

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE**

IN RE

**TERRY GAYLE PAYNE, d/b/a
VISIONARY TRADEWINDS OF THE SOUTHWEST,
Debtor.**

**Case No. 97-38771-whb
Chapter 13**

**TERRY GAYLE PAYNE, d/b/a
VISIONARY TRADEWINDS OF THE SOUTHWEST,
Plaintiff,**

v.

Adv. Proceeding 98-0352

**LES BIRCHFIELD, d/b/a
BIRCHFIELD RENOVATIONS, and
ELBERT EDWARDS, III,
Defendants.**

**LES BIRCHFIELD, d/b/a
BIRCHFIELD RENOVATIONS,
Counter-Plaintiff,**

v.

Adv. Proceeding 98-0352

**TERRY GAYLE PAYNE, d/b/a
VISIONARY TRADEWINDS OF THE SOUTHWEST,
Counter-Defendant.**

**MEMORANDUM OPINION AND ORDER ON PLAINTIFF/COUNTER-DEFENDANT'S
AMENDED COMPLAINT TO COMPEL TURNOVER OF CERTAIN PROPERTY FROM
DEFENDANT/COUNTER-PLAINTIFF AND FOR OTHER RELIEF, AND ORDER ON
COUNTER CLAIM OF DEFENDANT/COUNTER-PLAINTIFF**

JUDGE WILLIAM HOUSTON BROWN

APPEARANCES:

Mr. Andrew Bender
Attorney for Plaintiff/Counter-Defendant
147 Jefferson, Suite 1203
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Ms. Toni Campbell Parker
Attorney for Defendant/Counter-Plaintiff
2110 One Commerce Square
40 South Main Street
Memphis, Tennessee 38103

Mr. George W. Stevenson
Chapter 13 Trustee
200 Jefferson Avenue, Suite 1113
Memphis, Tennessee 38103

This adversary proceeding is before the Court on Terry Payne's Amended Complaint to Compel Turnover of Certain Property from Defendant and for Other Relief, and on Les Birchfield's Counter-Complaint for money damages. These complaints arise out of Ms. Payne's commercial lease of Mr. Birchfield's real property located at 831 South Cooper Street, Memphis, Tennessee, and of Ms. Payne's subsequent eviction from the premises. The Amended Complaint seeks turnover of \$3,325.00 previously held in escrow by Mr. Birchfield's former attorney, and compensatory and punitive damages arising from alleged negligent and willful damage to Ms. Payne's personal property during the eviction procedure. Mr. Birchfield's Counter-Complaint seeks compensatory and punitive damages allegedly arising from unpaid rent and damage to the leased premises, and other costs and expenses. The primary issue before the Court is whether Mr. Birchfield, as the landlord, had a duty to protect Ms. Payne's personal property during the eviction process.

The trial of these complaints took place on November 3, 1998. Based on the testimony of the witnesses at trial, the statements of counsel, and the entire record in this proceeding, the Court concludes that Mr. Birchfield owed a duty to act with reasonable care regarding Ms. Payne's personalty and finds that Ms. Payne is entitled to compensatory damages from Mr. Birchfield for negligent infliction of damage to her personal property during the eviction procedure. The Court also finds that Mr. Birchfield is entitled to compensatory damages from Ms. Payne arising from the breach of her agreement to pay rent pursuant to the parties' lease, and for damages to the leased premises during the period of Ms. Payne's occupancy. Under these circumstances, and because the parties presented only speculative proof of their damages, the Court determines that a mutual offset of damages is appropriate in this case, so that neither party should receive a monetary judgment against the other. Ms. Payne is entitled to and should receive, however, the \$3,325.00 presently being held in escrow by the Clerk of this Court. Because the parties failed to present proof of willful and malicious conduct sufficient to support an award of punitive

damages, the parties' requests for punitive damages are denied.

This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B) and § 157(b)(2)(E). This opinion and order contains the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

FACTUAL SUMMARY

The parties entered into a lease agreement wherein Ms. Payne agreed to lease Mr. Birchfield's rental property located at 831 South Cooper, Memphis, Tennessee, for a term of five (5) years, commencing January 1, 1995 and ending on January 1, 2000, at a rental price of \$425.00 per month. Ms. Payne operated her retail business, Visionary Tradewinds of the Southwest, on the premises, where she sold various southwestern items and objects of art to the public.

