CLEVELAND MUNICIPAL COURT
DIVISION OF HOUSING
CUYAHOGA COUNTY, OHIO

SMJ GROWTH CORPORATION	)CASE NO. 96 CVG 02843
	)
Plaintiff,	)MAGISTRATE'S REPORT AND
	)RECOMMENDATION
vs.	)
	)
ELIJAH NORMAN JR. ET AL.	)
	)
Defendants.	)

This came came for hearing on the first cause of action for possession, March 12, 1996. Plaintiff's representative Mohan Jain and counsel were present. Defendant Vivian Norman was present. The Court, sua sponte, continued the case for the taking of additional evidence to May 28, 1996 at which time Plaintiff's representative Mohan Jain, Plaintiff's counsel, Defendant Vivian Norman and Defendants' counsel were present. The case was heard by and submitted for decision to Magistrate C. David Witt, to whom the case was assigned pursuant to Ohio Civil Rule 53.

FINDINGS OF FACT:

1. Plaintiff and Defendants entered into a written lease agreement for the rental by the Defendants of residential property located at 13406 Beachwood, Cleveland, Ohio. The term of lease was one year commencing September 1, 1995. The monthly rental obligation was described in the lease as $625.00 payable in advance of the first date of the month. The lease included a discount program wherein the rent was reduced by $50.00 in the event payment was made prior to the due date.

2. Plaintiff and Defendant Elijah Norman Jr. also entered into a written option to purchase wherein in return for a payment of $6,000.00, the receipt of which was acknowledged, the Defendant Elijah Norman Jr. received an option to purchase the rental

premises for $57,900.00. The option included an expiration date of August 31, 1996. In the event the option was exercised, the $6,000.00 was to be applied to the purchase price. Additionally, the option to purchase provided a rent credit of $150.00 per month which would be applied to the purchase price and that "(A)s an incentive, Optioner will grant 12 months rent credit to Optionee regardless of the month within the option term the option is exercised." The option to purchase also provided that the option was to be conditioned upon performance of the lease terms including timely payment of rent; that a breach of the rental agreement would render the option null and void; that in such event all monies paid by optionee under the option would be forfeited to and retained by the optionor.

3. The Plaintiff and Defendant Elijah Norman Jr. entered into a purchase agreement October 26, 1995 for the premises for the agreed amount of $57,900.00. The Agreement provided all documents and funds were to be placed in escrow within 45 days. The President of SMJ Growth Corp., Mohan Jain, testified at trial that Third Federal Savings and Loan Association was prepared to finance the purchase of the property by Defendant at the agreed price; that a condition of the mortgage was that certain outstanding financial obligations identified in Defendant Elijah Norman's credit report be satisfied; and that the mortgage and sale of the property did not occur because the Defendant failed to satisfy the outstanding financial obligations that were a prerequisite to Third Federal's financing of the sale of the property.

4. Mohan Jain testified, further, that he is, among other things, a consultant for property owners seeking reappraisal of their real estate tax obligations and is therefore familiar with the methodologies of tax valuatuion; that the property which is the subject of this case was appraised for tax purposes (first half of 1995) as valued as $11,100.00; that this represented an actual value in the mid thirty thousand dollar range as determined by Cuyahoga County for tax purposes; that tax assessments are not necessarily an accurate indicator of the actual value of an individual property because they are influenced by and are

a function of the values of other properties in the neighborhood; that the reasonableness of the sale price is reflected by the fact Third Federal was willing to finance the sale for the agreed price.

5. Mohan Jain testified that which respect to his real estate sales, he makes his living by selling property; not by incurring the benefit of forfeited option agreements. He testifed that SMJ Growth Corp. and related entities have entered into 107 option agreements since 1992; that of this 107, 51 have resulted in transfers of interest to the optionee; that 41 options are currently in effect; that only 15 agreements have been forfeited; and that in all cases where the optionee sought to renew the option, the option has been so extended by the Plaintiff.

6. Mohan Jain testified that with respect to the 107 option agreements in place since 1992, four (inclusive of the instant case) involved options, the dollar amount of which equalled or exceeded $6,000.00. He testified the dollar amount of the option is usually a function of the purchase price, and the income and credit worthiness of the optionee. He testified that in the present instance, Defendant Elijah Norman Jr. insisted on a $6,000.00 option payment. Jain testified, under cross-examination, that it is possible to estimate with particularity in a given transaction, the adverse financial consequence of an optionee's failure to exercise the option and of a tenant's failure to adhere to the terms of lease with respect to the payment of rent.

