

IN THE CLEVELAND MUNICIPAL COURT
CUYAHOGA COUNTY, OHIO
HOUSING DIVISION

CHARLES STORY) CASE NUMBER 92 CVG 22935
22011 LIBBY ROAD)
BEDFORD HEIGHTS, OHIO 44146)
)
PLAINTIFF)
)
vs.) <u>LANDLORD-TENANT</u>
)
JANET JAMISON)
16306 HARVARD AVENUE)
CLEVELAND, OHIO 44128) <u>REFEREE'S REPORT AND</u>
) <u>RECOMMENDATION</u>
DEFENDANT)

This case came to be heard on February 10 and 11, 1993 before Referee Barbara A. Reitzloff, to whom this case was assigned by Judge William H. Corrigan pursuant to Ohio Civil Rule 53, to take evidence on all issues of law and fact regarding plaintiff's second cause action and defendant's counterclaim.

Plaintiff in court with counsel.

Defendant in court without counsel.

FINDINGS OF FACT:

1. Plaintiff is the legal owner of the single family home located at 16303 Harvard Road, Cleveland, Ohio (hereinafter "the premises").
2. Plaintiff obtained legal title to the premises when he purchased it in June 1989.
3. Plaintiff has been a friend of defendant's mother for some years, and knew defendant prior to 1989.
4. In 1989, plaintiff and defendant inspected the premises in the process of plaintiff's purchase of it.

5. At the time of the parties' inspection of the premises, some defective conditions existed at the premises and some repairs were needed. Although plaintiff denies knowledge of any defective conditions at the time of his purchase of the premises, his testimony was less convincing than that of the defendant, who testified that both parties observed defects in the premises.

6. The defective conditions in existence at the time of plaintiff's purchase of the premises included defective plumbing, missing pipes, damaged, dirty interior walls, and loose and decayed storm windows and doors.

7. At the time of plaintiff's purchase of the premises, the parties agreed that defendant would occupy the premises, making plaintiff's monthly mortgage payments, and, at a later date, take ownership of it from plaintiff.

8. Defendant did not contribute to the down payment of the premises. Defendant testified that she contributed money toward plaintiff's down payment for the premises. In support of her testimony, defendant submitted a copy of a check defendant received from an unrelated party, which was endorsed by both plaintiff and defendant. Plaintiff testified that he endorsed the check to cash it for defendant at the bank. Plaintiff denies receiving any money from defendant for the purchase of the premises, and this testimony is credible in light of the lack of corroborating evidence from defendant.

9. Since June 1989, plaintiff has been the sole holder of

legal title to the premises; at no time has defendant been a legal, titled owner of the premises.

10. Defendant made plaintiff's monthly mortgage payment to Society Bank from June 1989 through May 1992. A portion of each monthly payment was credited toward plaintiff's property tax liability for the premises.

11. Defendant's payments to the bank were often made after plaintiff's mortgage payment due date, resulting in the assessment of a late fee against plaintiff's account. Defendant did not pay the late charges which were assessed, and plaintiff made no attempt to collect the late charges from defendant prior to filing this action.

12. During defendant's occupancy of the premises the amount of plaintiff's mortgage payment increased. In April 1992, the payment increased from approximately Three Hundred Eighty-Eight Dollars (\$388.00) to Three Hundred Ninety-Two Dollars and Fifty Cents (\$392.50). The payment remained at Three Hundred Ninety-Two Dollars and Fifty Cents (\$392.50) during the remaining months of defendant's occupancy.

13. Defendant vacated the premises in approximately October 1992, but failed to notify plaintiff that she had done so. Plaintiff first became aware that defendant had moved from the premises on or about November 4, 1992, when plaintiff was so informed by the court. Defendant disputes this, but admits by her own testimony that she notified plaintiff of her intent to vacate prior to and not after vacating the unit.

14. While occupying the premises, defendant paid all water and sewer charges incurred at the premises, in an amount

totalling Six Hundred Forty-Five (\$645.00). Plaintiff does not dispute that defendant paid the water and sewer charges. The amount of the charges is supported by records from the Water Department submitted by defendant and admitted by the court.

15. During her occupancy of the premises, defendant experienced problems with the heating system, which plaintiff failed to correct after receiving verbal notice of the condition from defendant.

