

CLEVELAND MUNICIPAL COURT  
HOUSING DIVISION  
CUYAHOGA COUNTY, OHIO  
RONALD J.H. O'LEARY, JUDGE

ATKM MANAGEMENT GROUP LLC  
Plaintiff (s)

Date: December 24, 2019

-VS-

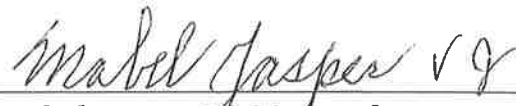
2018 CVG 018737

JENNIFER J TALLEY  
Defendant (s)

JUDGMENT ENTRY

Upon review, the Magistrate's Decision is approved and confirmed.

- {¶1.} Judgment for defendant on her counterclaims for \$1118, plus costs and interest.
- {¶2.} Plaintiff second cause claims against defendant are dismissed with prejudice at plaintiff's costs.
- {¶3.} Defendant is also entitled to an award of reasonable attorney fees under R. C. §5321.16(C), and reasonable expenses, including attorney's fees, under Civ. R. 37(B) (3). Defendant's counsels may submit affidavits and supporting documents, which should include evidence in addition to the number of hours spent on the case, the fees customarily charged in the locality for similar services, and the experience, reputation, and ability of the lawyer performing the services in accordance with Rule 1.5 (a) of the Ohio Rules of Professional Conduct.



Mabel Jasper, Visiting Judge  
Housing Division

SERVICE

A copy of this judgment entry and order was sent by regular U.S. mail to the addresses of record for parties/counsel on 12/27/19 by [signature].

☒ Clerk to issue notice of Final Appealable Order

CLEVELAND MUNICIPAL COURT  
HOUSING DIVISION  
CUYAHOGA COUNTY, OHIO  
RONALD J.H. O'LEARY, JUDGE

ATKM MANAGEMENT GROUP LLC  
Plaintiff (s)

Date: December 24, 2019

-VS-

2018 CVG 018737

JENNIFER J TALLEY  
Defendant (s)

MAGISTRATE'S DECISION

Case called for second cause trial on the afternoons of December 4 and 6, 2019 by Magistrate H. Edward Gregory III, to whom it was referred by Judge Ronald J.H. O'Leary pursuant to Ohio Rule of Civil Procedure 53. Plaintiff's president and owner Stanley Kebe appeared represented by Attorney Michael A. Heller. Defendant Jennifer J. Talley appeared represented by Attorneys Jennifer E. Sheehe and Dinola E. Phillips.

Prior to the commencement of trial, the Court addressed the following motions:

1. Defendant's *Motion to Appoint Court Reporter* was granted.
2. Plaintiff's *Motion for Leave to Answer Instanter* filed November 27, 2019 was denied. The Court did not see this as excusable neglect since the plaintiff was notified about the March 26, 2019 response deadline in the February 14, 2019 Magistrate's Order. Plaintiff objects to this ruling.
3. The Court addressed Defendant's *Motion for Default* by relying on Civ. R. 8 (D) that provides, "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in a responsive pleading." As defendant's counterclaim did not state the amount of damages in the prayer for relief, a requirement for default judgments per Civ. R. 54(C), defendant needed to offer evidence at the trial to establish the amount of damages.
4. Plaintiff's *Motion in Limine* is granted in part in restricting the use of medical records. Defendant may provide testimony regarding her personal feelings and perceptions.
5. Defendant's *Motion for Sanctions* are granted at this time to the extent that plaintiff shall not offer any documentary evidence that plaintiff failed to provide defendant in response to defendant's request for production of documents. Defendant had indicated that plaintiff's counsel sent partial responses on June 9, 2019 but defendant never provided any detail as to

what documents defendant received, or what documents plaintiff said it would provide but failed to supply.

6. Court denied plaintiff's oral request for new counsel and the oral request of plaintiff's counsel to withdraw as both requests were made immediately before the start of trial. Both plaintiff and counsel for plaintiff object to this ruling.

