DAVID R. WILCOX ET AL. *v.* DANIEL J. FERRAINA ET AL.
(AC 26015)

Schaller, McLachlan and Harper, Js.

Argued September 18, 2006—officially released April 17, 2007

(Appeal from Superior Court, judicial district of Hartford, Housing Session, Hon. Robert Satter, judge trial referee.)

Bruce G. MacDermid, for the appellants (defendants).

Jonathan M. Starble, for the appellee (named plaintiff).

Matthew K. Beatman, receiver for the plaintiff American Crushing and Recycling, LLC.

Opinion

HARPER, J. In this entry and detainer action, the defendants, Daniel J. Ferraina and Thomas DeFranzo, brought this appeal challenging the trial court's judgment in favor of one of the plaintiffs,[1] David R. Wilcox. The defendants argue that the court improperly found that Wilcox was in actual possession of the property at issue within the meaning of the entry and detainer statute, General Statutes § 47a-43.[2] In addition, the defendants dispute the court's finding that they dispossessed Wilcox "with force and strong hand" in violation of § 47a-43. We disagree with both of the defendants' claims, and therefore affirm the judgment of the trial court.

The following facts are relevant to the defendants' appeal. Wilcox is the owner and managing member of the plaintiff American Crushing and Recycling, LLC (American Crushing), a construction company. Ferraina is the owner of a parcel of land located in Windsor (property).

On January 13, 2004, Wilcox and Ferraina entered into an agreement in which Wilcox paid Ferraina $100,000 for "the exclusive right" to excavate and to remove earthen material from the property, to screen topsoil on the property and to fill and to grade its north slope with clean fill. The agreement also gave Wilcox the right to bring onto the property all equipment that would be "necessary or useful" to accomplish those tasks. Furthermore, a clause in the agreement permitted Wilcox to nominate any entity to exercise his rights under the agreement. Pursuant to that clause, Wilcox nominated American Crushing.

Beginning in April, 2004, the plaintiffs moved large equipment such as excavators, trucks and payloaders onto the property and commenced operations. By its terms, the agreement commenced on April 15, 2004, and remained effective until the material was removed "to an elevation of 158 feet" or December 31, 2005, whichever occurred first.

On August 3, 2004, the plaintiffs instituted this entry and detainer action against the defendants pursuant to § 47a-43. The verified complaint and application for temporary injunction alleged that beginning on July 10, 2004, the defendants unlawfully had blocked the plaintiffs' entrance to the property and taken possession of the plaintiffs' construction equipment and saleable products. The plaintiffs further alleged that the defendants had used the plaintiffs' equipment and products without their permission and informed their customers that the property was not open for business, thereby interfering with the plaintiffs' business relationships.

The court held two hearings before issuing a memorandum of decision on November 3, 2004. The court found that, on July 10, 2004, DeFranzo used two pickup

trucks to bar the plaintiffs' ingress and egress from the property and called the police when the plaintiffs protested. The court also found that, in taking those measures, DeFranzo acted both in his individual capacity and as Ferraina's agent.

The court further found that a few days after the incident on July 10, 2004, Ferraina constructed a berm of sand across the entrance to the property from Old Iron Ore Road. Because of the plaintiffs' need to move heavy trucks onto the property, the court noted, Old Iron Ore Road was the plaintiffs' only practical means of accessing the property.

On the basis of those findings, the court concluded that the plaintiffs were in actual possession of the property within the meaning of § 47a-43 and that the defendants dispossessed them "with force and strong hand."[3] Accordingly, the court rendered judgment in favor of the plaintiffs and issued an injunction "prohibiting the defendants from blocking the plaintiffs' entry or exit from the subject site." The defendants promptly filed this appeal.

Thereafter, on June 6, 2005, the plaintiffs filed a request for leave to amend their complaint to include a claim for monetary damages and a request for "double damages" under General Statutes § 47a-46.[4] As the defendants did not file a timely objection to the request, the complaint was amended automatically in accordance with the provisions of Practice Book § 10-60 (a).[5] The plaintiffs later filed a demand for a jury trial on the damages claim, which is still pending before the trial court.[6]

I

Before reaching the merits of the defendants' appeal, we first must determine whether the case has been rendered moot by events that have occurred since the issuance of the final judgment.

The following additional facts are necessary to our consideration of this issue. The defendants filed this appeal on November 22, 2004, and the case was originally scheduled for argument in October, 2005. In the interim, the plaintiffs filed a motion to terminate the stay of execution pursuant to Practice Book § 61-11 (d), which the court granted on January 5, 2005.