7. Vivian Norman testified she has earned an associate degree, that she and her husband can both read; that they had an opportunity to read the lease and option agreements before execution; that they had an opportunity to ask questions of Plaintiff's representative concerning the contents of the agreements prior to execution of the agreements. She testifed that, notwithstanding the above, she neither appreciated nor considered that the $6,000.00 advanced to purchase the option would be forfeited in the event the sale of the

property was not consumated. She also testified that prior to occupancy of the premises, she and her children were living in shelters as victims of domestic violence.

8. The Defendants failed to pay rent for the months of December 1995 and thereafter through the present date.

9. The Defendants were served a notice to leave premises January 5, 1996.

10. The Plaintiff has not accepted rent since the service of the notice to leave premises not has rent been tendered.

CONCLUSIONS OF LAW AND FACT:

11. This case would be characterized a straightforward non-payment of rent action were it not for the existence of the option to purchase. The testimony is uncontroverted that the Defendants failed to pay the scheduled rent for December 1995 and thereafter. The question is whether the option to purchase and the $6,000.00 payment from Defendant Elijah Norman Jr. to the Plaintiff impact Plaintiff's claim for possession arising out of non-payment of rent. Defendants' counsel argues that, notwithstanding the prima facie rental delinquency, the $6,000.00 should be credited to the outstanding rental arrearage and that Defendants should be permitted to retain possession. Defendants' counsel asserts both the lease and option agreements should be characterized as unconscionable and unenforceable. Defendant's counsel bases this argument on multiple theories: First, that the agreements were entered into under duress; that the Defendants were is desperate straights with Defendant Vivian Norman and her children living in homeless shelters at the time the agreements were entered into. Secondly, that the Defendants did not appreciate the consequences of the agreements that they signed. Thirdly, that the $6,000.00 payment in support of the option was inherently unconscionable given that the vast majority of other option payments entered into by the Plaintiff were for significantly fewer dollars. Fourthly, that forfeiture of the option payment represents a punitive liquidated damage bearing no

reasonable relationship to actual damage, which actual damage was by Mohan Jain's own testimony capable of calculation.

12. These issues have been previously addressed with conflicting results. The East Cleveland Municipal Court, facing a similar fact situation, concluded the option to purchase was unconscionable, apportioned the entire option payment to past due rent and denied a writ of restitution. Jain v. Reed, East Cleveland Municipal Court Case No. 95 CVG 0088-51 (1995). The Cleveland Housing Court concluded the option fee would provide unjust enrichment to the landlord and found a Defendant not guilty with respect to the landlord's claim for possession. Jain v. Pringle, Cleveland Housing Court Case No. 92 CVG 26572 (1992). However, in Jain v. Pringle, Cleveland Housing Court No. 92 CVG 30197 (1992), the Court ignored the option agreement; the tenant was evicted for non-payment of rent.

13. In revisiting these issues, we address, initially, the matter of duress. While the Court has sympathy for the plight of Defendant Vivian Norman and her children, we do not conclude that the lease agreement was entered into under duress. By her own testimony, Vivian Norman (and her husband Defendant Elijah Norman per Vivian Norman's testimony) had every opportunity to read the lease agreement and to ask questions of the Plaintiff regarding the contents of the agreement. They understood their obligation to pay rent as evidenced by their partial performance with respect to the payment of rent. For a time they honored their obligation; then there came a time when they did not.

14. Defendants next argue the $6,000.00 option payment is inherently unconscionable. Defendant base their argument on the fact that only four of the 107 option agreements entered into by Plaintiff and related entities since 1992 included options priced at $6,000.00 or a greater amount. Plaintiff on the other hand argues that the dollar amount of the option was freely bargained; that it was the Defendant Elijah Norman Jr. who, himself, insisted on the $6,000.00 dollar amount; that the dollar amount on an option is routinely a function of the value of the property and the credit worthiness

of the optionee and that these factors influenced the amount of this particular option.

15. In analyzing the question of conscionability, we note, intitially, that Section 5321.14 of the Ohio Revised Code prohibiting unconscionable agreements applies only to "rental agreements", not to separate option agreements. Stacy v. Zupp, No. CA 9566, 1994 WL 369899 (5th District Ct. Apps., Stark, 6/20/94).

