IN THE FRANKLIN COUNTY MUNICIPAL COURT
COLUMBUS, OHIO

Berkeley Park, LLC,
Plaintiff,

vs.

Stephen C. Pile, et al.,
Defendants.

Case No. 2005 CVG 046214

JUDGMENT ENTRY AND DECISION

Findings of Fact:

1. On August 18th 2005, Plaintiff and Defendant entered into a residential lease agreement for premises at 5279 Sabine Hill, New Albany at a stated monthly rental of $1,049 per month, to commence on August 18th, 2005 and to run through August 17th, 2006. Defendant posted a security deposit in the amount of $300.

2. Defendant listed the proposed occupants of the premises as himself, his wife and his 16 year old son Taylor Pile.

3. Plaintiff gave Defendant a move-in incentive equivalent to one month's free rent as reflected on a "Rent Addendum" signed by Defendant on August 4th, 2005.

4. Defendant arranged to pay his monthly rent by electronic funds transfer no later than the 3rd day of each month.

5. In the early morning hours of October 1, 2005 Taylor Pile experienced some kind of episode which resulted in bizarre behavior that seriously disturbed neighbors in Plaintiff's apartment complex to the extent that the police were called. Eventually, medics were also summoned and Taylor was taken to the hospital. Neither Defendant nor his wife were at the premises on that occasion, nor was any other adult physically present to supervise Taylor.

6. Plaintiff's agents became aware of the disturbance on October 1, 2005 when the night manager took several calls starting about 4:00 a.m. She reported the incident to Jessica Wilbur, the property manager for Plaintiff, later that Saturday morning when Wilbur came to work. Wilbur dutifully reported the incident to Plaintiff's Supervising Manager, April Zimmerman-Katz, who instructed Wilbur to "dig," i.e., to investigate the matter. The following Monday, Wilbur began to investigate. At first, due in part to the fact that Defendant's apartment was adjacent to another unit which had been the subject of previous complaints, Plaintiff prepared a notice to vacate which was served on those other tenants. Upon further investigation, including talking to some of the neighbors who had

been disturbed, talking to Defendant's wife as well as to the police officer who had been involved in the apprehension of Taylor Pile, Plaintiff's agents concluded that Taylor Pile was responsible for the disturbance. The decision was then made to evict Defendant.

7. On October 12, 2005, Plaintiff served Defendant with a Notice to Leave the Premises on or before October 17th, 2005 but Defendant did not comply with the Notice.

8. On November 2, 2005, Plaintiff sued Defendant for possession of the premises and for the balance of rent due under the lease. Some time after the filing of the suit but before the eviction action could be heard, Defendant vacated the premises and the eviction action was dismissed from this case on November 22, 2005.

9. Because Defendant had arranged for electronic funds transfer to pay his rent, money representing rent for November and December, 2005 was paid to Plaintiff.

10. Plaintiff expended $115 for painting the premises following Defendant's vacation and re-rented the unit on 6/12/06.

Conclusions of Law:

Lease provisions No. 10 and No. 12 are not inconsistent with R.C. 5321.05(A)(8). Defendant contends that they are in conflict with the statute and therefore violate R.C. 5321.06 and are unenforceable because they "give Plaintiff unfettered discretion to decide whether a violation of the lease has occurred." But neither the statute nor the lease provisions give any more or less discretion to the Plaintiff. In either case, the Plaintiff would take whatever action it thought appropriate to enforce the statute or the lease provisions; if the Defendant disagreed with the decision as to whether or not a violation had occurred, the matter could be contested and a court would make the ultimate decision.

Plaintiff was not required to give a 30-day notice with opportunity to cure. Defendant contends, consistent with his argument concerning the inconsistency between the lease provisions and the statute, that Taylor Pile's conduct "undoubtedly violated O.R.C. 5321.08(A)(8)," and that Plaintiff was therefore obligated to comply with R.C. 5321.11 and give Defendant a 30-day notice with an opportunity to cure. Defendant has overlooked a significant phrase in R.C. 5321.11. The statue reads in part: [I]f the tenant fails to fulfill any obligation imposed upon him by section 5321.05 of the Revised Code

that materially affects health and safety.....(emphasis added). Although Taylor Pile's conduct violated both the lease provisions and the statute there has been no showing or suggestion that his conduct materially affected health and safety. Since such a showing would be a predicate to the requirement on a landlord to serve a 30-day notice with an opportunity to cure, there was no such requirement in this case. *Starr v. Kaderly*, No. 96 APG03-293, 1996 WL 465256 (Franklin Co. App. 1996).

There is authority to the effect that acceptance of future rent may waive a landlord's right to terminate the tenancy for a breach of the lease provisions. *Presidential Park Apts. v. Colston*, 17 O.O. 3rd 220 (Franklin Co. App. 1980). R.C. 1923.04 requires service of a notice to vacate as a predicate to filing an action for eviction. The court of appeals has ruled that where a landlord accepts future rent, that conduct is inconsistent with the notice to vacate. This is of course in the context of an eviction action and on proper motion filed during such an action a court should dismiss the action if a landlord has acted in this manner. It does not appear that such a motion was filed in this case; in fact that portion of this case which was for possession of the premises under R.C. Chapter 1923 was dismissed on November 22, 2005 after Defendant vacated the premises and returned the keys. In effect, what would have been a good defense to the eviction action was "waived" by the Defendant's conduct in vacating the premises.

