

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Carrie Peterson,)	
)	
Plaintiff/Appellee,)	Supreme Court No. 20130164
)	
vs.)	Cass County District Court
)	No. 09-2013-CV-00861
Mara Pierce,)	
)	
Defendant/Appellant.)	
_____)	

APPEAL FROM THE MEMORANDUM OPINION AND ORDER DATED
MAY 1, 2013, IN THE DISTRICT COURT OF CASS COUNTY,
STATE OF NORTH DAKOTA,
THE HONORABLE WICKHAM CORWIN, PRESIDING

BRIEF OF PLAINTIFF/APPELLEE

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STATEMENT OF THE FACTS

[¶1] On March 19, 2013, a Complaint was filed alleging Mara Pierce failed to pay rent to her landlord, Carrie Peterson, for a condominium located at 4394 - 46th Avenue South, Fargo, ND. Appellant's Appendix at 5. While Pierce and Peterson did not enter into an official lease, Pierce agreed in writing to pay \$1,400.00 in rent on the first of each month. Id. at 8.

[¶2] Over the course of the rental term, a dispute arose over the proper method of making payment. On occasion, Pierce placed her rent directly into Peterson's mailbox, rather than mailing it to Peterson or even placing it in an envelope. Peterson objected when Pierce paid rent without mailing the payment, and Peterson even provided self-addressed stamped envelopes to Pierce to help Pierce pay rent in a more secure fashion. Appellant's Appendix at 17.

[¶3] Although Pierce generally paid rent by check, on a few occasions, she paid in cash. Peterson and Pierce continue to dispute the number of times these cash payments were made. In any event, Peterson stated her disapproval with cash payments, but stated it did not amount to a problem in the past "because [Peterson] actually received the cash." Id.

[¶4] After Pierce failed to pay Peterson \$1,400 rent for January 2013, Peterson sent Pierce an email reminding her to pay by check (personal, business or cashier's) mailed to Peterson's address. Id. at 18. In response, Pierce stated she had paid January rent. Id. Peterson responded by again indicating she never received any rental payment for January, and she told Pierce she would take legal action if Pierce did not pay or provide proof of payment:

You can send a personal or cashier's check to my house — that is the only way rents or mortgages are to be paid. If you were foolish enough to put \$1400 cash into an unsecured mailbox, which we both know no one in her right mind would do, then it is on you if it is lost. There is no proof of payment without a canceled check or a receipt for cash delivered in hand. Unless you can provide me with that proof, you are still delinquent. If I don't receive payment

for January and February in my mailbox in an envelope sent through the postal service by the end of next week, I will have to take legal action.

Id. When Pierce failed to pay or provide proof of payment, Peterson started this action.

[¶5] After a hearing was held on April 5, 2013, the district court ordered the parties to brief the law on payment. In a Memorandum Opinion, the district court found Pierce had placed \$1,400 cash in Peterson’s mailbox for January rent, but Peterson never received it. Id. at 53. The district court concluded, “Placing cash in another person’s mailbox provides no assurance the delivery will be completed.” Id. While Pierce had done this on prior occasions, the district court acknowledged that “Peterson did not request or agree to this approach. Indeed, there are indications she actively discouraged it.” Id. at 53-54. Accordingly, the district court concluded Peterson did not agree to assume the risk of nondelivery by Pierce, and Peterson never received the rental payment. Id. at 54. Because “the January rent payment was not successfully made or completed,” the \$1,400 rent was still due and owing, the district court held, and Peterson was entitled to recover a judgment against Pierce for \$1,400. Id.

LAW AND ARGUMENT

I. Standard of Review

[¶6] “In an appeal from a bench trial, the trial court’s findings of fact are reviewed under the clearly erroneous standard of N.D.R.Civ.P. 52(a) and its conclusions of law are fully reviewable.” Niles v. Eldridge, 2013 ND 52, ¶ 6, 828 N.W.2d 521.

