covenant—Forfeiture—Waiver—Rent Restriction—Increase of Rent (Restriction) Law, 1942, section 7 (1).

The landlord, while absent in Greece, leased certain premises through an agent to one S. for a period of three years from the 1st February, 1941, and thereafter from year to year. There was no covenant against sub-letting but there was a covenant by the lessee not to exercise or allow to be exercised in the premises "any other business or trade than that of a garage." On the 1st May, 1941, while the landlord was still absent in Greece, the lessee, S., sub-let a part of the premises to the appellant for the term of "one year or for a less period." The sub-tenant, appellant, used that part of the premises as a store and was still in occupation of it at the time of the landlord's return to Cyprus in April, 1945. From May, 1941, until the landlord returned from Greece, his property was under the control of the Custodian of Enemy Property.

In August, 1945, the landlord brought an action in the District Court against S., the sub-tenant's lessor, and judgment was given, by consent, on the 26th April, 1946, for the delivery to the landlord of the whole property comprised in the lease to S. Immediately thereafter the sub-tenant was duly notified of what had occurred and was required to deliver up possession of the premises comprised in the sub-lease by the 31st May, 1946, but he refused to do so and the landlord brought an action against him to recover possession. At no time was rent received by the landlord from the sub-tenant, and as from the 31st May, 1946, both the landlord and the sub-tenant's lessor refused to accept rent offered by him. Judgment was given in favour of the landlord and the sub-tenant appealed.

Held: (i) that the restrictive covenant applied to the whole of the premises included in the head-lease. The covenant was not an unusual covenant and it was of a kind which normally runs with the land. In the sub-lease to the appellant the premises were described as "the immovables of Michaelides" (the landlord) and the appellant, as the sub-lessee, had constructive notice of the terms of his immediate lessor's lease.

(ii) There was no evidence of any such unequivocal act on the part of the landlord as would constitute a waiver on his part of a breach of covenant by which the sub-tenant was bound.

(iii) Whatever may have been the position of the sub-tenant's sub-lease up to the time when the landlord declared his intention to re-enter upon the premises and to enforce forfeiture for breach of covenant, there can be no doubt that the sub-lease was avoided as from the time when the landlord notified the sub-tenant of the judgment of the District Court against the sub-tenant's lessor and demanded delivery of possession. In these circumstances, the sub-tenant clearly could not claim the protection of the Rent Restriction Laws for he was at no time performing, or ready to perform, the covenants which his sub-lease bound him to observe, and the landlord was entitled to recover possession from him.

Judgment of the District Court affirmed.

Appeal by the sub-tenant from an ejectment order made by one of the District Judges of Nicosia in favour of the landlord. (Action No. 683/47.)

E. Tavernaris for the appellant.

J. Clerides for the respondent.

The facts of the case are fully set forth in the judgment of the Court which was delivered by :

JACKSON, C.J. : This is an appeal from a judgment of one of the District Judges of Nicosia by which the appellant was restrained, by injunction, from interfering with certain premises in Nicosia, belonging to the respondent, and was ordered to quit the premises forthwith and to deliver possession of them to the respondent. The appellant was further ordered to pay to the respondent a sum of £2 per month by way of damages as from the 1st September, 1946, until delivery of the premises to the respondent.

On the 4th January, 1941, the respondent, who is the owner of certain premises in Aristotelis Street, Nicosia, and was then absent in Greece, leased them through an agent to one Stavrou for a period of 3 years from the 1st February, 1941, and thereafter from year to year. The premises were described in the lease as a garage, with certain subsidiary garages. There was no covenant against sub-letting but there was a covenant by the lessee " not to exercise or to allow to be exercised in the garage or in any part thereof any other business or trade than that of a garage."

On the 1st May, 1941, the lessee, Stavrou, sub-let a part of the premises, described in the sub-lease as a store, to the appellant for the term of " one year or for a less period." The appellant has used that part of the premises as a store and is still in occupation of it and claims to continue in occupation under the Rent Restriction Laws.

The appellant's first argument was that the restrictive covenant as to the use of the premises leased by the respondent to Stavrou did not apply to the part sub-let

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to him. Upon this point we have no doubt that the District Judge was right in holding, on an interpretation of the lease to Stavrou, that the restrictive covenant applied to the whole of the premises included in the head-lease.

