

IN THE HILLSBORO MUNICIPAL COURT, HIGHLAND COUNTY, OHIO

Respiratory & Clinical Supply Corp.

Plaintiff

Case No. 88-CV-F-128

vs.

HILLSBORO MUNICIPAL COURT

OCT 15 1988

Scott Freshour

FINDINGS OF FACT, OPINION
AND JUDGMENT ENTRY

Defendant *D. Wilkin*

This cause came on for trial on the pleadings and evidence on October 28, 1988. The trial was continued to the evening of December 1, 1988 for the convenience of the parties, the Court having not allowed enough time at the initial hearing to fully try the matter. By stipulation, it is agreed that paragraphs 1 and 2 of the complaint are admitted by the Defendant and that the second affirmative defense in Defendant's answer is withdrawn. The Court finds that:

1. Plaintiff is an Ohio corporation lawfully doing business in Highland County, Ohio who entered into a lease agreement on February 1, 1987 with Scott Freshour and Pete Wilkin (Plaintiff's Exhibit 1), which provided, among other things, for late charges of \$3.00 per day, up to 10 days, and \$5.00 per day after 10 days. Said agreement further provides that after 15 days, eviction notice would be served unless prior arrangements were made with the lessor corporation. Plaintiff's records (Exhibit 4) indicate the application of the late fee, in accordance with its contractual formula, commencing September of 1987 through February of 1988. An examination of Defendant's Exhibit A, and specifically the receipt given to the Defendant dated September 2, 1987, indicates a

payment of \$30.00 with a zero balance owed. The receipt for September 14, 1987 also indicates a balance due of zero. This is totally inconsistent with the entry of September 14, 1987 on Plaintiff's Exhibit 14 which shows the imposition of a late penalty. Further receipts on January 11, 1988, February 12, 1988 and March 1, 1988 indicate certain payments made, with an indication of a balance due on January 11, 1988 of \$220.00, with the remaining receipts alluded to showing no balance due. Likewise, these receipts are totally inconsistent with the imposition of late charges. These receipts constitute a communication between Plaintiff and Defendant at the time payment was made which sets forth the balance due. The Court therefore finds that there is an account stated between the parties regarding late fees and that Plaintiff is not entitled to any late fees, pursuant to its claim as set forth in paragraph 4 of the complaint. In addition, the Court finds that these late fees constitute a penalty and are unconscionable. Further, it is the opinion of this Court that Plaintiff would be estopped from asserting a claim for late fees because of its conduct in issuing the receipts, depriving Defendant of any notice whatsoever of the imposition of that provision of the contract.

2. The Court finds on the complaint in favor of the Plaintiff in that Defendant did negligently permit the commission of waste to the leased premises, resulting in damages. There is no evidence upon which the Court can make a finding in favor of Plaintiff regarding the allegation of stolen and damaged furniture. The Court does find from the evidence that Plaintiff is entitled to damages for replacing the window, the cleaning expense and replacing the damaged doors. The Court does not find sufficient evidence to show that Defendant is responsible for replacing the linoleum as claimed by Plaintiff. The Court notes that Mr. BoDecker

(who the Court feels was an extremely honest and candid witness) could not substantiate the linoleum and damaged furniture claims, nor could Plaintiff's other witnesses. The Court therefore finds in favor of the Plaintiff and against the Defendant in the sum of \$243.21 for the damages described above. The Court orders that the deposit given by the Defendant shall be applied to said damages, resulting in a net amount due from Defendant to Plaintiff in the sum of \$23.21.

3. In regard to Defendant's supplemental counter-claim, the Court has already made a finding regarding the security deposit and applies the same to the damages found to be due Plaintiff. The Court finds that Mr. BoDecker did call the Defendant in the late hours for the reason that he was unable to contact Defendant through all reasonable means regarding the sporadic rental payments. The Court finds that Plaintiff did not harass or intimidate Defendant, nor was there any evidence showing that Defendant suffered "extreme emotional distress" as a result of the telephone contact. Therefore, the Court finds in favor of the Plaintiff and against the Defendant on the counter-claim and supplemental counter-claim.

It is therefore the order of this Court that the Plaintiff recover from the Defendant the sum of \$23.21, plus costs.

ENTER:


Judge

J. 12, P. 453