16. Even assuming, arguendo, some duty to assess the conscionability of the relationship between the parties, the Court finds no significant evidence of record to suggest that a $6,000.00 option, given the instant facts, is inherently unconscionable. Defendant Norman Jr. appears to have freely entered into the option agreement. Indeed, there is no direct evidence contradicting Plaintiff's claim that it was Defendant Norman Jr. who insisted on the $6,000.00 option. Moreover, the dollar amount of an option in a given situation is a function of multiple considerations including the ability of the optionee to finance the remaining portion of the purchase price after the option amount has been applied as a down payment. Given these variables the Court is reluctant to interject itself between the parties and to rewrite an agreement that both parties at the time regarded as being consistent with their own best interests. Lastly, the $6,000.00 option amount appears on its face to be reasonable given the benefit derived. Under the terms of the option, the parties agreed to a purchase price of $57,900.00. For a fee of $6,000.00, the Plaintiff agreed to remove the property from the open market for a period of one year in order to make it available to the Defendant. Arguably, the property had the potential to increase in value by the amount of $6,000.00 over a one year period (approximately a 10% inflation in value). In this context, an option fee of $6,000.00 freezing the purchase price for a period of one year is not inherently unreasonable.

17. Lastly, Defendants argue that the forfeiture provision of the option agreement is punitive and a liquidated damage; that the Landlord/Tenant Act precludes punitive and/or liquidated damages; that the forfeiture provision should, accordingly, be deemed

unenforceable. To be sure, liquidated damages are not appropriate in the context of a residential lease. The dollar amount of damages must bear a reasonable relationship to the actual loss suffered. Albreqt v. Chen, 17 App 3d 79, 477 NE 2d 1150 (Lucas 1983); Riding Club Apartments v. Sargent, 2 App 3d 146, 440 NE 2d 1368 (1981) both interpreting security deposit provisions. The difficulty with Defendants' thesis, however, is that it extends a principle applicable in a pure leasehold situation to a situation involving interpretation of a different sort of legal vehicle, an option to purchase. We find no case law to support the thesis that forfeiture of an option based upon non-performance of lease responsibilities (i.e nonpayment of rent) is inherently punitive. Indeed, we find the contrary. At least one Ohio court has sustained the position that nonpayment of rent may contractually trigger negation of an option to purchase. Du Pont v. Du Pont, 5 Abs 668 (App. Lucas 1927). What little case law there is suggests that a higher degree of judicial scrutiny is reserved for analysis of leases as opposed to analysis of options to purchase. This makes good sense. Landlords and tenants are frequently in unequal bargaining positions. This reality gave rise to Ohio's Landlord/Tenant Act, Section 5321.01 et al. of the Ohio Revised Code. No comparable legislation regulates the conduct of optioners and optionees. And with good reason: optioners and optionees are, except in the most outrageous of circumstance, capable of dealing with each other on an arms length basis without intrusion from the courts. Even in the present instance, where Plaintifff and Defendants have very different economic resources, the Defendants were hardly compelled to do a deal with the Plaintiff. Apparently capable of satisfying -- at least initially -- a monthly rental obligation of $625.00, the Defendants had many options within the Cleveland rental market. The fact that the arrangement ultimately went bad for the Defendants does not give license for the Court to rewrite the terms of the agreement.

18. Moreover, even if this Court were to rule that Plaintiff was somehow in illegal possession of $6,000 properly the property of Defendants, such ruling would not

automatically satisfy Defendants' outstanding rental arrearage. There is nothing in the record to sugggest the parties intended that the $6,000.00 tendered by the tenant would ever be utilized as payment on the rental arrearage. The arrearage exists quite apart from the disposition of other funds utilized to purchase an option.

JUDGMENT:

19. Judgment for the Plaintiff as to Plaintiff's First Cause of Action for Possession. Writ to issue.

20. Defendant's Answer and Counterclaim and Plaintiff's Reply thereto are deemed admitted consistent with their dates of filing.

21. All remaining causes of action are consolidated for hearing on October 14, 1996 at 2:00 PM, 13th floor of the Justice Center.

RECOMMENDED

C. DAVID WITT
HOUSING COURT MAGISTRATE

APPROVED

JUDGE RAYMOND PIANKA
HOUSING DIVISION
CLEVELAND MUNICIPAL COURT

SERVICE

A copy of the Magistrate's Report was sent by ordinary U.S. mail to the Plaintiff SMJ Growth Corp., 3951 Erie Street, Suite 201, Willoughby, Ohio 44094, Plaintiff's Counsel, Mark Witt, 3951 Erie Street, Suite 101, Willoughby, Ohio 44094 and to the Defendants's Counsel, David Dawson, Legal Aid Society, 1223 W. 6th St., Cleveland, Ohio 44113 this 28th day of ~~June,~~ August 1996.

IN ORDER TO BE CONSIDERED, ALL OBJECTIONS TO THE REFEREE'S REPORT MUST BE FILED WITHIN FOURTEEN (14) DAYS OF FILING AND MUST COMPLY WITH THE OHIO RULES OF CIVIL PROCEDURE AND THE LOCAL RULES OF THIS COURT. FOR FURTHER INFORMATION, CONSULT THE ABOVE RULES OR SEEK LEGAL COUNSEL.