16. While occupying the premises defendant contracted and paid for a number of repairs at the premises. Defendant submitted invoices and receipts for repairs, which shall be admitted, establishing the following amounts spent for the following items:

storm windows	\$411.65
doors	795.00
furnace repair	135.00
plumbing repairs	125.00
repair and painting	
walls	400.00

Defendant also produced a receipt for the installation of an alarm system at the premises.

CONCLUSIONS OF LAW AND FACT

The first issue to be determined in this case is whether a landlord/tenant relationship existed between the parties. Plaintiff argues that the parties were landlord and tenant; defendant asserts that she occupied the premises as its owner and not as a tenant.

It is undisputed that the plaintiff is the sole holder of legal title to the premises. While defendant argues that she was the intended owner, this argument is inconsistent with the evidence showing her attempts to purchase the premises while occupying it. These attempts, along with the other evidence presented, negate defendant's claim of ownership of the premises.

The parties through their conduct have created an oral, month to month tenancy. Defendant's monthly rent is in an amount equal to plaintiff's monthly mortgage payment, Three Hundred Ninety-Two Dollars and Fifty Cents (\$392.50) since April 1992.

Plaintiff has established by a preponderance of the evidence that defendant last paid rent for the month of May 1992. The parties disagree about the exact date that defendant vacated, however, after reviewing the testimony of the parties and the court records, it appears that plaintiff was first informed that defendant had vacated the premises on or about November 4, 1992, when plaintiff and his attorney appeared for a default hearing on plaintiff's second cause action. Prior to that time, plaintiff did not have a judgment against defendant on the first cause action, and could not legally reclaim the premises. As a result, plaintiff has established that he is entitled to recover rent for the period from June 1, 1992, through November 4, 1992, for a total of Two Thousand Fourteen Dollars and Eighty-Two Cents (\$2,014.82), calculated as follows: $\$392.50 \times 5 \text{ months} = \$1,962.50$ plus \$52.32 prorated November 1992 rent).

In addition to his claim for rent, plaintiff seeks to recover late charges assessed by the bank due to defendant's late rental payment (toward plaintiff's mortgage). It is undisputed that during defendant's occupancy she frequently made payments to the bank after the due date of plaintiff's mortgage payment, causing late fees to be assessed against plaintiff nearly every month. During the two years of defendant's occupancy, however, plaintiff did not, at any time prior to filing this action, attempt to collect from defendant the late fee assessed against him. It is not clear whether a late fee was part of the parties, rental agreement; however, even if it was, the fee has been waived by plaintiff's lack of enforcement, and will not be awarded in this case.

Finally, plaintiff seeks to recover his attorney fees in this action. While the Ohio Landlord/Tenant Act does permit the attorney for the landlord to recover her fees under some circumstances (See Revised Code 5321.05(C)), neither Revised Code Chapter 1923 nor Chapter 5321 provide for plaintiff's recovery of fees under the instant circumstances, i.e. in an action for restitution and unpaid rent. Plaintiff's request for an award of attorney fees is therefore denied.

In October 1992, in response to plaintiff's complaint defendant filed an answer and counterclaim which plaintiff moved to strike at out of rule. Defendant filed a second counterclaim on February 8, 1993, just two days prior to trial. Defendant's first answer and counterclaim were admittedly filed late. However, in light of the fact that

defendant is an unrepresented party, and the lack of prejudice to the plaintiff, the court will grant defendant leave instanter to file her first answer and counterclaim, and will deny plaintiff's motion to strike. Regarding defendant's second counterclaim however, defendant's failure to seek leave of court and the filing of the counterclaim only two days before trial leaves the court with no alternative but to strike defendant's second counterclaim.

Defendant, in her counterclaim, seeks reimbursement for real estate taxes paid, contributions by defendant toward plaintiff's down payment and costs, repairs performed at the premises, and water and sewer changes paid by defendant. In addition, defendant seeks damages in the form of a rent abatement due to the plaintiff's alleged failure to maintain the premises. Defendant also seeks an order instructing plaintiff not to sell the premises until the termination of this action.

Defendant's first claim seeks reimbursement for real estate taxes paid as part of the monthly mortgage payment. The agreement of the parties provided that defendant make the monthly mortgage payment to the bank in the amount required by the bank. That a portion of this payment was comprised of the assessment for property taxes does not change the amount due from defendant. In addition, defendant's statement that her agreed-upon monthly payment was Three Hundred Twenty-Two Dollars (\$322.00), the amount of the mortgage payment less property taxes, appears less credible in light of her two year

history of monthly payments will excess of Three Hundred Twenty-Two Dollars (\$322.00). Accordingly, as previously stated, the court finds defendant's monthly rental obligation was equal to the payment due to the bank on plaintiff's mortgage account. Defendant is therefore not entitled to reimbursement for the portion of her rent which was applied to plaintiff's property taxes.

In the second element of her counterclaim, defendant seeks reimbursement for money she allegedly paid toward plaintiff's down payment. As previously stated, there was insufficient evidence offered to establish that defendant did in fact contribute to plaintiff's down payment. As a result, defendant's claim for reimbursement will be denied.

Next, defendant seeks damages due to plaintiff's alleged violation of Revised Code 5321.04(A)(6), which requires a landlord who is a party to a rental agreement to:

(6) Supply running water, reasonable amounts of hot water and reasonable heat at all times, except where the building that includes the dwelling unit is not required by law to be equipped for that purpose, or the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct public utility connection.

This obligation to supply running water, hot water and heat includes the obligation to pay for the utility services, Griffin v. Holston, No. L-83-261, slip op. at 4 (Ct. App. Lucas Cty. December 16, 1983); Vidoni v. Herman, No. 91 CVG 10970 (Municipal Court Cleveland, September 27, 1991; Raphael v. Medina, No. 91 CVG 12740 (Municipal Court Cleveland, August 27, 1991). In this case, defendant paid for water service at

the premises during her entire occupancy. The evidence did not establish that this obligation was imposed by the parties oral rental agreement, however, even if it had been, this provision would be unenforceable pursuant to Revised Code 5321.13. Defendant has established, through water department records and her own testimony, that she paid water and sewer charges at the premises in the amount of Six Hundred Forty-Five Dollars (\$645.00). She has received no reimbursement from plaintiff for these payments. Defendant is therefore entitled to recover on this portion of her counterclaim in the amount of Six Hundred Forty-Five Dollars (\$645.00).

In her next counterclaim, defendant seeks reimbursement for repairs she made to the rental premises. Defendant established that plaintiff was on notice of the need for repairs to the plumbing, heating, windows, doors, and interior walls of the premises, but failed to make those repairs. As a result, defendant contracted for the repairs, spending a total of One Thousand Eight Hundred Sixty-Six Dollars and Sixty-Five Cents (\$1,866.65). These charges appear reasonable, with the exception of the Seven Hundred Ninety-Five Dollars charge for the door, which shall be reduced to Two Hundred Ninety-Five Dollars, for a new total of One Thousand Three Hundred Sixty-Six Dollars and Sixty-Five Cents (\$1,366.65). Under these circumstances defendant, as a tenant, may set off the cost of the repairs, One Thousand Three Hundred Sixty-Six Dollars and Sixty-Five Cents (\$1,366.65), against plaintiff's

recovery for unpaid rent. Kuhn v. Guffin, 3 Ohio App.2d 195, 209 N.E.2d 824 (Lucas Cty. 1964); See also Smith v. Padgett, 32 Ohio St.3d 344, 347 n.1, 513 N.E.2d 737, 740 n.1, (1987); Peter M. Iskin, Ohio Eviction and Landlord-Tenant Law, Chapter II, Section Q, Subsection 12, 1992.

Plaintiff argues against defendant's recovery on this claim, citing Martins Ferry Jaycee Housing, Inc., v. Pawlaczyk, 4 Ohio App.3d 302, 448 N.E.2d 512 (Belmont Cty. 1982). Martins Ferry, however, is inapplicable to this case. In Martins Ferry the court held that a tenant could not raise the issue of defective conditions at the rental premises as a defense to the landlord's claim for possession if the tenant did not deposit his or her rent with the court prior to the hearing on the claim for possession. The court specifically stated, however, that the tenant could raise the issue of the condition of the premises as a counterclaim. "Failing to deposit the amount of rent payments, the tenant still has the right to pursue his action as a counterclaim and not as a defense to the eviction." 4 Ohio App3d 302, 304. In this case, the defendant has moved from the premises, leaving the claim for possession moot. In response to plaintiff's claim for money damages, defendant properly raises the issue of repairs and conditions as a counterclaim.

Defendant, in her counterclaim, also seeks a rent abatement as a result of the condition of the premises. As defendant caused the needed repairs to be made at the premises in a relatively prompt manner after plaintiff's refusal to

make repairs, and in light of defendant's reimbursement for those repairs, defendant has failed to establish by a preponderance of the evidence that the conditions caused a reduction in the rental value of the premises. Defendant therefore will not recover on this claim.

Defendant seeks reimbursement for funds she paid for property insurance on the premises. There does not appear to have been an agreement between the parties pursuant to which defendant is entitled to reimbursement for this expense, nor does the Ohio Landlord/Tenant Act provide for a recovery. Furthermore, it appears from the insurance documents submitted that defendant, not plaintiff, appeared on the policy as the insured party. Thus, the insurance could not be said to have benefitted plaintiff. Defendant will therefore not recover on this claim.

Finally, defendant seeks an order forbidding plaintiff from transferring his ownership of the premises during the pendency of this action. Defendant has cited no legal or factual authority for this request, and it is denied.

CONCLUSION

In summary, plaintiff has established defendant's liability for unpaid rent in the amount of One Thousand Nine Hundred Sixty-Two Dollars and Fifty Cents (\$1,962.50). Defendant, on her counterclaims, is entitled to reduce this amount by One Thousand Three Hundred Sixty-Sixty Dollars and Sixty-Five Cents (\$1,366.65) for repairs, leaving a balance of Five Hundred Ninety-Five Dollars and Eighty-Five Cents

(\$595.85). Defendant is also entitled to recover Six Hundred Forty-Five Dollars (\$645.00) on her claim for the water and sewer charges, leaving a balance owed to defendant of Forty Nine Dollars and Fifteen Cents (\$49.15).

JUDGMENT

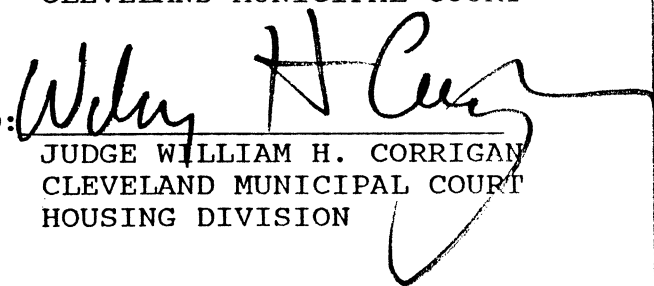
1. Defendant is granted leave instanter to file her counterclaim of October 19, 1992. Plaintiff's motion to strike as to that counterclaim is denied. Defendant's second counterclaim, filed February 8, 1993 is stricken as out of rule.

2. Judgment for defendant against plaintiff on plaintiff's second cause action and defendant's counterclaim in the amount of Forty-Nine Dollars and Fifteen Cents (\$49.15) plus costs and interest from date of judgment.

RECOMMENDED:


BARBARA A. REITZLOFF
HOUSING COURT REFEREE
CLEVELAND MUNICIPAL COURT

APPROVED:


JUDGE WILLIAM H. CORRIGAN
CLEVELAND MUNICIPAL COURT
HOUSING DIVISION

SERVICE

A copy of the Referee's Report was sent by ordinary United States mail to the Plaintiff's Attorney Kathryn T. Joseph, 3600 Terminal Tower, Cleveland, Ohio 44113 and to the

Defendant, Janet Jamison, 15611 Glendale, Cleveland, Ohio 44128
this ____ day of March, 1993.

WM. CORRIGAN MAR 11 1993

IN ORDER TO BE CONSIDERED, ALL OBJECTIONS TO THE REFEREE'S
REPORT MUST BE IN WRITING WITHIN FOURTEEN (14) DAYS OF FILING
AND MUST COMPLY WITH THE OHIO RULES OF PROCEDURE AND THE LOCAL
RULES OF THIS COURT. FOR FURTHER INFORMATION, CONSULT THE
ABOVE RULES OR SEEK LEGAL COUNSEL.

RECOMMENDED:


BARBARA A. REITZLOFF
HOUSING COURT REFEREE
CLEVELAND MUNICIPAL COURT

APPROVED:


JUDGE WILLIAM H. CORRIGAN
CLEVELAND MUNICIPAL COURT
HOUSING DIVISION