



2013

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Robert S. Lewis

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Recommended Citation

Lewis, Robert S. (2013) "Recent Developments: Nickens v. Mount Vernon Realty Grp., LLC: A Property Owner May Employ the Common Law Remedy of Peaceable Self-Help as a Means to Gain Possession of Real Property from an Occupant in Unlawful Possession; The Property Owner Must Act Reasonably When Taking Possession and Disposing of the Occupant's Personal Property," *University of Baltimore Law Forum*: Vol. 43 : No. 2 , Article 6.
Available at: <http://scholarworks.law.ubalt.edu/lf/vol43/iss2/6>

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RECENT DEVELOPMENT

NICKENS V. MOUNT VERNON REALTY GRP., LLC: A PROPERTY OWNER MAY EMPLOY THE COMMON LAW REMEDY OF PEACEABLE SELF-HELP AS A MEANS TO GAIN POSSESSION OF REAL PROPERTY FROM AN OCCUPANT IN UNLAWFUL POSSESSION; THE PROPERTY OWNER MUST ACT REASONABLY WHEN TAKING POSSESSION AND DISPOSING OF THE OCCUPANT'S PERSONAL PROPERTY.

By: Robert S. Lewis

The Court of Appeals of Maryland held that peaceable self-help, when employed reasonably, remains available as a remedy for a property owner to repossess real property from an unlawful occupant. *Nickens v. Mount Vernon Realty Grp., LLC*, 429 Md. 53, 54 A.3d 742 (2012). The court concluded that a property owner must exercise a similar reasonableness in the disposition of an occupant's personal property that remains within the dwelling. *Id.* at 79, 54 A.3d at 757-58. The court further determined that common law self-help coexists with statutorily proscribed repossession remedies available under the Baltimore City Code. *Id.* at 75, 54 A.3d at 755-56.

On January 11, 2008, American Servicing Company ("ASC") initiated a foreclosure action in the Circuit Court for Baltimore City against the parents of Demetrius Nickens ("Nickens"), after they failed to make mortgage payments for several months. At the time of the proceedings, Nickens notified ASC that he resided at the property. On January 30, 2009, Deutsche Bank National Trust Company purchased the property at a foreclosure sale, and took possession on May 14, 2009. Mount Vernon Realty Group, LLC ("MVRG"), hired by ASC, instructed Nickens to vacate the property, and informed him they would enter the home and remove his personal property if he did not comply. On September 6, 2009, after learning Nickens would be out of town, MVRG repossessed the property and disposed of Nickens' belongings, which he estimated were valued at \$75,000.

In response to the repossession of the property and disposition of his belongings, Nickens filed suit in the Circuit Court for Baltimore City against MVRG and other relevant parties for the tort claims of forcible entry and conversion. The trial court granted MVRG's motion to dismiss for Nickens' failure to state a claim upon which relief could be granted. The Court of Special Appeals of Maryland, in an unreported opinion, affirmed the judgment entered by the trial court, finding that MVRG lawfully used peaceable self-help to repossess the property. The court

also held that MVRG was not guilty of conversion when it disposed of Nickens' belongings, determining he abandoned his interest in his personal property when he left it in the house. The Court of Appeals of Maryland granted Nickens' petition for a writ of certiorari.

The court first addressed whether the manner by which MVRG entered the foreclosed property and locked out Nickens was lawful under the common law remedy of peaceable self-help. *Nickens*, 429 Md. at 63-64, 54 A.3d at 748-49. Nickens maintained the lock out was a forcible entry and not a permissible form of peaceable self-help. *Id.* The common law prohibition of forcible entry barred repossession of land occupied by another except when in a "peaceable and easy manner." *Id.* at 66, 54 A.3d at 750 (citing 5 Rich. 2, c. 8 (1391) (Eng.)). The court rejected Nickens' claim of forcible entry, as the doctrine further provides a titleholder cannot be guilty of forcible entry when entering one's own house that has been unlawfully detained by another. *Id.*