The appellant also argued that the restrictive covenant was an unusual and onerous one and that, as he had no notice of it, he was not bound by it. It did not, he said, run with the land. But the covenant was not, in our opinion, an unusual covenant and it was of a kind which normally runs with the land. In the sub-lease to the appellant the premises are described as of " the immovables of Michaelides " (the respondent) and the appellant, as the sub-lessee, had constructive notice of the terms of his immediate lessor's lease. (Woodfall, 24th Edition, p. 594.)

The appellant's next point was that if he had committed a breach of a covenant by which he was bound, the breach had been waived. The respondent was absent in Greece at the time of the head-lease granted in his name to Stavrou (4th January, 1941), and at the time of the sub-lease granted by Stavrou to the appellant (apparently in April, 1941). He did not return to Cyprus until April, 1945. From May, 1941, until, at any rate, the respondent returned from Greece, his property was under the control of the Custodian of Enemy Property. In August, 1945, the respondent brought an action against Stavrou, the appellant's lessor, and judgment was given, by consent, on the 26th April, 1946, for the delivery to the respondent of the whole property comprised in the lease to Stavrou. Immediately thereafter the appellant was notified in writing by the respondent of what had occurred and was required to deliver the premises comprised in the sub-lease by the 31st May. No reply was received and the respondent's advocates wrote again to the appellant on the 1st July, 1946. Apparently no reply was received to that letter either. At no time was rent received by the respondent from the appellant and as from the 31st May, 1946, following on the judgment given by the District Court on the 26th April, both the respondent and the appellant's lessor refused to accept rent offered by him.

We fully agree with the District Judge that, in these circumstances, there is no evidence of any such unequivocal act on the part of the respondent as would constitute a waiver on his part of a breach of covenant by which the appellant was bound.

Whatever may have been the position of the appellant's sub-lease up to the time when the respondent declared his intention to re-enter upon the premises and to enforce forfeiture for breach of covenant, there can be no doubt that the sub-lease was avoided as from the time when the respondent notified the appellant of the judgment

of the District Court against the appellant's lessor and demanded delivery of possession of the premises comprised in the sub-lease by the 31st May, 1946.

In these circumstances, the appellant clearly cannot claim the protection of the Rent Restriction Laws for he was at no time performing, or ready to perform, the covenants which his sub-lease bound him to observe.

An English case in which the facts appear to have been very similar to those in this case was a case which was not cited to us, namely the case of *Chapman* v. *Hughes* (1923), 39 T.L.R. 260. Unfortunately the full report is not available to us and we have only a brief summary which appears as number 121 in a volume entitled "Rent Restriction cases" (second edition) by the learned editor of Woodfall's "Landlord and Tenant." Since we have not a full report, we must be cautious in using the case as an authority and we wish to say that our judgment would have been the same even if we had not found this apparent authority for it. That case turned on the interpretation of section 5 (1) (*a*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which excluded a tenant from protection from ejection if any obligation of the tenancy had been broken or not performed. In that respect the section was similar to the opening passage of section 7 (1) of our Rent Restriction Law of 1942.

In the case quoted a tenant held a dwelling house under conditions which bound him not to permit it to be used for any business without the landlord's written consent. The tenant, without such consent, let part of the house to a sub-tenant for a piano business. Subsequently the tenant's holding was determined by consent and the sub-tenant remained in occupation for the part sub-let to him. In an action by the landlord against the sub-tenant to recover possession it was held that as the original tenant had broken the terms of his tenancy, the landlord was entitled to recover possession from the sub-tenant.

For the reasons which we have given, we think that this appeal must be dismissed with costs. The amount of the damages awarded to the respondent by the District Court represents the actual loss which the respondent has sustained as from the 1st September, 1946, by reason of the appellant's failure to do what he ought to have done several months earlier, namely, to deliver up possession of the premises comprised in the sub-lease, the implied terms of which he had failed to observe. The amount is reasonable and the District Court's award on this point, as well as on the others mentioned in the judgment, must be affirmed.

Appeal dismissed.