IN THE FRANKLIN COUNTY MUNICIPAL COURT
COLUMBUS, OHIO

Megan L. Allman,
Plaintiff,

vs.

Scott Thorne,
Defendant.

Case No. 2006 CVI 000629

JUDGMENT ENTRY

This matter came on for hearing on August 9, 2006 on Defendant's objection to the magistrate's report. A record was made of the proceedings. Plaintiff appeared pro se and Defendant appeared represented by counsel. Following oral argument the court came to the following decision.

The magistrate's findings of fact are adopted in toto.

By operation of R.C. 5321.17(B), on October 1, 2005, the parties were engaged in a month-to-month tenancy. The notice given by Defendant on September 30, 2005 was effective to terminate the tenancy as of October 31, 2005 and Defendant is therefore indebted to Plaintiff in the amount of $640.00, representing one month's rent.

The lease was drafted on behalf of Plaintiff and presented by her agent. The terms relating to the return of Defendant's security deposit do not appear to have been separately negotiated and the lease must be strictly construed against the drafter. The only reference in the lease to a requirement for a 60-day notice of intent to vacate is found in ¶13 of the lease and on its face relates only to the conditions for return of the security deposit. Contrary to Defendant's contention, the lease does not impose a 60 day notice obligation on Defendant and permit termination without notice by Plaintiff; the lease, therefore, is not unenforceable due to unconscionability.

The court is not prepared to decide whether the $35.00 late fee included in the lease is or is not an unenforceable penalty. Late fees are designed to compensate landlords for the loss of use of the rent they were due for whatever period they were deprived of it. In this case, however, the recovery of the full amount due, plus interest from the date it was due, will adequately accomplish those ends. The court does not, therefore, separately award a judgment for late fees.

Defendant contends that, since the lease was negotiated and signed by Plaintiff's agent, and since by definition (R.C. 5321.01), an agent may be a "landlord", that the agent Rich Russo is a necessary party who should be joined under Civ. R. 19(A). Defendant contends that Russo might file another action against Defendant, subjecting him to the potential of two adverse judgments for the same conduct. The court is of the opinion that Defendant waived this objection by not making it before trial.

Defendant also asks the court to re-open the evidence in the case, either itself or by referral to the magistrate, to hear evidence from an additional witness. According to Defendant, the witness was scheduled to attend the original hearing in this case before the magistrate, but was unavoidably detained. That hearing was scheduled for 1:30 p.m. on February 22, 2006. The hearing proceeded and at the conclusion of the testimony the witness had not appeared. The magistrate and parties waited until 3:30 p.m. and when the witness had not appeared by that time, the hearing was concluded. The court is of the opinion that parties are responsible for procuring the timely arrival of any witnesses they expect to have testify and specifically denies Defendant's request to re-open the hearing to take additional evidence.

Judgment for Plaintiff in the amount of $640.00 for unpaid rent plus $850.00 for damages to the premises and $35.81 for unpaid utility services, less $640.00, the amount of Defendant's security deposit, for a total judgment of $885.81, plus interest on $640.00 from October 1, 2005 and interest on $245.81 from the date of judgment plus costs. The Plaintiff will hold the Defendant harmless against any subsequent action by her agents against Defendant which arises out of this tenancy.

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.

8/10/06
DATE

Ted Barrows
JUDGE TED BARROWS

Copies to:

Megan L. Allman
228 Oxford Oak Drive
Blacklick, Ohio 43004
Plaintiff

Clement W. Pyles, Esq.
1405 Fahlander Drive North
Columbus, Ohio 43229
Attorney for Defendant

IN THE FRANKLIN COUNTY MUNICIPAL COURT, COLUMBUS, OHIO
SMALL CLAIMS DIVISION

MEGAN ALLMAN,	:	
PLAINTIFF	:	
v.	:	**CASE NO. 2006 CVI 629**
SCOTT THORNE,	:	
DEFENDANT	:	

AMENDED MAGISTRATE'S DECISION

This cause came on for a trial before Magistrate Dennis R. Kimball on February 22, 2006. Both parties represented themselves. The magistrate issued a decision in the matter on February 27, 2006. An objection has been filed. The case has been assigned to Judge Ted Barrows of this court. Judge Barrows has ordered findings of fact and conclusions of law. Based upon the testimony and other evidence presented, after weighing the credibility of the witnesses, the magistrate makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The defendant was a tenant of residential rental property (a condominium owned by the plaintiff located at 216 Oxford Drive in Blacklick, Franklin County, Ohio) under a written lease for a one year term ~~ending September~~ 30, 2005. The lease does not name the plaintiff, but rather her managing agent Art Russo Realtors, as the "Lessor," although the defendant's testimony did not rebut the plaintiff's evidence proving her ownership of the residence.

2. The defendant paid a security deposit of $640.00 at the beginning of the tenancy. The lease required rent of $640.00 per month. The lease assesses a "penalty" for late rent payment of $35.00 plus $15.00 per day for every day past the first day of the month. The $15.00 per day

assessment bears no reasonable relationship to actual losses caused by late rent payments.

3. The defendant vacated the property and surrendered keys on October 3, 2005. The defendant gave his only written notice of termination on or about September 30, 2005, the day of termination stated in the lease. The defendant's testimony to the contrary on this point was not credible. The plaintiff's rental manager, Art Russo Realtors, employed reasonable efforts to rerent the property, but failed to do so prior to December, 2005.