Prior to argument before this court, however, on July 29, 2005, one of American Crushing's trucks was involved in an accident that resulted in the death of four people and the injury of several others. Later, a wrongful death action was filed against the company, leading to its eventual placement in receivership.

Since then, virtually all of American Crushing's vehicles, equipment and other assets have been liquidated, and American Crushing has ceased all business operations. By agreement between the parties, American

Crushing has withdrawn its portion of the complaint, and the defendants have withdrawn the part of their appeal relating to American Crushing.

Given these recent developments and the expiration of the original agreement on December 31, 2005, we questioned whether this appeal should be dismissed as moot. Accordingly, we ordered all involved parties to submit supplemental briefs to this court addressing this issue.

"Mootness is a threshold issue that implicates subject matter jurisdiction, which imposes a duty on the court to dismiss a case if the court can no longer grant practical relief to the parties. . . . Mootness presents a circumstance wherein the issue before the court has been resolved or had lost its significance because of a change in the condition of affairs between the parties. . . . [T]he existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way." (Internal quotation marks omitted.) *Smith-Lawler* v. *Lawler*, 97 Conn. App. 376, 378–79, 904 A.2d 1235 (2006).

The defendants concede that the appeal has become moot as to any claims relating solely to American Crushing. They contend, however, that the appeal is not completely moot due to Wilcox' assertion of an individual claim for damages. The continuation of this appeal, the defendants argue, would "underscore that the damage claims of Mr. Wilcox are without merit," and "preclude any future concocted damages claims . . . ."

The expiration of the parties' agreement on December 31, 2005, eviscerated the court's earlier order of injunctive relief. Therefore, to the extent that the plaintiffs originally sought injunctive relief, including restoration to the premises, the case indeed has become moot. Similarly, even if the court improperly enjoined the defendants from "blocking the plaintiffs' entry or exit from the subject site," we no longer could offer any practical relief because of the termination of the plaintiffs' contractual right to enter onto the property.

Our Supreme Court, however, has allowed us to retain jurisdiction "where the matter being appealed creates collateral consequences prejudicial to the interests of the appellant, even though developments during the pendency of the appeal would otherwise render it moot." *Crest Pontiac Cadillac, Inc.* v. *Hadley*, 239 Conn. 437, 439 n.3, 685 A.2d 670 (1996). After conducting a careful review of the record, we conclude that the case is not moot because of the prejudicial collateral consequences that could befall the defendants if we

failed to address the merits of this appeal. Specifically, the validity of the earlier finding of unlawful entry and detainer will govern the disposition of the damages claim currently pending before the trial court. If the court's finding of liability was ill-founded, as the defendants maintain, then there would be no basis in law for awarding damages to Wilcox.

Given that meaningful, practical consequences could result from our resolution of the claims relating to Wilcox, we conclude that the appeal is not moot. Having reached that conclusion, we now turn to the merits of the defendants' appeal.

II

The defendants claim that the court improperly found that Wilcox was in actual possession of the property within the meaning of the forcible entry and detainer statute. They also challenge the court's finding of dispossession "with force and strong hand."

"The process of forcible entry and detainer, provided by our statutes, is in its nature an action by which one in the possession and enjoyment of any land, tenement or dwelling unit, and who has been forcibly deprived of it, may be restored to the possession and enjoyment of that property. This process is for the purpose of restoring one to a possession which has been kept from him by force. . . . For a plaintiff to prevail, it must be shown that he was in actual possession at the time of the defendant's entry." (Citation omitted.) *Berlingo* v. *Sterling Ocean House, Inc.*, 203 Conn. 103, 108, 523 A.2d 888 (1987).

We begin with the legal standard governing our review of both of the defendants' claims. "Our review of questions of fact is limited to the determination of whether the findings were clearly erroneous. . . . The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . We cannot retry the facts or pass on the credibility of the witnesses. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Murphy, Inc.* v. *Remodeling, Etc., Inc.*, 62 Conn. App. 517, 520–21, 772 A.2d 154, cert. denied, 256 Conn. 916, 773 A.2d 945 (2001).

A

The defendants first claim that the court's finding that Wilcox actually possessed the property was clearly erroneous. Their argument is twofold. First, the defendants allege that the agreement afforded Wilcox a license to use the property but not a possessory interest in the property. Second, the defendants contend that

the record is devoid of evidence supporting the court's finding that Wilcox exercised "dominion and control" over the property within the meaning of § 47a-43. We find neither argument persuasive.