II. The District Court Correctly Determined Pierce’s January Rental Payment was not Successfully Made or Completed and Pierce Owed \$1,400

A. Pierce Failed to Establish Her Affirmative Defense of Payment

[¶7] “The general rule is that the burden of proving payment is upon the party who alleges it; that payment is an affirmative defense, and must be established by a fair preponderance of the evidence.” Depositors’ Holding Co. v. Brown, 251 N.W. 295, 297

(N.D. 1933); see also Hughes v. Wachter, 238 N.W. 776, 781 (N.D. 1931) (“the burden rests upon the defendant to prove payment.”). Accordingly, it was not Peterson’s burden to disprove Defendant’s payment; rather, Pierce had the burden of proving she paid January rent. Pierce failed to meet her burden.

[¶8] Pierce produced no evidence, other than her self-serving testimony, to support her contention that she delivered the rent to Plaintiff. **“Where the issue of payment is raised, proof of payment is essential in order to claim the benefit of it.”** 70 C.J.S. Payment § 71 (emphasis added). Pierce had no checks showing payment because she allegedly paid in cash. She produced no receipt for her cash payment, or any written proof whatsoever that she made the rental payment in January. See Bartholomay v. Bartholomay, 65 N.W.2d 468, 469 (N.D. 1954) (concluding the defendant failed to establish the defense of payment, in part, because of “her lack of receipts or records of any kind”).

[¶9] Moreover, although the Court found Pierce placed the cash in Peterson’s mailbox, there is nothing showing Peterson accepted the payment, which is an essential element of Pierce’s affirmative defense. See Odou & Arnold v. Benson, 228 N.W. 812, 813 (N.D. 1930) (“The delivery of the check to [the defendant] by the garnishees for a bona fide debt which they owed to the defendant . . . and the acceptance by the defendant of such check in full payment, was payment.”) (emphasis added). On appeal, Pierce agrees that “Peterson never received Pierce’s rent payment.” Appellant’s Br. at 4. Therefore, Pierce’s affirmative defense must fail because she offered no evidence on an essential element that she must prove.

B. Pierce Must Bear the Loss

[¶10] Pierce claims there was a course of conduct where cash placed in the mailbox was an acceptable tender of payment. This skips over the district court’s finding that “Peterson did not request or agree to this approach,” and that “there are indications she actively

discouraged it” by voicing her disapproval and providing self-addressed stamped envelopes to Pierce to mail the payment. Peterson’s actions were in compliance with federal law. As the district court correctly recognized at the hearing, “Postal Service regulations . . . provide that letterboxes and other receptacles designated for the delivery of mail shall be used exclusively for matter which bears postage.” U.S. Postal Serv. v. Council of Greenburgh Civic Assoc., 453 U.S. 114, 125 (1981) (internal quotation marks and citation omitted).

[¶11] While Peterson had accepted cash in the past, she noted there had been no issues then “because [Peterson] actually received the cash.” Appellant’s Appendix at 17. Because Peterson never received the January 2013 payment, she clearly could not have accepted it. Therefore, even if there was a course of conduct of accepting cash in the past, nothing shows Peterson received or accepted the alleged cash payment in January 2013.

[¶12] Finally, Pierce argues this situation is like a buyer and seller under the Uniform Commercial Code (U.C.C.). This argument is a red herring. Delivery under the U.C.C. between a buyer and seller does not govern the payment of rent by a tenant to a landlord. Even if it did, there was no “actual transfer of physical possession” here, because it is undisputed that Peterson never received the rental payment. Therefore, as the district court concluded, the \$1,400 rental payment remains due, and Pierce must be held accountable for the missing rent.

III. Conclusion

[¶13] The district court’s Memorandum Opinion and Order correctly held that Pierce should be ordered to pay \$1,400 for missing rent in January 2013. Peterson respectfully asks that the district court’s judgment be affirmed in all respects.

Dated: August 14, 2013.

/s/ Carrie Peterson
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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2013, I caused the following document:

1. Brief of Plaintiff/Appellee

to be filed electronically with the Clerk of the Supreme Court by e-mailing a true and correct copy to supclerkofcourt@ndcourts.com and to be served upon the attorney for Appellant, Ann Miller, by e-mailing a true and correct copy to amiller@andersonbottrell.com.

Dated this 14th day of August, 2013.

/s/ Carrie Peterson
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