Defendant contends that Plaintiff's acceptance of the electronic transfer of funds representing rent for the month of November waived the breach and would have constituted a defense on the eviction action; since Defendant would have prevailed in the eviction action, the argument goes, he should not now be held accountable for the balance of rent due under the written lease agreement. The court will not rise to the invitation to speculate as to the outcome of the possession action which was terminated by Defendant's voluntary surrender of the premises; the question before the court is one of contract law, that is, enforcing the agreement entered into between the parties. As pointed out by Plaintiff, that agreement contains a clause at Paragraph 10: "[I]f the Tenant fails to complete the terms of the lease and/or renewal thereof, the Tenant shall nonetheless be responsible for rent to the end of the term." Defendant is clearly liable for rent during the balance of the term or until the premises were re-rented, as long as Plaintiff has shown diligence in its attempt to re-rent.

Plaintiff seeks to recover the rent amount for the month of September, which Defendant was not then required to pay because of the move-in incentive as reflected in the "Rent Addendum" executed by the parties. Plaintiff contends that the clear language of that Addendum contemplated the successful completion of the rental agreement and held the Defendant responsible for payment of that month's rent if the lease was not completed. Defendant contends that this charge is an unenforceable penalty and both parties cite to the case of *Samson Sales, Inc. v. Honeywell, Inc.*, (1984), 12 Ohio St. 3rd 27. That case refers to *Jones v. Stevens* (1925), 112 Ohio St. 43 for a three part test to determine whether a court should conclude that such an amount constituted liquidated damages for the breach or a penalty: "Where the parties have agreed on the amount of damages, ascertained by estimation and adjustment, and have expressed this agreement in clear and unambiguous terms, the amount so fixed should be treated as liquidated damages and not as a penalty, if the damages would be (1) uncertain as to amount and difficult of proof, and if (2) the contract as a whole is not so manifestly unconscionable, unreasonable, and disproportionate in amount as to justify the conclusion that it does not express the true intention of the parties, and if (3) the contract is consistent with the conclusion that it was the intention of the parties that damages in the amount stated should follow the breach thereof." As an inducement to prospective tenants to enter into a lease agreement, Plaintiff offered to forego one month's rent out of a one-year lease.

Testimony was offered to the effect that Plaintiff suffered higher than usual vacancy rates during this period of time and later offered lower rental rates and two months free rent as additional inducements in order to increase occupancy. It makes sense to infer that Plaintiff would recover the value of that one month's rent over the life of the lease. How then would the Plaintiff establish the amount of the loss if a tenant breached a rental agreement after 3, 5, 7, or 9 months of a 12-month lease? Since the actual loss to the Plaintiff under such circumstances would be uncertain as to amount and difficult of proof, the first test is met. There is nothing about the contract as a whole which would justify the conclusion that it did not express the true intention of the parties and it is consistent with the conclusion that it was the intention of the parties that damages in the amount stated should follow the breach as represented by Defendant's

signature on a separate document, thus satisfying the second and third tests. The amount of one month's rent is liquidated damages for the breach and is not a penalty.

Plaintiff has contended that Defendant is liable to it for repainting the unit after Defendant vacated, and for an unpaid utility bill. Defendant was in possession of the premises for slightly more than 3 months. Plaintiff offered no evidence that there was a necessity to repaint the premises because of any damage done by Defendant and in fact offered evidence that suggested that on any vacation of premises, it is Plaintiff's practice to have the unit "tuned" by professional painters and cleaners. Plaintiff has failed to prove any damages to the premises caused by Defendant's occupancy. Defendant has conceded the unpaid utility bill.

Under the terms of the lease agreement, Defendant is indebted to Plaintiff for unpaid rent from January 1st through June 11th at the rate of $1049 per month for a total of $5629.63, for liquidated damages for the rent inducement in the amount of $1049 and for the final utility bill in the amount of $18.91. Defendant is to be credited with the amount of his security deposit, $300 and with an additional $150, representing the increased rent obtained by Plaintiff upon re-renting the premises, which it would not have realized had Defendant remained in possession for the balance of the lease term.

By agreement of the parties, the trial to the court in this matter was solely on Plaintiff's claims as presented in the Complaint; determination of Defendant's counterclaim was reserved for another day.

Judgment for Plaintiff on the complaint in the amount of $6247.54 plus costs and interest on the principal amount at the rate of 8% from the date of judgment.

It is so Ordered.

The court hereby directs the Municipal Court Clerk to serve upon all parties notice of this judgment and its date of entry upon the journal.

4/10/07
DATE

JUDGE TED BARROWS

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