IN THE MARIETTA MUNICIPAL COURT

WASHINGTON COUNTY, OHIO

Sandra Hall, Agent Arthur Howard Wine & Associates	:	
Plaintiff,	:	Case No. 94 C.G. 667
vs..	:	
Tammy Leonard	:	DECISION AND ENTRY
Defendant.	:	

. . . . . .

PROCEEDINGS

This matter came on for Trial to the Court on November 18, 1994. Present and appearing for the Plaintiff was Attorney Michelle H. Willard. Present and appearing for the Defendant was Attorney Dennis Harrington.

Hearing was held on Plaintiff's Complaint For Damages as well as the Defendant's Counterclaims for a defective electrical system at the residence, breach of the common law warranty of habitability and breach of the terms of the Rental Agreement. Both parties adduced evidence. Both parties were given the opportunity to file Post Trial Memorandum. The Court hereby renders its Decision.

FACTS

On June 6, 1994, the Defendant signed a written Lease Agreement to rent 901 Garfield Avenue from the Plaintiff. Along with said Lease Agreement, the Defendant signed attachment A, the House Rules Addendum and Guidelines. These documents were prepared

by the Plaintiff. Sandra Hall, the Agent for the Plaintiff testified that the Defendant was given the opportunity to inspect the premises prior to signing the Lease. On June 6, 1994, the Defendant paid partial rent of $250.00 and an additional $100.00 towards the security deposit.

Ms. Hall testified that on July 22, 1994 she was contacted by the Defendant who stated that she could not afford to live at 901 Garfield Avenue. Ms. Hall advised the Defendant that she must vacate said premises on or before July 31, 1994 if she wanted to be released from the Lease. In addition, Ms. Hall advised that if she was still there on August 1, 1994, they would require the August rent and move-out report.

During this time, the Defendant complained of a fuse box in the basement and Lewis Massey, Plaintiff's employee, did inspect the fuse box. He testified that there was no problem with the fuse box at 901 Garfield Avenue.

On August 30, 1994, Plaintiff filed a Forcible Entry and Detainer Action after attempting to locate the Defendant personally at 901 Garfield Avenue and by mail. On September 7, 1994, the Defendant returned the key to the property to Plaintiff. Thereafter, Plaintiff began to show the property to other individuals at the end of September, 1994. The Plaintiff did not receive any inquiries for rentals between early September and late September, 1994.

By agreement of the parties, a Writ of Restitution was ordered by Entry dated September 22, 1994. On November 15, 1994, Plaintiff signed a Sale Agreement for 901 Garfield Avenue.

Defendant testified that Ms. Hall advised her that the Plaintiff would pro-rate the rent until she could vacate the premises. Defendant did admit that the key was not

returned until September 7, 1994 and she had not notified the Plaintiff of her new address until that date. Defendant admitted that she did not contact Ms. Hall in reference to the Vacate Report and that she moved out of the residence the first weekend of August, 1994.

Barbara Franks, a friend of the Defendant, testified that when the Defendant moved into the residence, the lawn needed mowed and that the grass was about a foot high. Furthermore, there was a refrigerator, television and trash left on the back porch. Ms. Franks testified that the interior of the home was cleaner when the Defendant moved out than when she moved into the residence. Ronald McBride mowed the grass for the Defendant on a weekly basis and confirmed that the refrigerator and television were on the back porch of the residence. Mr. McBride testified that it took ten to fifteen minutes for the lawn work at 901 Garfield Avenue.

Ms. Leonard, the Defendant, testified that she did not read the Lease word for word and she did not realize that she would be responsible for the months of rent still due on the Lease if she had not vacated the premises on or before July 31, 1994. Ms. Hall testified that she advised the Defendant that if she wanted out of the Lease, she must vacate the residence prior to August 1, 1994.