"A plaintiff suing under the forcible entry and detainer statute must prove his *actual* possession of the land or property from which he claims to have been dispossessed. . . . The question of whether the plaintiff was in actual possession at the time of the defendant's entry is one for the trier of fact. . . . Generally, the inquiry is whether the individual has exercised the dominion and control that owners of like property usually exercise. . . . [I]t is not necessary that there be a continuous personal presence on the land by the person maintaining the action. There, however, must be exercised at least some actual physical control, with the intent and apparent purpose of asserting dominion." (Citations omitted; emphasis in original.) *Communiter Break Co*. v. *Scinto*, 196 Conn. 390, 393–94, 493 A.2d 182 (1985).

The defendants first argue that the agreement constituted a license rather than a lease. The agreement's categorization as a license is significant, the defendants contend, because licensees, unlike lessees, do not acquire any possessory interest in the property. The defendants further reason that without a possessory interest in the property, Wilcox could not have had actual possession of the property as required under § 47a-43.

Even if we assume arguendo that Wilcox had a license and thereby lacked any possessory interest in the property, we fail to see how that fact pertains to the "actual possession" inquiry that is the touchstone of entry and detainer law. Many who have no right of possession to land or property are nonetheless in "actual possession" within the meaning of § 47a-43. A prime example would be a squatter in an apartment building; see *Fleming* v. *Bridgeport*, 92 Conn. App. 400, 886 A.2d 1220 (2005), cert. granted, 277 Conn. 922, 895 A.2d 795 (2006);[7] or a person currently "in the actual, hostile, notorious and continuous possession" of land. (Internal quotation marks omitted.) *Orentlicherman* v. *Matarese*, 99 Conn. 122, 125, 121 A. 275 (1923). In both circumstances, the party seeking relief under the entry and detainer statute lacked a legally cognizable possessory interest in the property, at least vis-a-vis its real owner. Yet, neither party was precluded from recovering under § 47a-43 for failure to satisfy the standard of "actual possession."

Furthermore, our Supreme Court implicitly has rejected the defendants' approach by permitting trespassers to recover under the entry and detainer statute. In *Orentlicherman* v. *Matarese*, supra, 99 Conn. 122, decided more than eighty years ago, the plaintiff's immediate predecessor in title annexed seventeen to twenty feet of the defendant's land by moving a bound-

ary fence. Id., 124. When the defendant dug holes and stuck posts in the plaintiff's land in an attempt to reestablish the original boundary line, the plaintiff sued, alleging unlawful entry and detainer. Id., 125.

Despite the plaintiff's status as a trespasser, our Supreme Court did not hesitate to remand the case to the trial court with direction to render judgment in his favor upon determining that he had been "in actual, peaceable possession," and that "the defendant made an entry on [the] land with force and with the purpose to dispossess with a strong hand . . . ." Id. In so holding, the court emphasized that "[t]his statute was made to protect a person in such possession, although a trespasser, from disturbance by any but lawful and orderly means." Id., 126.

An examination of the goals underlying the entry and detainer statute further emphasizes the reasons why actual possession, rather than right of possession, must remain the ultimate inquiry. The statute was intended to prevent "the employment of force against a peaceable party"; (internal quotation marks omitted) id., 126–27; and more fundamentally, the temptation for one to "[make] himself judge in his own cause, and [enforce] his own judgment." (Internal quotation marks omitted.) Id., 126. Were such behavior allowed, "a breach of the public peace would be invited, and any wrong, if redressed at all, would be redressed at the cost of a public disturbance, and perhaps of serious bodily injury to the parties." (Internal quotation marks omitted.) Id., 127. The defendants' argument, therefore, is contrary to long-standing Connecticut law on entry and detainer.

Nor are we persuaded by the defendants' argument that the court's finding of actual possession is clearly erroneous because Wilcox did not exercise a sufficient degree of dominion and control over the property. The evidence before the court included Wilcox' physical presence on the property five or six days a week for approximately ten hours per day, the housing of Wilcox' excavation equipment on the property for "several years" and Wilcox' construction of three roads and an antitracking pad on the property. In addition, Ferraina testified that Wilcox had been running a topsoil screening business from the property for one year prior to July 10, 2004, and that Wilcox had told "many people" that he owned the property. All of this evidence, in the aggregate, is more than sufficient to sustain the court's finding that Wilcox exercised "dominion and control" over the property.