Having determined the lock out was not a forcible entry, the court examined whether MVRG lawfully exercised the remedy of peaceable self-help. *Nickens*, 429 Md. at 68, 54 A.3d at 751. Self-help permits a titleholder to repossess property wrongfully held by another if the titleholder uses "no more force than is reasonably necessary." *Id.* at 69, 54 A.3d at 752 (citing *Manning v. Brown*, 47 Md. 506, 512 (1878)). The court emphasized that the titleholder must use reasonable care, and that an action may be brought for an injury sustained by the occupant, or to his or her personal property, as a result of a lack of care. *Nickens*, 429 Md. at 69-70, 54 A.3d at 752 (citing *Manning*, 47 Md. at 512). Analogizing the remedy to a more recent case involving commercial property, the court recognized that self-help requires the titleholder to effectuate the repossession peacefully in order to avoid retaliatory violence or the risk of severe loss. *Nickens*, 429 Md. at 70-71, 54 A.3d at 752-53 (citing *K & K Management, Inc. v. Lee*, 316 Md. 137, 178, 557 A.2d 965, 985 (1989)).

The court next determined whether MVRG acted reasonably by changing the locks of the dwelling occupied by Nickens. *Nickens*, 429 Md. at 72, 54 A.3d at 754. The standard of reasonableness is based on the attendant circumstances of the situation. *Id.* The court pointed out that Nickens knew about the foreclosure sale months in advance of the lock out, had no right to occupy the property, and MVRG gave him reasonable notice of its intent to enter and take possession of the property. *Id.* Based on these factors, and an overall interest on the part of MVRG in avoiding potential harm or violence, the court concluded that MVRG acted reasonably as a matter of law. *Id.* at 72-73, 54 A.3d at 754.

The court additionally held that, contrary to the assertion of Nickens, the Baltimore City Code (“Code”) does not supersede common law self-help, but instead coexists with the common law remedy. *Nickens*, 429 Md. at 75, 54 A.3d at 755-56 (citing BALT. CITY. CODE art. 8, § 8B-2 (2008)). The Code allows for a sheriff in Baltimore City to repossess a property on writ of possession after providing two weeks’ notice to an unlawful occupant. *Nickens*, 429 Md. at 73, 54 A.3d at 754 (citing BALT. CITY. CODE art. 8, § 8B-2). The court examined the express language of the Code and determined that the Mayor and City Council of Baltimore did not intend for the Code’s provision to abrogate or supersede the common law remedy of self-help. *Nickens*, 429 Md. at 75, 54 A.3d at 755-56. As such, the court held that the common law remedy of reasonable self-help remained an available remedy for a foreclosure purchaser. *Id.*

The court then considered whether MVRG committed the tort of conversion when it disposed of Nickens’ personal property that was within the dwelling when they repossessed the property. *Nickens*, 429 Md. at 77, 54 A.3d at 756. Contrary to the findings of the intermediate appellate court, the Court of Appeals of Maryland ruled that Nickens did not abandon his personal property. *Id.* at 78, 54 A.3d at 757. Abandonment must indicate an affirmative act to relinquish all ownership in the future. *Id.* at 77-78, 54 A.3d at 757 (citing *Steinbraker v. Crouse*, 169 Md. 453, 458, 182 A. 448, 450 (1936)). According to the court, nothing in the record demonstrated that Nickens intended to abandon his personal property, and the court held that the circuit court entered summary judgment prematurely. *Nickens*, 429 Md. at 78, 80, 54 A.3d at 757-58. As with taking possession of real property, the purchaser must dispose of the occupant’s personal goods in a reasonable manner, or the purchaser may be liable for conversion. *Id.* at 78-79, 54 A.3d 757-58 (citing *K & K Management*, 316 Md. at 178, 557 A.2d at 965). To determine whether MVRG disposed of Nickens’ property reasonably and whether a valid claim therefore existed on the conversion count, the court remanded the case to the circuit court to take discovery on the manner in which MVRG disposed of Nickens’ property. *Nickens*, 429 Md. at 79-80, 54 A.3d at 758.

In *Nickens*, the Court of Appeals of Maryland upheld the common law remedy of peaceable self-help. Under this doctrine, a foreclosure purchaser has the duty to act peaceably and reasonably when repossessing real property, and the court extended this standard of reasonableness to the disposition of the personal property found therein. Because of the increasing frequency of foreclosures due to the recent economic downturn and real estate crisis, purchasers of foreclosed homes should be aware that Maryland courts remain committed to this long-standing

remedy. Maryland practitioners should understand that the key issue when employing self-help is whether the titleholder acted reasonably based on the attendant circumstances. The court also indicated the potential for legislators to abrogate the common law right of self-help without a writ of possession and practitioners should monitor future legislation.