DISCUSSION

Plaintiff's Exhibit Nine offered at Trial summarizes the damages Plaintiff is pursuing in this action. Plaintiff has requested past due rent under the Agreement, late fees, the balance of the Security Deposit, cleaning and miscellaneous expenses as outlined on the Vacate Report, attorney fees and Court costs. Defendant has requested an award of $100.00 on her Counterclaims plus costs. Based upon the Decision in *Briggs versus MacSwain*, (1986)

31 Ohio App 3d 85, Plaintiff herein is entitled to recovery of the rent due under the Lease Agreement for the period from July 1994 through November 15, 1994. Defendant owes partial rent in the sum of $150.00 for the months of July, 1994 and November, 1994 and the full amount of rent, $300.00 for the months of August, September and October, 1994. In *Briggs versus MacSwain*, supra, the Court held that: "giving the Three Day Notice under *Ohio Revised Code*, Section 1923.04 does not terminate the obligation of the tenant to pay rent for the remainder of the rental period for which no rent has been paid". The landlord is required, however, to use reasonable diligence in mitigating damages by attempting to rerent the premises.

In this case, the Plaintiff did attempt to rerent the property by advertising the property in local newspapers and showing the property to other viewers. In the instant case, there was a contract between the parties for the fixed term of the Lease i.e. twelve months for the monthly rental rate. The Court finds that Ms. Hall's testimony as to the Agreement to release the Defendant from the Lease if she vacated by August 1, 1994 is more credible than that of the Defendant. The Defendant had the opportunity to read the Lease word for word, if she so chose. However, she testified that she did not do so. It is important to note that the Defendant did not return the key or have any further contact with the Plaintiff until September 7, 1994. Plaintiff's Exhibit Six, the letter Defendant sent to Plaintiff shows that the Defendant did not return the key until September, 1994. Clearly, Plaintiff is entitled to have the key to the residence returned so that future renters can be assured that only authorized individuals have access to the property.

Plaintiff has requested late fees be awarded by the Court as additional damages.

The Court finds based upon the facts in this case, that an award of a late fee would be a penalty and thus unenforceable. See *200 West Apartments versus Foreman*, Unreported Case No. 92 CVF 1349, (September 15, 1994). Defendant cites *Cubbon versus Locker*, (1982) 5 Ohio App. 3d 200, as authority for her position that damages should not be awarded after service of the Three Day Notice to vacate the premises. However, *Locker*, supra, can be distinguished because the Plaintiff in *Locker* did not file a Forcible Entry and Detainer Action. In the instant case, Plaintiff did file the Complaint for Forcible Entry and Detainer and Damages. Defendant signed the Lease for rental of the premises and based upon contract law is obligated to comply with the terms and conditions of that Agreement. Plaintiff did make reasonable efforts to mitigate damages and attempt to rerent the premises.

Plaintiff has requested that the Court award the balance owed on the Security Deposit. The Court could find no legal authority for an award for the balance due on the Security Deposit. *Ohio Revised Code*, Section 5321.16 outlines the legal requirements concerning Security Deposits and their refund, if any, and itemization of damages suffered by the tenants noncompliance with Section 5321.05 of the *Ohio Revised Code*.

In *Albreqt versus Chen*, (1983) 17 Ohio App. 3d 79, the Court reviewed damages claimed by the landlord for the tenants noncompliance with the Rental Agreement and refund of Security Deposits. The Court in *Chen*, supra, held:

> "Therefore, under the circumstances, Appellee is not responsible for the costs of any carpet cleaning. In the absence of an affirmative showing, by way of itemization (see R.C. 5321.16 [B]) that there was a specific need to clean the carpet, Appellant's unilateral deduction was improper. A lease provision regarding carpet cleaning that is inconsistent with R. C. 5321.16 (B) is unenforceable."

In the instant case, the Plaintiff failed to show a specific need to clean the carpet and evidence offered by the Defendant from Barbara Franks and Ronald McBride substantiated Defendant's claim that the carpet was in as good a condition when Defendant vacated the residence as when she moved in.

Plaintiff has also requested an award of $225.00 for cleaning/trash out as listed on Plaintiff's Exhibit Seven the Vacate Report. In the instant case, there was no evidence offered as to itemization of the cleaning or trash removal expenses. The house rule/addendum to the Lease Agreement prepared by Plaintiff outlines an extensive itemization of costs for various cleaning items and replacement to the fixtures and property in the residence. Plaintiff did not offer any receipts for payment of cleaning or trash hauling services. Furthermore, Plaintiff did not offer any evidence that these expenses were due to ordinary wear and tear or something above that. Therefore, there is insufficient evidence to support an award for the $225.00 claimed for cleaning and trash out. It should also be noted that various witnesses offered by the Defense testified that there were items of trash on the back porch of the residence when the Defendant first took occupancy of the premises.