The defendants cite *Murphy, Inc.* v. *Remodeling, Etc., Inc.*, supra, 62 Conn. App. 517, which, they allege, presented facts similar to those in this case. They further contend in their brief that "[o]n the basis of similar facts, the court in *Murphy, Inc.*, determined that the plaintiff was not in possession of the premises."

Murphy, Inc., involved an agreement in which the plaintiff leased two signs and attendant supporting structures on the roof of a building. See id., 518. On appeal, this court reversed the trial court's finding of actual possession because it concluded that the record was devoid of evidence suggesting that the plaintiff exhibited any amount of physical control over the premises. Id., 522.

In so holding, we pointed out that the plaintiff did not have a set of keys to either the building itself or the gate in the fence that surrounded the building. Id., 521. Without a personal set of keys to either the building or the gate, the plaintiff's access to the roof was severely restricted. Id. We further observed that, during the five year duration of the agreement, the plaintiff was on the premises only every other month for approximately fifteen minutes to three hours. Id. Finally, we noted that, although the plaintiff parked its vehicles on the property during visits, the vehicles were never left on the property overnight. Id.

Despite the defendants' assertions, it is clear that the facts relied on in *Murphy, Inc.*, are quite distinguishable from those present in this case. Here, Wilcox had access to the property at all times. Indeed, as mentioned previously, the testimony indicated that Wilcox actually was present on the property five to six days per week for approximately ten hours a day. The record also shows that Wilcox regularly left excavation vehicles and equipment on the property overnight.

Ultimately, despite the defendants' various arguments to the contrary, we conclude that there was sufficient evidence presented at the hearings from which the court could find that Wilcox had "actual possession" of the property immediately prior to July 10, 2004. As a result, we cannot say that the court's findings on this issue were clearly erroneous.

B

The defendants next claim that the facts in the record do not support the court's finding that they dispossessed Wilcox "with force and strong hand." We disagree.

Our Supreme Court has described "strong hand" as encompassing the employment of "an unusual number of people, with weapons, with menaces,—or accompanied with some circumstances of actual violence, calculated to intimidate the plaintiff, and deter him from asserting or maintaining his rights." (Internal quotation marks omitted.) *Hartford Realization Co.* v. *Travelers Ins. Co.*, 117 Conn. 218, 224–25, 167 A. 728 (1933). The court has further cautioned that "[a]n entry which has no other force than such as implied by law in every trespass, is not a forcible entry within the meaning of the statute. . . . To make a detainer forcible, the same kind and degree of force, or indications of violent

designs, must be exhibited." (Internal quotation marks omitted.) Id., 225.

In support of their argument that "force and strong hand" are absent here, the defendants refer to several transcript excerpts from the trial court hearings in which Wilcox allegedly admitted that he was not prevented from gaining access to the property. The defendants further remind us that "[they] have denied that they prevented [Wilcox] from entering upon the [p]roperty (for activities permitted under the [a]greement)." Finally, the defendants state in their brief that "by Mr. Wilcox's own testimony, there is nothing left to be removed from the site other than his equipment, which Mr. Ferraina has acknowledged may be removed . . . at any time."

We decline the defendants' invitation to reweigh the evidence. "Once again, this court is compelled to state, what has become a tired refrain, we do not retry the facts or evaluate the credibility of witnesses." *Bowman* v. *Williams*, 5 Conn. App. 235, 238, 497 A.2d 1015 (1985), appeal dismissed, 201 Conn. 366, 516 A.2d 1351 (1986), and cases cited therein. Furthermore, our review of the record confirms that there was ample evidence to support the court's finding that the defendants, with force and strong hand, dispossessed Wilcox of the property.

First, the evidence in the record supports the court's finding that, on July 10, 2004, DeFranzo obstructed Wilcox' means of ingress and egress by placing his trucks across the road. DeFranzo admitted in his testimony that he called the police when his obstruction of the road precipitated a threatened physical confrontation between himself and Wilcox.

