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THE ATHENS COUNTY MUNICIPAL COURT

AUG 12 1981

IN THE ATHENS COUNTY MUNICIPAL COURT

ATHENS, OHIO

CLERKS OFFICE
ATHENS COUNTY, OHIO

MARY LOU STEWART, et al.,	:	
	:	Case Nos. 43-57
LANDLORD,	:	
AND	:	<u>DECISION</u>
ELIOT KALMAN, et al.,	:	and
TENANTS.	:	<u>JOURNAL ENTRY</u>

This matter came on for hearing on July 30, August 6 and August 7, 1981 upon the application of the landlord, Wallick Properties, for a release of rent held in escrow and upon the applications of tenants for sanctions under Ohio Revised Code Section 5321.07.

For the purpose of taking evidence on three common issues, the cases involving Eliot Kalman, David Eshlman, Julia Young, Charles Dutrow III, Jill Atherton and Helen Gawthorp were combined. The issues of rubbish collection, parking lot difficulties and damaged concrete were common to all eleven (11) tenants but these three issues were the only defects complained of by the six tenants mentioned above.

The remaining five tenants' cases were also combined for evidence taking purposes, those tenants being Richard and Paula Brophy, Ronald and Patricia Luce, Katherine Munson, John R. Thomas and Connie Willett. These tenants shared an additional common complaint of insufficient water pressure. They also had individual complaints beyond the common claims.

The court will address all eleven (11) cases in this opinion.

STATEMENT OF CASE

On or about May 1, 1981, the above named tenants sent to Mary Lou Stewart, Manager of Carriage Hill apartments, letters listing complaints about defects at the Carriage Hill facility. The letters were notices made pursuant to Ohio Revised Code Sec. 5321.07(A). They requested that defects be corrected by May 31, 1981.

On or about June 1, 1981, the tenants filed applications with the court to deposit their rent with the court pursuant to Ohio Revised Code Section 5321.07. These notices were mailed to the landlord by the clerk of this court and were delivered to the landlord via certified mail on or about June 2, 1981.

The landlord on June 12, 1981 filed an application for release of the deposited rent pursuant to Ohio Revised Code Sec. 5321.09 claiming all defects complained of by the tenants had been remedied.

The tenants failed to file an answer or a counterclaim but on July 31, 1981 with leave of court, the tenants filed an application pursuant to Ohio Revised Code Sec. 5321.07(B)(2). The application asked: (1) for an order from the court directing the landlord to correct the conditions complained of by the tenants; (2) for an order reducing the tenants' period rent retroactively and prospectively; (3) for an order to use the rental escrow money to remedy the conditions; and (4) for a continuing order for the tenants to deposit money in escrow until all conditions are remedied.

STATEMENT OF ISSUES

The court, in deciding questions presented in both applications, must decide the following issues:

1. Did the defects complained of by tenants exist at the time they placed their rent in escrow?
2. If the defects existed, were they repaired by the landlord?
3. If any defects now exist, do they materially affect the health and safety of the tenants?
4. What remedies, if any, should be afforded to the landlord?
5. If material defects exist, what, if any, remedies should be afforded to the tenants?

FINDINGS AND DECISIONS

- I. Did the defects complained of by the tenants exist at the time they placed their rent in escrow?

The first six tenants gave notice of the following defects in need of repair as of May 1, 1981 and June 1, 1981:

1. Damaged concrete on stairs, hallways, sidewalks and curbs.
2. Potholes and trenches in parking lots and driveways.
3. Inadequate maintenance and insufficient capacity of rubbish storage facilities.

The landlord in its June 12 application did not deny these defects existed. Instead, the landlord stated the defects were remedied. The testimony presented at the hearing and the exhibits clearly indicate that defects existed in all designated areas as specified.

The concrete in many common areas was deteriorated to the steel rods and curbs were broken. Large potholes and trenches existed in the common parking areas and driveways. The rubbish disposal system consisted of several 55 gallon drums at 11 locations. The drums had no lids and rubbish often overflowed the containers.

It is apparent, therefore, that at the time of filing the three common defects existed for all eleven (11) tenants.

The second group of tenants from buildings 10, 11 and 14 complained of the lack of water and insufficient water pressure. Evidence indicated that some water problems existed as early as 1973. The problem in recent months has become acute, and certainly existed on the date of the filing of tenants' action.

The remaining five tenants also listed numerous other complaints. Many of those defects have been corrected. Some allegedly still exist. It is clear, however, that all of the defects complained of existed as of May 1, 1981 and June 1, 1981, and many existed to the extent of creating housing code violations.