Plaintiff has also requested an award of $50.00 for mowing the lawn and $12.00 for light bulb replacement. Plaintiff was on notice at the end of July, 1994 that the Defendant was going to vacate the premises in reference to the claim for mowing, however, the Defendant did not return the keys to the landlord or further contact the landlord during the month of August, 1994 after vacating the premises. The contract signed by the Defendant provides in paragraph eight that: "during the summer months the yard must be mowed on a eleven day cycle" and the house rules provides that: "replacement of light bulbs will be charged

at the expense of $3.00 each". The Court finds that the expenses for said services for the light bulbs and the mowing were outlined in the Lease Agreement and house rules signed by the Defendant. Defendant was not diligent in corresponding with the Plaintiff after she vacated the residence or in returning the keys. Furthermore, the Defendant testified that Ms. Hall did remind her of all Vacate Report.

Plaintiff has also requested damages in the amount of $30.00 for a new lock and replacement key. Plaintiff's Exhibit six, a letter written by the Defendant, shows clearly that Defendant did not timely return the keys to the Plaintiff. The Court finds based on the testimony and exhibits that Plaintiff was reasonable in incurring these expenses since the keys were not timely returned. Defendant cites *Sampsons Sales, Inc. versus Honeywell Inc.*, (1984) 12 Ohio St 3d 27, syllabus for the argument that the contract with the Plaintiff was unconscionable and that a set amount of damages listed in the Contract and other documents should not be awarded because they are not difficult to ascertain or prove. Defendant is a licensed beautician, who passed her State Boards, and is obviously educated and able to read the terms and conditions of the Lease Agreement and other addendums.

The Court finds that the provisions for the lawn mowing, light bulb replacement and lock replacement are not impermissible penalties and are permitted as liquidated damages under the Lease Agreement signed by the Defendant.

Defendant is requesting an award of $100.00 for alleged defects in the electrical system and breach of common law warranty of habitability. Lewis Massey testified that he has worked in the field of maintenance for seventeen years and did inspect the fuse box located at 901 Garfield Avenue and did not find any problems with the electrical system. Mr. Massey

performed this work in a timely fashion on July 30, 1994 and Defendant has failed to substantiate her Counterclaim for damages due to the electrical system.

Plaintiff has also requested an award for attorney fees and Court costs. The question of attorney fees is addressed in *Ohio Revised Code,* Section 5321.05 (C)and the Court costs are addressed in *Ohio Revised Code,* Section 1929.09. *Ohio Revised Code*, Section 5321.05 (C) provides that:

> "if a tenant violates any provision of this section, the landlord may recover any actual damages which result from the violation together with reasonable attorney fees".

In the instant case, the Court does not find that the tenant violated any provision of *Ohio Revised Code*, Section 5321.05 and, therefore, an award of attorney fees is not merited. In reviewing *Ohio Revised Code*, Section 1923.09 the Court finds that the Complaint For Damages and a Writ of Restitution herein was properly shown by the Plaintiff and that the costs should be equally divided between the parties due to the findings herein.

DECISION

On Plaintiff's Complaint For Damages the Court finds that Plaintiff is entitled to the unpaid rent for July, August, September, October and one-half of November, 1994, which sum totals $1200.00. Furthermore, as damages the Plaintiff is entitled to $50.00 for the lawn mowing expense; $12.00 for replacement light bulbs; and $30.00 for the new lock and replacement key for a total sum of $92.00. Defendant has failed to prove her Counterclaim and no award shall be made for the Counterclaim. No award is made for attorney fees. Court costs shall be equally assessed between the parties.

Plaintiff has retained $100.00 of the Security Deposit paid by the Defendant. It is hereby ORDERED that, **PLAINTIFF IS AWARDED JUDGMENT IN THE SUM OF $1,192.00 PLUS INTEREST FROM THE DATE OF THIS ENTRY AGAINST THE DEFENDANT, TAMMY LEONARD.**

ENTER: As of the date of filing hereof.

_____

Nancy E. Brum, Acting Judge

cc: Michelle H. Willard, Esquire
Dennis Harrington, Esquire