Ferraina acknowledged in his testimony that he constructed a sand berm across the road the plaintiffs had been using to access the property. This court has previously upheld a finding of dispossession where the defendant built a physical barrier to prevent entry onto the property. See *Evans* v. *Weissberg*, 87 Conn. App. 180, 866 A.2d 667 (2005) (plaintiff dispossessed by erection of fence). Furthermore, the evidence concerning the property's topological and geographical layout supports the court's finding that the road thus obstructed was "the only practical access the plaintiff had to the property."[8] Wilcox testified that there were no other means for him to access the property and explained why there were no other viable alternative routes. Given this evidence, we cannot say that the court's finding that the defendants dispossessed Wilcox with force and strong hand was clearly erroneous.

The judgment is affirmed.

In this opinion McLACHLAN, J., concurred.

[1] The defendants have withdrawn their appeal from the judgment in favor of the other plaintiff, American Crushing and Recycling, LLC (American Crushing). Nevertheless, all references to the plaintiffs are to David R.

Wilcox and American Crushing.

[2] General Statutes § 47a-43 (a) provides in relevant part: "When any person (1) makes forcible entry into any land, tenement or dwelling unit and with a strong hand detains the same, or (2) having made a peaceable entry, without the consent of the actual possessor, holds and detains the same with force and strong hand, or (3) enters into any land, tenement or dwelling unit and causes damage to the premises or damage to or removal of or detention of the personal property of the possessor, or (4) when the party put out of possession would be required to cause damage to the premises or commit a breach of the peace in order to regain possession, the party thus ejected, held out of possession, or suffering damage may exhibit his complaint to any judge of the Superior Court."

[3] Although the court did not specify which subdivision of General Statutes § 47a-43 (a) the defendants violated by taking the aforementioned acts, it appears that the court relied on subdivision (2), as it is the only part of the statute that explicitly requires dispossession "with force and strong hand . . . ."

[4] General Statutes § 47a-46 provides: "The party aggrieved may recover in a civil action double damages and his costs against the defendant, if it is found on the trial of a complaint brought under section 47a-43 that he entered into the land, tenement or dwelling unit by force or after entry held the same by force or otherwise injured the party aggrieved in the manner described in section 47a-43."

[5] Practice Book § 10-60 (a) provides in relevant part: "Except as provided in Section 10-66, a party may amend his or her pleadings or other parts of the record or proceedings at any time subsequent to that stated in the preceding section . . . (3) [b]y filing a request for leave to file such amendment, with the amendment appended, after service upon each party . . . . If no objection thereto has been filed by any party within fifteen days from the date of the filing of said request, the amendment shall be deemed to have been filed by consent of the adverse party. . . ."

[6] This appeal from the court's injunction order while the damages claim is still pending raises a concern about whether the defendants are appealing from a "final judgment" within the meaning of Practice Book § 61-1. We conclude that they are.

"Ordinarily, when a judgment as to liability has been entered but damages have not been determined, there is no appealable final judgment." *Glasson* v. *Portland*, 6 Conn. App. 229, 231 n.3, 504 A.2d 550 (1986). In *Ricci* v. *Naples*, 108 Conn. 19, 22, 142 A. 452 (1928), however, our Supreme Court stated that a judgment is a "final judgment" as long as "all the issues were determined, except the amount of damages, and the court rendered a judgment after fully hearing the parties." Applying that principle in a later case, our Supreme Court held that a judgment ordering indemnification was a "final judgment" even though the specific amount of damages had not yet been determined. *Walton* v. *New Hartford*, 223 Conn. 155, 162 n.9, 612 A.2d 1153 (1992). Furthermore, this court has held that a final judgment existed where an injunction conclusively determined the party's rights, notwithstanding the fact that the trial court had not yet held a hearing in damages. See *Glasson* v. *Portland*, supra, 231 n.3.

In this case, the court found that the defendants committed an unlawful entry and detainer and granted the plaintiffs the permanent injunctive relief they originally requested in their complaint. Consequently, the court's judgment disposed of all pending causes of action and left only the issue of damages for resolution in a future proceeding. Under these circumstances, we hold that the defendants are appealing from a final judgment and that, accordingly, we may consider the merits of the appeal.

[7] The Supreme Court granted the plaintiff's certification for appeal, limited to the following two questions: "1. Did the Appellate Court properly conclude that the private defendants did not violate the entry and detainer statute? 2. Did the Appellate Court properly conclude that the police defendants are immune from liability for their action in removing the named plaintiff from an apartment where she was in actual possession?" *Fleming* v. *Bridgeport*, 277 Conn. 922, 895 A.2d 795 (2006).

[8] During oral argument before this court, the parties mentioned that they took the trial judge on a tour of the property. In its memorandum of decision, however, the court made no reference to his visit to the property.