Attorney Denio A. Leone appeared for Third Party Defendant Buckeye Advanced Remediation, LLC. ("Buckeye") and provided the Court with a copy of Buckeye's *Notice of Dismissal of Claim, With Prejudice*, Buckeye and plaintiff having resolved their mutual claims outside of Court. Plaintiff filed its *Notice of Dismissal* with prejudice as to Third Party Defendant Buckeye Remediation on December 10, 2019.

Trial commenced with plaintiff's case going forward on December 4, 2019 and defendant's case going forward on December 6, 2019. Defendant's counsel read her written counterclaims into the record. Parties were given until December 10, 2019 to file written closing arguments.

#### FINDINGS OF FACT:

- {¶1.} At all times relevant to this action, plaintiff was the owner of the residential premises known as 3601 E. 74<sup>th</sup> Street, down in Cleveland, Ohio ("premises").
- {¶2.} Defendant began residing in the premises with her two children in April 2018 after signing a written lease agreement ("lease") on April 13, 2018. A copy of the lease was admitted and marked as Plaintiff's Exhibit B.
- {¶3.} The Emerald Development & Economic Network, Inc. ("EDEN") subsidized defendant's tenancy, as defendant is a Shelter Plus Care program participant.
- {¶4.} Under the terms of the Housing Assistance Payment Contract ("HAP"), signed by EDEN and plaintiff, the lease term began April 13, 2018 and the total contract rent was \$755 per month with EDEN paying the housing assistance payment amount of \$581 each month. A copy of Part A of the HAP was admitted and marked as Plaintiff's Exhibit P -1.
- {¶5.} Defendant paid plaintiff a security deposit of \$755.
- {¶6.} According to paragraph 3 of the lease, defendant was responsible for paying the tenant portion of \$174, due on the first of the month and a "charge of \$25.00 will be made as a penalty for late payments received after the 6<sup>th</sup> day of the month...."
- {¶7.} Defendant attests that during the course of her stay in the premises several conditions existed at the premises that plaintiff did not properly address. In July

2018, EDEN and the City of Cleveland's Health Department inspected the premises and cited plaintiff for mold.

{¶18.} On September 22, 2018, defendant notified plaintiff via email message that her bathroom ceiling was leaking, that the furnace was not working properly and that the premises had a vermin infestation. Defendant attests plaintiff did not make repairs for several months.

{¶19.} Defendant attests that in October 2018, plaintiff sent someone to the premises to service the furnace who did not know how to repair the furnace properly as defendant was instructed to undertake a variety of different steps to restart furnace should it stop working, which defendant found confusing. Defendant attests she eventually purchased a space heater but offered no additional evidence as to the amount paid for the heater.

{¶10.} Defendant attests she eventually called EDEN and the City of Cleveland's Department of Health because of the furnace problem and because she and her family kept getting sick and plaintiff was not making proper repairs to the premises.

{¶11.} A copy of a seven page HUD Inspection Checklist ("checklist"), attached to defendant's counterclaim and marked as Exhibit C, shows that an inspection was requested and performed on 11/01/2018 with a reinspection being performed on 11/6/2018. According to the checklist, the premises failed for the following three stated reasons:

- a. "Not free from severe infestation by mice/vermin LR-HIRE independent exterminator to eliminate vermin [.] Basement and Exterior;
- b. Miscellaneous Deficiency LR-PROVIDE inspector document – mold remediation confirming unit is safe and healthy and safe from contractor [.] Basement;
- c. Miscellaneous Deficiency LR-HIRE independent Mold Remediation Specialists to remediate mold-like substances in basement ceiling [sic] [.] Basement."

{¶12.} A copy of a letter from EDEN dated November 09, 2018, attached to defendant's counterclaim and marked as Exhibit B, informed defendant that the premises failed the inspection and that the HAP contract was terminated 11/6/2018, and defendant had permission to move.

