Black Diamond Holding Company, LLC, v. Luhn (04CA2410)
Answer Brief--Summary

This action involved an unusual lease that gave the Tenant a lifetime term, but allowed the Landlord substantial discretion in where to house the Tenant among a variety of premises. At the time this dispute arose, the Tenant had already moved one time at the Landlord's request, but was reluctant to move again without certain commitments. Order, para. 14-16, R. 114. The trial court specifically found that "Luhn's efforts to define some guidelines for his [second] move cannot be labeled frivolous or ill-intentioned." Order, para. 20, R. 115.

Landlord argues that because the trial court found a detainer as to a specific cabin, it had to terminate the lease and could not fashion an equitable remedy. However, when "an equitable defense is interposed [in an FED action] the action acquires an equitable character as to the plaintiff who then becomes entitled to such equitable relief as the facts indicate." *White v. Widger*, 358 P.2d 592, at 599 (Colo. 1960).

This principle was discussed at greater length in *Fairview Mining Corporation v. American Mines & Smelting Co.*, 278 P. 800, at 802 (Colo. 1929), as follows:

> "Doubtless desiring to get possession as quickly as possible, plaintiff selected the speediest remedy available. In doing so, however, it may not in this jurisdiction, where equitable defenses to a legal cause of action are allowed, both as matter of defense and as ground for affirmative equitable relief, cut off the right of the defendant to plead as a defense to plaintiff's legal cause of action, or as grounds for equitable relief, its own equities, which, as here, in effect convert what was instituted as a legal action, under the old practice, into a suit in equity."

See also, *Rocky Mountain Gold Mines, Inc. v. Gold, Silver & Tungsten*, 93 P.2d 973 (Colo. 1939).

In the action at issue in this appeal, the Tenant did interpose equitable defenses and counterclaims for equitable relief (e.g., the doctrine of unclean hands and a counterclaim for declaratory judgment). R. 36. Clearly, the trial court had the power and authority to fashion an equitable remedy, which it did on the facts presented. "The power to fashion equitable remedies lies within the discretion of the trial court, and such rulings will not be disturbed on appeal absent an abuse of discretion." *Young Properties v. Wolfick*, 87 P.3d 235, at 237 (Colo.App. 2003); see also *La Plata Med. Ctr. Assocs. Ltd. v. United Bank,* 857 P.2d 410, 420 (Colo.1993); *Schneider v. Drake*, 44 P.3d 256 (Colo.App. 2001).

The trial court noted in its Order that the forcible entry and detainer statute is a statute which provides for forfeiture of a tenant's right of possession. Black Diamond argues that the trial court made that determination a basis to deny termination of the lease. However, nothing in the Order supports that argument. As previously discussed, the trial court properly exercised its discretion to fashion an equitable remedy. In any event, the trial court was correct. By a "forfeiture" one is involuntary divested of specific property, in consequence of some default or act forbidden by law. *Woitchek v. Isenberg*, 379 P.2d 392, (Colo. 1963). The trial court's observation that the FED statute provides for a forfeiture of a tenant's right of possession and must be strictly construed is correct, but is not of importance to the result in this appeal.