At some point, Ms. Payne became delinquent in her monthly rental payments, and she apparently withheld portions of her rental payments in order to make repairs to the premises. Mr. Birchfield instituted a forcible entry and detainer ("FED") action in the General Sessions Court of Shelby County, Tennessee, to recover from Ms. Payne the rent arrearages and to regain possession of the premises. Mr. Birchfield obtained a judgment in General Sessions Court for \$750.00 plus costs, based on Ms. Payne's breach of contract for failure to pay rent, and Mr. Birchfield was restored to possession of the premises.

Ms. Payne subsequently appealed the General Sessions judgment to the Circuit Court of Shelby County, Tennessee, and she posted an appeal bond in the amount of \$5,350, pursuant to T.C.A. § 29-18-130. An order was entered in the Circuit Court appeal on November 21, 1997, providing that Ms. Payne was to tender to Mr. Birchfield an amount equal to her October, November, and December, 1997 rental payments. Failing such payment, the order provided that a writ of possession would issue. The parties subsequently entered an order by consent directing the Clerk of the Circuit Court to disburse the \$5,350 amount to Mr. Birchfield's former attorney, Elbert E. Edwards, III, who was then authorized to disburse

to Mr. Birchfield \$2,025, apparently representing the amounts owed by Ms. Payne for rent arrearages and costs through December 31, 1997. The remainder of the appeal bond, \$3,325, remained in the escrow account of Mr. Edwards pending disposition of the state court proceedings. On the same day, however, the Circuit Court also entered an order directing the Circuit Court Clerk to issue a writ of possession on December 31, 1997, thereby restoring Mr. Birchfield to possession of the premises. Mr. Birchfield obtained the writ, and began eviction proceedings at some point during the morning of December 31, 1997. At the time Mr. Birchfield entered the premises, Ms. Payne was away, but her inventory items of personal property remained. Mr. Birchfield and his process server, Mr. James Finney, supervised the “set out,” wherein they and other persons hired by Mr. Birchfield proceeded to remove Ms. Payne’s items of personal property from the building to the front lawn and sidewalk.

Testimony of the parties and the witnesses established that Ms. Payne and her friend, Ms. Elizabeth McGrath, arrived at the scene approximately one hour after Mr. Birchfield entered the premises. At that time, most of Ms. Payne’s personal possessions had been removed from the shop onto the front lawn and sidewalk. Ms. Payne and Ms. McGrath both testified that Ms. Payne’s items of personal property had been removed from the shop in a random, unorganized manner, with little or no regard for the protection and preservation of the inventory items. In fact, several pieces of pottery and other objects were broken, chipped, or cracked.

When Ms. Payne entered the premises, she informed Mr. Finney and Mr. Birchfield of her pending bankruptcy case and produced for them a copy of her bankruptcy petition that had been filed after the eviction began. At that time, the eviction process was stopped, and Mr. Birchfield and Mr. Finney left the premises. Ms. Payne was again evicted from Mr. Birchfield’s property pursuant to a subsequent order of this Court, and Ms. Payne vacated the property in April, 1998. Testimony of Mr. Birchfield established that when he regained possession of the property at that time, a thermostat had

been moved, some electrical plates were damaged, and the carpet was a complete loss. In addition, Mr. Birchfield had to replace window blinds in the kitchen, and the kitchen floor was damaged. Mr. Birchfield made efforts to advertise the vacancy in hopes of re-leasing the property, but he has determined that he should obtain an occupancy permit and bring the property “up to Code” before another tenant moves in.

ANALYSIS AND CONCLUSIONS OF LAW

The primary issue before the Court concerns the duty, if any, of Mr. Birchfield to preserve and protect Ms. Payne’s personalty during the eviction procedure. The parties have presented no authority in support of their respective positions, and the Court was able to find little Tennessee case authority on this issue.¹ The Tennessee statute governing forcible entry and detainer proceedings by a landlord, T.C.A. § 29-18-101, *et seq.*, does not prescribe a procedure or protocol for a landlord to follow after he has lawfully taken possession of the leased premises.