2. If the defects existed, were they repaired by the landlord?

The testimony of both the landlord's representatives and the tenants indicated that many repairs have been effectuated since notice was given. Many of the parking lots have been hot-patched, concrete repairs continued through August 6 and new dumpsters have been installed to help eliminate the rubbish problem.

Nevertheless, much of the testimony from both sides indicates that many repairs are not yet complete. More concrete work needs to be done, especially to stairways. Some potholes and water collecting areas still exist in the driveways and parking lots. At least two dumpsters have holes in their bottoms and are still in need of repair.

There is no question that the water problem still exists, as do several of the individual complaints, including lack of painting and improper weatherization.

In short, some of the defects have been remedied; many defects have not been corrected.

3. If any defects exist, do they materially affect the health and safety of the tenants?

The landlord does not concede that any defects exist. However, the landlord argues if the court does find defects, the defects do not materially affect the health and safety of the tenants. The landlords argue that the only way the tenants can be given relief is if the defects "materially affect health and safety."

The tenants argue that the landlord's duties to the tenants go beyond material defects and the obligations are outlined with specificity in Ohio Revised Code Section 5321.04, which states, in relevant part:

- (A) A landlord who is a party to a rental agreement shall:
- (1) Comply with the requirements of all applicable building, housing, health, and safety codes which materially affect health and safety;
 - (2) Make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition;
 - (3) Keep all common areas of the premises in a safe and sanitary condition;

(4) Maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, and air conditioning fixtures and appliances, and elevators, supplied or required to be supplied by him;

(5) When he is a party to any rental agreements that cover four or more dwelling units in the same structure, provide and maintain appropriate receptacles for the removal of ashes, garbage, rubbish, and other waste incidental to the occupancy of the dwelling unit, and arrange for their removal;

(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;

The landlord again claims the key is the phrase "materially affects health and safety," and that only such violations necessitate continued escrowing of rent. Larry Hughes and Bob Finsterwald of the Athens Code Enforcement office testified, as well as Joe Kasler of the Athens City-County Health Department. All testified that building, housing, health and safety code violations existed as recently as July 30, 1981. They testified that the conditions were comparable to other similar housing stock in Athens. However, each stated that with exception of a stairway defect at Building 10, there existed no "material risk of health or safety." It should be noted, however, that none of the three officials addressed the question of whether the water issue was a material defect to health and safety.

The landlord therefore argues under Section 5321.07 that the tenants' remedies are not allowable because the defects and violations of the housing code do not "materially affect health and safety." See Ohio Revised Code Section 5321.07(A) and "Ohio

Residential Landlord Tenant Act," 8 Akron Law Review 519 (1975) at 524. The landlord states since there was testimony of no material defects that the court should grant its application for a release of escrow and deny the tenants' application.

The court finds the landlord's view to be too restrictive and therefore rejects its argument. Under Ohio Revised Code Sec. 5321.04 the landlord is required to do far more than merely meet minimum code requirements. The landlord must also keep the premises in a fit and habitable condition, keep all common areas safe and sanitary, maintain all plumbing and specifically supply running water. These items are ignored in the landlord's argument.

The court finds the remaining problems not corrected by the landlord to be material. In addition, the defects create conditions that are not safe not sanitary. The defects impinge upon the habitability of the apartments in question.

4. What remedy, if any, should be afforded to the landlord?

Under the statutory language of Ohio Revised Code Section 5321.09 the landlord can obtain release of all of the rental escrow money if: 1) no defects existed, 2) if the defects, if any, were caused by tenants, or 3) if the defects complained of have been rectified and corrected. The landlord in the case at bar chose to apply to the court for release based upon the theory that the defects have been fully remedied.

From the evidence the court finds that all defects complained of have not been remedied. Therefore, all of the rent will not be released to the landlord.

The question then arises whether the landlord can receive a release of a portion of the rental escrow to compensate for the repair work done since May 1, 1981. The statutes anticipate a procedure for partial release in Ohio Revised Code Sec. 5321.10

which states in relevant part:

(A) If a landlord brings an action for the release of rent deposited with a clerk of court the court may, during the pendency of the action, upon application of the landlord, release part of the rent on deposit for payment of the periodic interest on a mortgage on the premises, the periodic principal payments on a mortgage on the premises, the insurance premiums for the premises, real estate taxes on the premises, utility services, repairs, and other customary and usual costs of operating the premises as a rental unit.

