

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

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| JOEL ELFMAN, DDS | : | COMMERCE PROGRAM |
| | : | |
| v. | : | FEBRUARY TERM 2001 |
| | : | |
| ARNOLD BERMAN, | : | No. 2080 |
| JOHN J. TURCHI, JR., and | : | |
| JOHN TURCHI PARTNERSHIP | : | Control No. 60716 |

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| PENNSYLVANIA FEDERATION | : | COMMERCE PROGRAM |
| BROTHERHOOD OF MAINTENANCE OF | : | |
| WAY EMPLOYEES | : | APRIL TERM 2001 |
| | : | |
| v. | : | No. 1299 |
| | : | |
| 1930-34 ASSOCIATES, LP, | : | Control No. 60716 |
| 1930-34 CORPORATION, and | : | |
| ARNOLD BERMAN | : | |

ORDER

AND NOW, this 21st day of June 2001, upon consideration of plaintiff Joel Elfman's motion for clarification and the response of defendants 1930-34 Associates, 1930-34 Corporation and John J. Turchi, Jr., and in accordance with the court's contemporaneously-filed opinion, IT IS HEREBY ORDERED that the motion is GRANTED. The court's June 6, 2001 order vacating the preliminary injunction shall be amended to include the following paragraphs:

(5) The court will reconsider Findings of Fact 15, 25, 41 and 44 and Conclusions of Law 10, 11 and 12.

(6) The court will reconsider Conclusion of Law 9 only as to plaintiff Penn Fed. (7)

The court will not reconsider other Findings of Fact or Conclusions of Law.

BY THE COURT:

JOHN W. HERRON, J.

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OPINION

On May 10, 2001 the court entered a preliminary injunction order against defendants 1930-34 Associates, 1930-34 Corporation and John J. Turchi, Jr. (“the Turchi defendants”). The order imposed fines on the Turchi defendants should they not comply with the injunction. The Turchi defendants moved for reconsideration of that order. On June 6, 2001 the court granted the motion for reconsideration, vacated the preliminary injunction and scheduled a new hearing on the preliminary injunction petition.

Plaintiff Joel Elfman now moves for clarification of the June 6, 2001 reconsideration order. Dr. Elfman asks the court to clarify whether it will reconsider all findings of fact and conclusions of law supporting the May 8, 2001 preliminary injunction, or, instead, only those findings and conclusions related

to the fines provision and the feasibility of compliance with the injunction. The Turchi defendants oppose clarification and argue that the court should reconsider all findings and conclusions.

The court grants the motion for clarification. At the upcoming injunction hearing, the court will hear evidence and argument about four issues. First, the court will hear evidence and argument about the changed circumstances due to Penn Fed's having allegedly removed its property from the building. Second, the court will hear evidence and argument about impossibility of performance within the time allowed by the preliminary injunction order, including evidence and argument about safety concerns. These first two issues are relevant to whether denying the injunction will cause greater harm than granting the injunction, whether the injunction will restore the parties to the status quo and whether the injunction is reasonably suited to abate the harm to the plaintiffs. Therefore, the court will reconsider Conclusions of Law 10, 11 and 12. In addition, the changed circumstances issue is relevant to whether Penn Fed continues to suffer imminent irreparable harm not compensable by money damages. Therefore, the court will reconsider Conclusion of Law 9 only as to Penn Fed. The court will reconsider Findings of Fact 15, 41 and 44, which support these conclusions, and make additional findings if necessary.

Third, the court will hear evidence and argument about John Turchi's state of mind. Though evidence as to Turchi's state of mind is not relevant to the legal determination of whether the Turchi defendants breached the lease, it may impact the equitable determination of whether to impose fines. Therefore, the court will reconsider Finding of Fact 25 and make additional findings if necessary.

Fourth, the court will hear evidence about ownership of the building to clarify the issue of proper naming of defendants in this action.

The Turchi defendants have presented no evidence or argument justifying reconsideration of other findings or conclusions -- including the legal conclusions that the Turchi defendants constructively

evicted the plaintiffs and breached the plaintiffs' leases¹ -- and the court will not reconsider other findings or conclusions.

¹ As part of the conclusions that 1930-34 Associates breached Dr. Elfman's lease and constructively evicted him, the court determined that section 7(c) of Dr. Elfman's lease does not give the Turchi defendants a defense to Dr. Elfman's claims. In their memorandum opposing the motion for clarification, the Turchi defendants argue that they are entitled to reconsideration of that determination. The court disagrees. Section 7(c) allows the lessor to disrupt elevator, water or other building services as required to repair those services, where the cause of the disruption is beyond the reasonable control of the lessor. Section 7(c) requires the lessor to take appropriate measures to restore these services without undue delay. Section 7(c) does not apply for two reasons. First, the cause of the loss of services -- neglect -- was within the control of Dr. Berman and 1930-34 Associates. Second, Berman and 1930-34 Associates did not take appropriate measures to restore the services without undue delay. Any evidence that the neglect and failure to make repairs occurred more under Dr. Berman's ownership than under 1930-34 Associates' ownership is not relevant to the issues of breach and constructive eviction, for 1930-34 Associates is liable for Dr. Berman's conduct as Dr. Berman's successor. See Akin v. Marshall Oil Co., 188 Pa. 614, 41 A. 748 (1898) (stating that a covenant in a lease for the performance of some duty in connection with the possession of the land runs with the land) and Checker Oil Co. v. Harold H. Hogg, Inc., 251 Pa.Super. 351, 380 A.2d 815, 818 (1977) (en banc) ("The burden of [an express or implied covenant of quiet enjoyment] runs with the land and thus passes to the transferee of the reversion or to the assignee of the landlord's interest in the lease."). To the extent that evidence of the circumstances of 1930-34 Associates' purchase of the building affects Dr. Elfman's equitable right to fines, however, the court will hear such evidence.

The court will enter a contemporaneous order granting the motion for clarification.

BY THE COURT:

JOHN W. HERRON, J.

DATE: June 21, 2001