At least one Tennessee case, *Harris v. Dobson-Tankard Co.*, 41 Tenn. App. 642, 298 S.W.2d 28 (Tenn. Ct. App. 1956), lends some support to Ms. Payne’s argument that Mr. Birchfield was responsible for the preservation of her goods during the eviction procedure. In the *Harris* case, Ms. Harris was a tenant in an apartment complex that was the subject of a foreclosure action. Dobson-Tankard Company purchased the property at the foreclosure sale, and unilaterally terminated all existing leases. The

¹ The Court is aware of authority from other jurisdictions, however, expressly stating that a landlord owes no duty to protect or preserve the personal property of a tenant during an eviction procedure. *See Banks v. Korman Assoc.*, 527 A.2d 933, 934 (N.J. Super. Ct. App. Div. 1987)(citing *Christensen v. Hoover*, 643 P.2d 525, 528 (Colo. 1982)); *McCready v. Booth*, 398 So. 2d 1000, 1001 (Fla. Dist. Ct. App. 1981); *Ringler v. Sias*, 428 N.E. 2d 869, 870 (Ohio Ct. App. 1980).

Company obtained a writ of possession in a “FED ” action naming only one of the building’s tenants, and the writ was turned over to a deputy sheriff for execution. The deputy enforced the writ against all occupants of the building, and hired several men to help remove the plaintiff’s goods and furniture from the premises while she was away at work. During the “set out,” a strong rainstorm hit, and the deputy took no steps to try to protect the plaintiff’s goods from the rain. The court determined that, although the eviction was wrongful as to Ms. Harris, it was the deputy’s duty to execute the writ of possession presented to him, and the deputy had a duty to use ordinary care not to damage Ms. Harris’ property. *Id.* at 651. For his negligence in causing the damage, the deputy would be liable, and so would the sheriff and his surety. *Id.*

Leonard v. Gilreath, 625 S.W.2d 722 (Tenn. Ct. App. 1981) is a more recent case somewhat pertinent to the issue before the Court. In *Leonard*, the tenant/plaintiff vacated the leased premises but left some personal items, such as furniture, in the leased house. When the plaintiff later visited the premises, she found her personal items outside in a downpour of rain. The tenant brought an action against the landlord to recover for the damage to her personal property, but because there was no evidence as to how the property was removed to the yard, or as to who removed the items from the house, the court determined that the plaintiff, not having met her burden of proof, should suffer the loss. *Id.* at 724. By inference, the court’s ruling indicates that if the tenant could prove that the landlord or his agent removed the items from the house, the tenant would recover her damages. However, in the *Leonard* case, the tenant had abandoned the premises and had left her personalty in the constructive possession of the landlord, whereas Ms. Payne was still occupying the premises at the time of her eviction, and she did not intentionally leave her property in Mr. Birchfield’s care.

In this case, Mr. Birchfield was acting under legal authority and was lawfully on the premises removing Ms. Payne’s personal property. Based on the Tennessee case law cited above, and on the facts

of this case, the Court determines that Mr. Birchfield and Mr. Finney owed a duty of reasonable care for the preservation of Ms. Payne's personal property during the eviction procedure, and that Ms. Payne is entitled to compensatory damages for the injury and damage to her property incurred during the "set out" process. Ms. Payne, however, owes to Mr. Birchfield rent arrearages and expenses for damage to the premises during her occupancy. Both Ms. Payne and Mr. Birchfield presented only speculative testimony of the amount of their damages, with no supporting documentation nor persuasive proof. Under these circumstances, the Court therefore **Determines and Orders** that a mutual offset of compensatory damages is appropriate in this case, and that neither party should recover a monetary judgment against the other. Ms. Payne is entitled, however, to receive the \$3,325 presently held in the Clerk's Office of this Court. The Court further determines that each party shall be responsible for its own attorney's fees, and that, because the Court was presented with no proof or evidence warranting punitive damages, the parties' mutual requests for punitive damages are denied. Upon this Order becoming final, the Clerk is **ORDERED** to disburse the \$3,325 being held in that office to Terry Gayle Payne and her attorney Andrew Bender.

SO ORDERED THIS 17th OF NOVEMBER, 1998.

WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE