

CLEVELAND MUNICIPAL COURT
HOUSING DIVISION
CUYAHOGA COUNTY, OHIO

Donna Rae Obrin)	
)	Judge Raymond L. Pianka
Plaintiff)	
)	Case Nos. 96 CVG 19301
vs.)	96 CVG 22876
)	
Jarvis Hicks)	MAGISTRATE'S REPORT AND
)	JUDGMENT ENTRY
Defendant)	

This matter came for trial March 6, 1997 on the parties' claims for money damages, pursuant to consolidation of second cause and counterclaims stated in two eviction actions, before Magistrate Sandra R. Lewis, to whom it was assigned by Judge Raymond L. Pianka pursuant to Ohio Rule of Civil Procedure 53, to take evidence on all issues of law and fact regarding the parties' claims. Plaintiff was present, proceeding pro se. Defendant was present and represented by Maria A. Smith.

STIPULATIONS

Prior to trial the parties agreed to the following stipulations of fact:

1. The parties had a written lease for the premises at 2065 West 29th Street. (See Attached as Stipulated Exhibit 1).
2. The lease term was to terminate on January 1, 1997.
3. The rental amount pursuant to the written lease was \$550.00.
4. The defendant paid a \$550.00 security deposit.
5. The defendant paid rent for every month to September 1996. (Not to include September 1996).
6. The lease, paragraph 4, states that the defendant shall be liable for electric usage payable to the plaintiff.
7. The defendant failed to pay \$196.08 of the electric bill from Cleveland Public Power.
8. The lease, paragraph 4, states that the defendant shall pay the plaintiff for water and sewer.
9. The property at 2065 West 29th Street is a single-family residence.
10. The defendant has paid \$90.00 to the plaintiff for water and sewer.
11. The plaintiff claims the defendant owes \$437.34 for water and sewer.

12. The defendant vacated the premises on November 22, 1996.
13. The plaintiff re-rented the premises on January 1, 1997 for \$770.00 per month.
14. The defendant had agreed to pay \$100.00 to plaintiff to repair a door. Defendant has paid \$30.00 of this account.
15. The defendant stipulates that the screen doors needed replacement screens.
16. The defendant admits that he damaged the basement window well cover.
17. The plaintiff admits that defendant was never, throughout the entire tenancy, given permission to use the basement.
18. The plaintiff waives any right to property damages that exceed the amount alleged in the complaint.

FINDINGS OF FACT

1. Plaintiff is the owner of the single family residential rental premises located at 2065 West 29th Street, Cleveland, Ohio 44113.
2. Pursuant to the lease, rent was due on the first of the month.
3. Paragraph 10 of the lease provides for late fees of \$45 per month.
4. On or about October 21, 1996, plaintiff served defendant with a three-day notice to vacated for non-payment.
4. Although the parties agreed that defendant was never allowed access to the basement, the parties disagreed on whether the basement had been included in their agreement. The lease is silent as to the basement. Plaintiff testified that she told defendant there was no use of the basement because the basement was not safe. Defendant testified that use of the basement was part of the rental agreement. Based upon the evidence presented, this Court finds that the basement was not a part of the rental agreement for the premises.
5. Upon vacating, defendant left approximately 15 bags of trash in the premises, as well as debris in the back yard. In addition, numerous portions of the walls and baseboards were fingerprinted, marked and scuffed beyond normal wear and tear. One of the kitchen sink/cabinet unit's doors had been torn off the hinges. Two cabinet doors on the pantry cupboards had been torn off the hinges. The bathroom towel rack and tissue holders had been torn from the walls. The storm door vacuum cylinder was torn from the door. The yard fence and posts were bent out of plumb beyond normal wear and tear.

6. Plaintiff admitted that she paid her workmen in cash and kept no receipts. Plaintiff testified that she paid the following amounts for labor on the repairs noted:

\$ 32	trash removal and general cleaning (\$8 per hour X 4 hours);
\$325	painting walls and wall boards (7 rooms);
\$320	spackling, plumbing, carpentry, repair of the storm door, removal of debris from the back yard (\$8 per hour X 40 hours); and
\$ 68	re-hang pantry doors, re-hang tissue roller and towel rack.

However, plaintiff was unable to itemize and correlate the hours of labor to the repairs for which she paid \$320 above.

7. Plaintiff admitted that she kept an “inventory” of materials for repairs needed on her several properties. Plaintiff admitted that she kept no records of materials as they were withdrawn from inventory and used on specific properties. Although plaintiff sought to establish the quantity and value of the materials used through the recollections of her workmen, plaintiff was unpersuasive. Therefore, this Court finds that plaintiff failed to carry her burden on the issue of the materials.

CONCLUSIONS OF FACT AND LAW

As a preliminary matter, review of the file in case number 96 CVG 19301 revealed defendant’s Motion for Default Judgment and plaintiff’s Motion for Leave to Answer Instanter remained open. This Court notes that both motions were rendered moot by the subsequent consolidation of the parties claims for money damages.

In the second cause of action, plaintiff seeks back rent and property damage. Defendant seeks credit for his security deposit, denies causing certain property damage for which monetary compensation is sought and counterclaims for unauthorized entry, monies wrongfully paid to plaintiff and loss of use of the basement.

Defendant vacated the premises November 22, 1996, having last paid rent in August of 1996. Thus defendant owed rent for the months of September, October and November 1996. Plaintiff is therefore entitled to recover back rent in the total amount of \$1650 (\$550 per month X 3 full months).

The lease provides for late fees of \$ 45. This Court has limited late fees to \$25 per month finding fees in excess of that amount unrelated to the damage sustained by landlord. Plaintiff served the three-day notice on October 21st. Thus plaintiff is entitled to recover late fees for the months of September and October, or \$50 (\$25 X 2 months).

Defendant failed to pay electric bills of \$198.08 to plaintiff as agreed under the lease. Therefore, plaintiff is entitled to recover \$198.08 for the unpaid electric bill balance.

Turning to the issue of property damage, defendant moved for partial summary judgment on the issue of the alleged property damages. Defendant cited plaintiff's failure to offer any evidence to establish a diminution in value as required under Cranfield v. Lauderdale (Eighth District 1994), 94 Ohio App.3d 426. This Court now grants partial summary judgment on the issue of property damages to defendant based on the cited authority.

Plaintiff also seeks payment of the water and sewer charges pursuant to the lease. This Court has recently held that tenants may contract to pay the water and sewer charges under certain conditions. Bess v. McBride (Cleveland Muni. May 6, 1997), 96 CVH 1586 (unreported). In Bess, this Court indicated that a lease signed by both parties and expressly placing the cost of water/sewer on the tenant could be enforceable.

In order to be enforceable, the lease must include a provision specifying that water and sewer are to be paid by tenant. The general terminology "all utilities" is not sufficient. In addition, the Court will look to whether the lease indicated the water meter reading at the time the tenant took possession, as well as whether the charge per thousand cubic feet of water was indicated. All these facts would demonstrate that the tenant understood his/her responsibility for, and control of, the water/sewer bills.

The lease in the present matter was signed by both parties. Paragraph 4 addresses utilities and reads as follows:

Grantee agrees to contact the East Ohio Gas Co. (361-2345) to register the Gas account for this single home in the name of the Grantee and agrees to Pay to the owner of the house for the full amount of Electric usage and for the full amount of the water and sewer usage as billed for this single home at: 2065 W. 29th St., Cleveland, Ohio 44113. Grantee states that he will keep these accounts paid current. Telephone or Cable TV for this apartment shall be the Grantee's responsibility.

The provision indicates that the premises is a single home and that the tenant (Grantee) agrees to pay the owner for the "full amount of the water and sewer usage as billed." However, the lease does not indicate the meter reading or the charge per thousand cubic feet used. Therefore, this lease does not meet the requirements under Bess and the provision is unenforceable as to the tenant.

Turning to the counterclaims, defendant seeks damages from plaintiff for unauthorized entry, monies wrongfully paid to plaintiff pursuant to the lease and loss of use of the basement. Having found that use of the basement was never a part of the agreement, there can be no recovery for loss of use. In addition, defendant failed to offer testimony on the claim of unauthorized entry and thus there is no recovery on this claim.

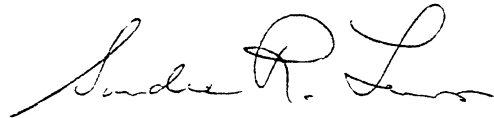
Finally, defendant seeks credit for monies paid to plaintiff pursuant to the lease. Specifically, defendant seeks credit for monies paid for water and sewer as set forth in the lease.

Defendant, in substance, asks this Court to create a right of action on behalf of tenants who have paid in conjunction with such provisions. This would be a broad expansion of existing law, and this Court declines to make such an expansion. Having found the lease provision unenforceable against the defendant/tenant, absent any legal authority, the Court declines to enforce the provision against the plaintiff/landlord.

Finally, the Court notes that in Stipulation #14, the parties reference an agreement regarding an unspecified door. Plaintiff is entitled to recover the \$70 balance due and owing on the agreement.

In conclusion, plaintiff is entitled to recover back rent in the amount of \$1650, plus late fees of \$50, plus unpaid electric bills in the amount of \$198.08, plus \$70 on the agreement for a subtotal of \$1968.08. Defendant made a security deposit of \$550. Offsetting this amount from the amount due plaintiff, there is due and owing plaintiff the sum of \$1418.08.

Recommended:

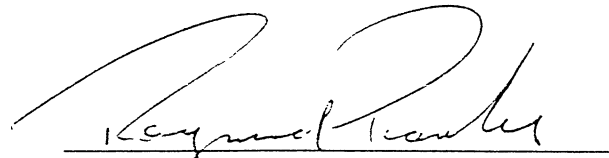


Magistrate Sandra R. Lewis

JUDGMENT

Upon review, the Magistrate's Recommendation is approved and confirmed. Plaintiff's Motion for Default Judgment and defendant's Motion for Leave to Answer Instanter, filed under case number 96 CVG 19301, were rendered moot by consolidation of these matters. Judgment is for plaintiff against defendant in the amount of \$1418.08, plus costs and interest. Judgment is for plaintiff on defendant's counterclaims.

Approved:


Judge Raymond Pianka
Housing Division

IN ORDER TO BE CONSIDERED, ALL OBJECTIONS TO THE MAGISTRATE'S REPORT MUST BE FILED WITHIN FOURTEEN (14) DAYS OF JOURNALIZATION 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.

SERVICE

A copy of this Judgment Entry was sent via regular U.S. Mail to the plaintiff Donna Rae Obrin, 2041 West 29th Street, Cleveland, Ohio 44113 and to defendant's counsel Maria A. Smith, 3408 Lorain Avenue, Cleveland, Ohio 44113 this 13 day of August 1997.

Michael E. Boyd