{¶13.} Defendant moved out of the premises on or about January 21, 2019 following a Court ordered eviction for non-payment of rent. Defendant last made a rent payment in October 2018 but defendant did not pay the tenant portion for August 2018. Defendant attests plaintiff would not accept her tender for November 2018 but she did not offer her portion for December 2018 or January 2019.

{¶14.} Defendant attests because of the move out she had to stay with a cousin and paid \$300 to do so, she lost personal property and furniture valued at over \$1400 and incurred moving costs of \$500 to \$600 however, defendant did not provide any documentary evidence supporting these amounts.

{¶15.} Defendant attests that the premises was worth \$150 per month because of the conditions plaintiff refused to remedy but did not provide any additional testimony as to how she arrived at that amount.

{¶16.} Defendant attests EDEN began paying for her new place in February 2019.

{¶17.} Plaintiff attests that defendant did not pay the \$174 tenant portion of rent plus late fees of \$25 for the months of August and November 2018, and that October's rent was late and a \$25 late fee is owed for that month.

{¶18.} Plaintiff attests that after the HAP contract was terminated, defendant agreed to pay \$650 per month beginning December 2018 and owes that amount for December and January 2019 plus \$25 in late fees for both months. Plaintiff did not offer any documentary evidence of this agreement.

{¶19.} Upon regaining possession of the premises, plaintiff attests to finding conditions in the premises that exceeded normal wear and tear, and presented an estimate from a contractor, Lloyd Jones Remodeling, for work to be performed dated February 15, 2019. A copy of the contractor's estimate was offered and admitted as Plaintiff's Exhibit J.

{¶20.} Plaintiff provided no photographs or other documentary evidence of the condition of the premises before defendant took possession in April 2018 or after defendant vacated the premises in January 2019.

{¶21.} Plaintiff attests he paid the contractor the amount listed in the estimate on December 4, 2019 but had no documentary evidence showing payment.

{¶22.} On January 21, 2019, the parties signed a statement acknowledging that defendant returned two sets of keys to plaintiff for the premises and that defendant provided plaintiff with the following forwarding address "1201 LENACRAVE AVE CLEVE 44105." A copy of this statement was admitted and marked as Defendant's Exhibit 27.

{¶23.} As of March 11, 2019, plaintiff had not returned the security deposit to defendant.

#### CONCLUSIONS OF LAW:

{¶24.} R. C. 5321.04(A), among other things, requires a landlord to comply with all applicable building, housing and safety codes that affect health and safety, and to make all repairs necessary to put and keep the premises in a fit and habitable

condition. In addition, R. C. 5321.04(A) (4) requires a landlord to maintain in good and safe working order and condition all heating fixtures and R. C. 5321.04(A) (4) requires a landlord to supply reasonable heat at all times.

{¶25.} In the recitation of her uncontested first and second counterclaims, defendant established that plaintiff was notified about defective conditions at the premises. In July 2018, EDEN and the City of Cleveland's Health Department inspected the premises and cited plaintiff for mold. On September 22, 2019, defendant emailed plaintiff that her bathroom ceiling had a leak, that the furnace was not working properly and that the premises had a vermin infestation. In November 2019, EDEN and the City of Cleveland again inspected the premises and reported that mold was still present at the premises. When plaintiff failed to remedy the conditions by the November 6, 2018 follow up inspection, EDEN terminated the HAP contract and gave defendant permission to move.

{¶26.} While defendant offered testimony that the premises contained hazardous conditions, mold since July 2018, insufficient heat and vermin since September 2018 that affected the health and safety of her family and that plaintiff failed to address properly, defendant did not offer any detailed testimony persuasive in establishing the premises was worth only \$150 a month.

{¶27.} In an R. C. 5321.04 contract claim, a tenant may meet the tenant's burden of proof for general damages without any testimony on the rental value of the premises in its defective condition.<sup>1</sup> The tenant may meet the tenant's burden of proof by simply proving the extent of the defective conditions at the premises.<sup>2</sup> Thereupon, "the finder of fact (judge or jury) must determine the monetary amount by which the defects and the reduction in use have lessened the value of the leasehold."<sup>3</sup>

{¶28.} Defendant has established that plaintiff was aware of the mold issue as early as July 2018 but failed to remediate this issue. Because this condition was allowed to persist in the premises unabated, the rental value was reduced by \$50 per month beginning July 2018 until defendant vacated in January 2019.