4. Paragraph #13(A) of the lease states: "Written notice of intent to vacate must be given no less than sixty (60) days prior to the termination of this lease." The lease is silent concerning the effect of a late termination notice or no termination notice. The lease in particular does not expressly provide for automatic renewals if either party gives an untimely termination notice. Because of her belief that the defendant gave no termination notice and later surrendered keys in October, 2005, the plaintiff testified to the defendant's obligation under the lease to pay for October, November and December 2005 rent (totaling $1,920.00). In rebuttal, the only evidence and arguments the defendant presented concerned his claims that he had given an earlier notice in August 2005 (which the magistrate did not find credible) and that 30 day notices are customary in the residential real estate rental industry. The defendant presented no other evidence concerning the effect of his late termination notice. The magistrate finds that the parties intended for the lease to renew on a month-to-month basis after the initial one year term until 60 days had passed following the tender of a termination notice.

5. The condominium was only 2 years old at the time the defendant took occupancy. The plaintiff had lived in it for the first year and a half. The plaintiff and her husband then moved to

another condominium nearby. The plaintiff tried to sell the unit after vacating it. The plaintiff kept the unit clean, presentable and in good repair while it was on the market. The defendant's tenancy began soon after the plaintiff took the unit off the market. The defendant's claim that the condominium was in poor condition when he moved in was not credible. The defendant caused the following damages: $270.00 to remedy stains and soil the defendant left on the carpet; $30.00 to clean the oven; $120.00 to clean two bathrooms; $75.00 to clean the kitchen; $80.00 to repair a damaged handrail; and $275.00 to replace a toilet that the defendant broke. The magistrate finds these repair costs to be reasonable. These costs total $850.00.

6. The lease required the defendant to pay the utility charges. The defendant vacated the property while still owing $35.81 to Nationwide Energy Partners, a utility provider.

7. The language of paragraph 13(A) quoted above is one of three "conditions" listed in that paragraph which have to be satisfied for the security deposit to be refunded. The plaintiff did not establish that the amount of the retained security deposit bore a reasonable relationship to the losses caused by the defendant's breach of those conditions.

8. The defendant based his counterclaim on the assertion that when he gave his termination notice on September 30, 2005, Art Russo Realtors promised to refund his security deposit if they rerented the condominium during the 60 day lease extension. The defendant admitted that the unit was not rerented during that time.

9. After the testimony concluded, the defendant repeated prior requests to delay the close of the case to wait for a tardy witness to appear. The parties and the magistrate waited until 3:30 p.m. for this witness who never appeared.

CONCLUSIONS OF LAW

The magistrate concludes that the plaintiff has proven a right to recover on the complaint by a preponderance of the evidence. While the lease was silent on the question of tenants who do not give timely termination notices, the plaintiff testified to an automatic extension of the tenancy in such situations, and the defendant's evidence conceded that point. Thus, the parties intended to extend the lease 60 days if no timely termination notice is given. The defendant's untimely notice delivered on September 30, 2005 triggered such an extension. With the plaintiff's rental agent's efforts to rerent the property failing, the defendant owes rent for October and November, 2005, $1,280.00.

The lease assesses a "penalty" of $35.00 plus $15.00 per day for each day that the rent is late. The magistrate finds the $35.00 assessment to be reasonably related to the uncertain costs incurred by the plaintiff when rent is paid late. Thus, that assessment is an enforceable liquidated damages clause. However, the $15.00 per day assessment is not so related, making it an unenforceable penalty. For this reason, the plaintiff may assess only $35.00 for each of the months of October and November, 2005 in which rent was not paid, for a total late charge assessment of $70.00.

In the original decision, this magistrate misinterpreted some of the facts above which caused the original judgment amount to be overstated by $675.00. The magistrate originally interpreted the defendant's late surrender of keys on October 3rd as an initial holdover which extended the tenancy to the end of October, 2005, followed by a 60 day extension to the end of December, 2005 caused by the defendant's late tender of the termination notice on September 30, 2005. However, the correct interpretation is that the defendant's late tender of his termination

notice occurred first, which extended the tenancy 60 days to the end of November, 2005. The defendant's subsequent surrender of keys on October 3rd occurred during this extended tenancy and did not cause the tenancy to extend further. Therefore, the plaintiff may recover unpaid rent plus $35.00 late charges for October and November, 2005 only, totaling $1,350.00.

The defendant left the residence dirty and damaged, to the plaintiff's loss of $850.00. In addition, the defendant still owed $35.81 to the Nationwide Energy Partners utility company. The plaintiff's proven losses total $2,235.81.

The language of paragraph 13 of the lease appears to permit the plaintiff to retain the security deposit if a 60 day notice is not given by the defendant. Such an assessment did not reasonably relate to the plaintiff's actual losses. Therefore, the automatic retention of the security deposit triggered by the failure to give a termination notice is another unenforceable penalty in the lease. For this reason, the defendant proved a fact in support of his counterclaim, at least up to the amount of the security deposit. However, this fact merely requires the plaintiff to subtract the deposit from the damages she has proven in this case. Doing so fully consumes the deposit. Thus, the defendant proved no basis for the counterclaim.

The defendant argues that the plaintiff was not the named lessor on the lease in question. However, the defendant did not contest that the plaintiff is the owner of the condominium. She is therefore an intended third party beneficiary of the lease and is entitled to bring this action.

The plaintiff's damages proven above total $2,235.81. Subtracting the $640.00 security deposit, the plaintiff may recover $1,595.81 in this action.

AMENDED DECISION

Judgment for the plaintiff against the defendant for $1,595.81 plus court costs and

interest, with the counterclaim to be dismissed at the defendant's costs.

A party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law contained in this decision unless the party timely and specifically objects to that finding or conclusion. Civ. R 53(E)(3)

DRK/5-24-2006

MAGISTRATE DENNIS R. KIMBALL

COPIES TO:

Megan Allman
228 Oxford Oak Drive
Blacklick OH 43004
PLAINTIFF

Scott Thorne
215 Oxford Oak Drive
Blacklick OH 43004
DEFENDANT