The landlord in this case chose not to apply to the court under Sec. 5321.10 neither in pre-trial pleadings nor in the presentation of evidence. The landlord does argue, however, that the court can grant a partial release to the landlord under Revised Code Sec. ~~5321.07~~. The landlord claims since Ohio Revised Code Sec. 5321.07 allows the court to reapportion the rent for tenants that it is implicit that the court can reapportion the escrowed rent to the landlord. The tenants argue contra, stating that the landlord's only chance for partial release is under Revised Code Sec. 5321.10, not Sec. 5321.07.

The court agrees with the tenants' argument. By not electing to proceed under Revised Code Sec. 5321.10, the landlord waived the possibility of partial release. There is no language referring to partial release under Revised Code Sec. 5321.09, and the court specifically rejects landlord's argument that partial release to the landlord can proceed under Revised Code Sec. 5321.07.

The court, in finding that defects still exist to the common areas, that the water problem exists and that defects in the five individual tenants' apartments still exist, finds the landlord's application for release not to be well taken and it is hereby overruled.

5. If material defects exist, what remedies, if any, should be offered to tenants?

The tenants have requested in their July 21, 1981 application that the court consider several remedies under Revised Code Sec. 5321.07. The court has heard nearly 20 hours of testimony and legal argument and has considered some 37 exhibits. Based on the testimony, exhibits and arguments, the court finds that material defects still exist in the three common areas. The rubbish issue has been substantially corrected, but defects still exist. Lack of water pressure exists for the five tenants so testifying, and individual defects exist in four of the 11 apartments. Therefore, the court orders as follows:

1. The court hereby orders, pursuant to Ohio Revised Code Sec. 5321.07, that the landlord comply with all housing, building, safety and health codes within thirty (30) days of this order and provide this court with evidence of such compliance at a hearing on the 16th day of September, 1981 at 9:30 a.m.

2. The court further orders the landlord specifically to:

- a) Complete all concrete repair to stairs,
hallways, sidewalks and curbs;
- b) Repair all potholes and trenches in parking
lots and driveways;
- c) Repair the remaining dumpsters in need of
patching and new bottoms;
- d) Provide weather stripping in apartments 1017
and 1430;
- e) Paint the apartment of Connie Willett, apartment
1125, which has not been painted in 12 years,
in violation of management agreements and plans.

3. The court finds a problem with the lack of water and insufficient water pressure has existed at Carriage Hill since the early 1970's. Only recently has the question been seriously addressed by the landlord. Even now the landlord choose to blame the City of Athens for lack of pressure. However, evidence indicated that pressure provided by the city is not below standard. Regardless of where the fault lies, the fact remains that the water problem exists and it is the landlord's obligation under Revised Code Sec. 5321.04(A)(6) to correct the problem. Therefore, the court orders the landlord to correct the problems of lack of water and insufficient water pressure within sixty (60) days of this entry and to provide the court with evidence of compliance at a hearing on the 15th day of October, 1981 at 9:30 a.m.

4. The tenants requested a reduction of rent retroactively and prospectively due to existing defects. The court views the tenants in two groups -- those with only the three common problems and those with the common complaints plus the water and individual problems. The tenants testified their fair market rent declined to zero due to the defects. The landlord did not rebut this testimony.

Pursuant to Ohio Revised Code Sec. 5321.07 the court has the authority to reduce the rent retroactive to the date of rental escrow. See Pagoda v. Smith, Case No. 37936 (Cuyahoga County Court of Appeals, Feb. 8, 1979 and Gill v. Zipkin, Case No. 78-LLT 88 (Cleveland Heights Municipal Court, Oct. 31, 1979).

The court, based upon evidence presented, believes the rent for those applicants sharing only the common problems should be reduced by one-half (50%) retroactively to June 1, 1981 and prospectively until the defects are remedied pursuant to this decision.


Based upon the evidence presented the court reduces the rent for the remaining five tenants by 75% retroactive to June 1, 1981 and prospectively until the defects are remedied pursuant to this decision.

5. The court hereby continues the order allowing the tenants who are a party to this action to continue to deposit their reduced monthly rent money with the clerk of this court until this order is complied with by the landlord and all defects complained of in this action are remedied to the satisfaction of the court.

6. The court, at this time, will not order the rent already held in escrow to be used to remedy the conditions. This request for relief was made in the alternative and need not be addressed at this time. The court finds that if satisfactory compliance with this order is not made, the court will, at a later time, address the issue of using escrow money for repairs.

The court so orders the above and assesses the costs of these actions to the landlord.

DATE: August 12, 1981


Thomas S. Hodson, Judge