

20130164

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20130164
Cass County District Court No. 09-2013-CV-00861

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Carrie Peterson,

STATE OF NORTH DAKOTA

Plaintiff/Appellee,

v.

Mara Pierce,

Defendant/Appellant.

BRIEF OF DEFENDANT/APPELLANT

**Appeal from Memorandum Opinion and Order dated May 1, 2013,
in the District Court, County of Cass, State of North Dakota,
The Honorable Wickham Corwin, Presiding**

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STATEMENT OF ISSUES

1. Did the District Court err in determining that Appellant Mara Pierce's rent payment was neither successfully made nor completed and therefore her rent payment in the amount of \$1,400 was still due and owing to Appellee Carrie Peterson?

STATEMENT OF THE CASE

This is an appeal from a Memorandum Opinion dated May 1, 2013 of the District Court, Cass County. Appellant's A. at 53. This action was commenced via Summons and Verified Complaint dated May 21, 2013. Appellant's A. at 4. The dispute arises out of a landlord/tenant agreement between Appellant Mara Pierce ("Pierce") and Appellee Carrie Peterson ("Peterson"), in which Pierce rented a condominium owned by Peterson pursuant to an oral agreement. Appellant's A. at 53. Pierce paid her January 2013 rent payment by placing \$1,400 in cash in Peterson's mailbox on or about December 30, 2012. Id. Peterson claimed she never received Pierce's rent payment for the month of January, and as such, served Pierce with a Notice to Evict. Appellant's A. at 4.

A hearing on the eviction action was held on April 5, 2013, in front of the Honorable Wickham Corwin, District Judge in Cass County, North Dakota. Appellant's A. at 53. Judge Corwin denied the eviction action and took the related payment issue under advisement. Id. In a Memorandum Opinion issued on May 1, 2013, Judge Corwin determined that Pierce was responsible for the lost rent payment and granted a judgment against her in the amount of \$1,400. Id. This appeal timely ensued on May 29, 2013. Appellant's A. at 56.

STATEMENT OF THE FACTS

Appellant Mara Pierce ("Pierce") rented a condominium ("Property") owned by Appellee Carrie Peterson ("Peterson") beginning on December 1, 2010. Appellant's A. at 38. The Property is located at 4394 46th Avenue South, Fargo, ND. Id. The lease agreement between the parties consisted of an oral agreement based on a letter from Pierce to Peterson in which she offered to pay Peterson rent in the amount of \$1,400 due on the first of each month. Appellant's A. at 53.

Throughout the rental period, the parties established a course of conduct whereby Peterson routinely accepted rent from Pierce after the first of each month. Appellant's A. at 38. Pierce would always drive to Peterson's home and attempt to personally deliver her rent payment to Peterson. Id. In the event that Peterson was not home, Pierce would leave the rent payment in Peterson's mailbox. Id. Peterson did not object to Pierce's method of delivery; instead Peterson accepted payment in this manner at various times throughout the rental period. Appellant's A. at 39. At one point Peterson provided Pierce with self-addressed stamped envelopes for Pierce to use to send her rent payment to Peterson, however this method proved unsuccessful when the rent payments were returned to the Property rather than being delivered to Peterson's home. Id.

Pierce paid rent payments to Peterson by either cash or check. Id. While usually paying by check, Pierce paid Peterson cash approximately seven times throughout the 29-month rental period, which amounts to twenty-five percent

(25%) of all rent payments made by Pierce and accepted by Peterson. Id. In fact, Peterson testified that it was “fine” with her that Pierce sometimes paid rent in cash. Appellant’s A. at 17.

The dispute at issue here involves Pierce’s rent payment for January 2013. Appellant’s A. at 53. On December 30, 2013, Pierce attempted to personally deliver her January 2013 rent payment, \$1,400 cash, to Peterson at Peterson’s home. Appellant’s A. at 39. When no one answered the door, and acting in conformance with past conduct, Pierce left the rent payment in Peterson’s mailbox. Id. Peterson never received Pierce’s rent payment. Appellant’s A. at 53.

Peterson then filed an unlawful detainer action against Pierce for nonpayment of rent. Appellant’s A. at 4. The District Court held a hearing at which Peterson’s request for an order of eviction was denied. Appellant’s A. at 53. The District Court found that Pierce placed \$1,400 in cash in Peterson’s mailbox. Id. The District Court also found that Peterson never received the money. Id. Thus the issue to be decided was who must bear the loss of the lost rent payment. Id.

The District Court determined that because the rent payment was made in cash, Peterson did not assume the risk of nondelivery; therefore Pierce was liable for the missing rent payment. Id. The District Court awarded Peterson judgment against Pierce in the amount of \$1,400 along with costs and disbursements. Appellant’s A. at 54. Pierce then filed a timely Notice of Appeal with the District Court on May 29, 2013. Appellant’s A. at 56.

LAW AND ARGUMENT

A. Standard of Review

Findings of fact are subject to the clearly erroneous standard of review. N.D.R.Civ.P. 52(a)(6); see also Hill v. Weber, 1999 ND 74, ¶ 12, 592 N.W.2d 585. A finding of fact is clearly erroneous if it is based upon an erroneous view of the law, no evidence presented during trial supports it, or, if although there is evidence to support it, on the record as a whole the reviewing court is left with a “definite and firm conviction” that a mistake was made. Miller v. Mess, 2011 ND 166, ¶ 12, 802 N.W.2d 153.