{¶29.} Defendant has established that plaintiff was aware of a heating issue and vermin infestation in September 2018 but failed to remediate these issues. Because these conditions were allowed to persist in the premises unabated, the rental value was reduced by an additional \$50 per month beginning September 2018 until defendant vacated in January 2019.

{¶30.} Defendant did not pay her rent portion for the months of August, November and December 2018, and January 2019. However, defendant's liability for rent is limited to the tenant portion for these months and defendant is not responsible

---

<sup>1</sup> *Miller v. Ritchie*, 45 Ohio St. 3d 222, 227, 543 N.E.2d 1265, 1271 (1989).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

for the housing assistance payment portion that EDEN stopped paying in November 2018 when the contract was terminated.<sup>4</sup>

- {¶31.} Plaintiff has not established by a preponderance of the evidence that a new agreement was created where defendant agreed to pay \$650 per month beginning December 2018 and owes that amount for December and January 2019.
- {¶32.} Given the reduced rental value discussed in paragraphs 28 and 29, defendant has a \$50 credit for July 2018 rent and a \$100 credit for October 2018 rent for a total credit of \$150. Defendant owes the reduced rental value of \$124 for August 2018 rent, and \$74 each for the months of November, December 2018 and January 2019 for a total rental liability of \$346. Offsetting the credit, defendant owes plaintiff \$196 for unpaid rent.
- {¶33.} Plaintiff is not entitled to recovery any late fees as plaintiff presented no evidence as to how plaintiff suffered any damages because of defendant's late payments and in addition, paragraph 3 C of the lease refers to the \$25 late fee as a "penalty," which courts have held is reason that such fees are unenforceable.<sup>5</sup>
- {¶34.} Defendant is not entitled to recover any damages from plaintiff for moving costs or items lost, as she was required to move out of the premises following plaintiff obtaining a judgment for possession of the premises in the first cause of action of this matter.
- {¶35.} Plaintiff is not entitled to recovery any damages from defendant for property damages. In its Judgment Entry journalized August 8, 2019, the Court ordered plaintiff to respond defendant's request for production of documents by August 14, 2019, which plaintiff failed to do. Pursuant to Civ. R. 37(B) (1) (c), the Court may strike plaintiff's second cause claim for property damage for plaintiff's failure to comply with the Court order. In addition, Civ. R. 37(B) (3) provides that "the court shall order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure."
- {¶36.} In the recitation of her uncontested third counterclaim, defendant established that she provided plaintiff with her forwarding address on January 21, 2019 and as of March 11, 2019, plaintiff had not returned the deposit to defendant.
- {¶37.} R. C. 5321.16(B) provides, "Upon termination of the rental agreement any property or money held by the landlord as a security deposit may be applied to the payment of past due rent and to the payment of the amount of damages that the landlord has suffered by reason of the tenant's noncompliance with Section 5321.05 of the Revised Code or the rental agreement. Any deduction from the security deposit shall be itemized and identified by the landlord in a written notice delivered to the tenant together with the amount due, within thirty days

---

<sup>4</sup> See 24 C.F.R. §982.451(b) (4) (iii).

<sup>5</sup> *200 West Apartments v. Foreman*, 8<sup>th</sup> Dist. No.66107, 1994 WL 505271, \*4 (Sept. 15, 1994).

after termination of the rental agreement and delivery of possession. The tenant shall provide the landlord in writing with a forwarding address or new address to which the written notice and the amount due from the landlord may be sent. If the tenant fails to provide the landlord with the forwarding or new address as required, the tenant shall not be entitled to damages or attorneys fees under division (C) of this section.”