Questions of law, on the other hand, are fully reviewable on appeal. Thompson v. Associated Potato Growers, Inc., 2000 ND 95, ¶ 7, 610 N.W.2d 53 (citations omitted). As set for above, Pierce submits the District Court’s own findings, coupled with settled law, compel a finding that Pierce made an effective legal tender and delivery of payment when she left her January 2013 rent payment in Peterson’s mailbox. Accordingly, Pierce submits the District Court erred as a matter of law in not so finding.

B. The District Court Erred in Concluding Pierce Did Not Make An Effective Legal Tender When She Placed Her Rent Payment, In The Amount Of \$1,400 Cash, In Peterson’s Mailbox.

1. Cash is an Acceptable Form of Payment

Throughout the time in which she rented the Property from Peterson, Pierce made twenty-five percent (25%) of her rental payments in cash. Appellant’s A. at 39. The parties thus established a course of conduct in which cash was an acceptable tender of payment. Appellant’s A. at 17; see Bennett v.

Broderick, 858 N.E.2d 1044, 1051 (Ind. Ct. App. 2006) (payment can be made by any medium offered by one party and accepted by another); Equip. Serv. Professionals v. Denowh, 693 N.W.2d 54, 57 (S.D. 2005) (the general rule is that both the payment of and tender of payment must be in money, unless the parties agree otherwise, or the obligee consents to accept some other medium of payment); Runion v. Helvestine, 501 S.E.2d 411, 415 (Va. 1998) (where an agreement does not specify the terms of payment, law implies that the purchase price will be paid in cash). Accordingly, the fact that Pierce paid her January 2013 rent payment in cash rather than check has no influence on the outcome of this matter.

2. *Delivery and Acceptance of Payment*

The District Court based its determination that Pierce bore the responsibility of the lost rent payment on the means she selected to attempt delivery. Appellant's A. at 53. The District Court went on to state, "[p]lacing cash in another person's mailbox provides no assurance the delivery will be completed." Id. However, if we draw a comparison from the relationship here between the landlord and tenant, to one of a buyer and seller governed by the Uniform Commercial Code ("U.C.C."), it is clear that Pierce effectively made the January 2013 rental payment when she placed \$1,400 in cash in Peterson's mailbox.

Pursuant to the U.C.C., delivery is accomplished when the seller intends to relinquish control over the goods to the buyer by placing them at the buyer's disposal. American State Bank of Olivia v. Ladwig & Ladwig, Inc., 646 N.W.2d

241, 246 (Ct. App. Minn. 2002). Actual transfer of physical possession is a prerequisite to delivery under the U.C.C. U.S. v. Doyle, 486 F.Supp. 1214, 1219 (D.Minn. 1984). To put it another way, delivery occurs when the seller has done “everything necessary to put goods completely and unconditionally at buyer’s disposal.” Joseph Heiting and Sons v. Jacks Bean Co., 463 N.W.2d 817, 823 (Neb. 1990).

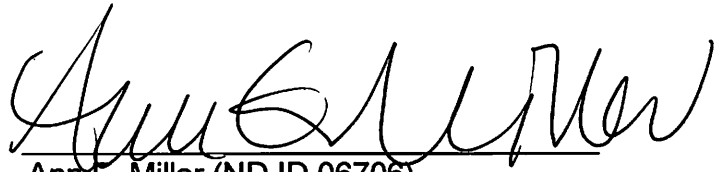
Pierce put her January 2013 rent payment, \$1,400 cash, in Peterson’s mailbox, which by course of conduct established throughout the rental period, was an acceptable method and place of payment. Appellant’s A. at 17. Thus, Pierce’s rental payment was transferred to Peterson and put completely at Peterson’s disposal. The fact that the payment went missing from the place in which payment was supposed to occur is not Pierce’s responsibility; Pierce had relinquished control of the payment when she placed it in Peterson’s mailbox. Instead Peterson bears the responsibility for the missing rent payment, not Pierce.

CONCLUSION

The District Court’s May 1, 2013 Memorandum Opinion and Order should be reversed, and the case remanded for entry of judgment in favor of Pierce.

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Dated this 22nd day of July, 2013.



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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

The undersigned, being first sworn, says upon her oath that a copy of each of the following:

Brief of Defendant/Appellant

was caused to be deposited in the United States Mail, first class postage paid, addressed to the following:

Carrie Peterson
3226 13th Ave S
Fargo, ND 58103

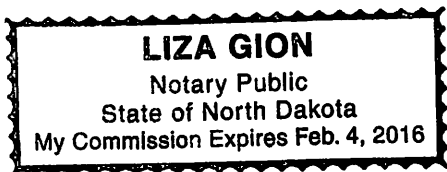
on the 22nd day of July, 2013.


Dated this 22nd day of July, 2013.



Terri Anderson

Subscribed and sworn to before me this 22nd day of July, 2013.





Notary Public