{¶38.} R. C. 5321.16(C) provides, “If the landlord fails to comply with division (B) of this section, the tenant may recover the property and money due him, together with damages in an amount equal to the amount wrongfully withheld, and reasonable attorney fees.”

{¶39.} Ohio courts have long held that “the term ‘wrongfully withheld’ means the amount found owing from the landlord to the tenant over and above any deduction that the landlord may lawfully make.”<sup>6</sup> “Where the landlord fails to refund the security deposit within the thirty-day period after termination as mandated by statute, the money is wrongfully withheld within the contemplation of R. C. 5321.16 (C).”<sup>7</sup> A landlord’s failure to make the timely refund of a security deposit, regardless of whether the landlord had a good faith or bad faith motive, does not affect the landlord’s liability for the statutory penalty provided by R. C. 5321.16 (C).<sup>8</sup>

{¶40.} The parties acknowledged that defendant provided plaintiff with a forwarding address where to send “a statement of offsets against her security deposit.” See Defendant’s Exhibit 27.

{¶41.} Defendant owes plaintiff \$196 for unpaid rent through January 2019. As such, the \$755 security deposit is reduced to \$559.

{¶42.} Pursuant to R. C. 5321.16 (C), defendant is entitled to recover \$559 of her security deposit and an additional \$559 for the portion wrongfully withheld when the portion defendant was entitled to recover was not timely refunded plus reasonable attorney’s fee.

#### RECOMMENDATION:

{¶43.} Judgment for defendant on her counterclaims for \$1118, plus costs and interest.

{¶44.} Plaintiff second cause claims against defendant are dismissed with prejudice at plaintiff’s costs.

{¶45.} Defendant is also entitled to an award of reasonable attorney fees under R. C. §5321.16(C), and reasonable expenses, including attorney’s fees, under Civ. R. 37(B) (3). Defendant’s counsels may submit affidavits and supporting

---

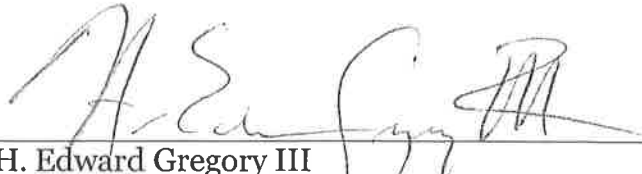
<sup>6</sup> *Vardeman v. Llewellyn*, 17 Ohio St. 3d 24, 29, 476 N.E.2d 1038, 1042 (1985).

<sup>7</sup> *Forquer v. Colony Club*, 26 Ohio App.3d 178, 179, 499 N.E.2d 7, 9 (10<sup>th</sup> Dist. 1985).

<sup>8</sup> *See Id* at 180, 499 N.E.2d at 9.



documents, which should include evidence in addition to the number of hours spent on the case, the fees customarily charged in the locality for similar services, and the experience, reputation, and ability of the lawyer performing the services in accordance with Rule 1.5 (a) of the Ohio Rules of Professional Conduct.

  
H. Edward Gregory III  
Magistrate, Housing Division

ATTENTION: A PARTY MAY NOT ASSIGN AS ERROR ON APPEAL ANY MAGISTRATE'S FINDING OF FACT OR CONCLUSION OF LAW UNLESS THE PARTY TIMELY AND SPECIFICALLY OBJECTS TO THAT FINDING OR CONCLUSION AS REQUIRED BY CIV. R. 53(D)(3)(b). ALL OBJECTIONS TO THE MAGISTRATE'S DECISION MUST BE FILED IN WRITING WITHIN FOURTEEN DAYS OF THE JOURNALIZATION OF THIS DECISION. OBJECTIONS MUST BE FILED EVEN IF THE TRIAL COURT HAS PROVISIONALLY ADOPTED THE MAGISTRATE'S DECISION BEFORE THE FOURTEEN DAYS FOR FILING OBJECTIONS HAS PASSED. OBJECTIONS 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.

SERVICE

A copy of this Magistrate's Decision was sent by regular U.S. mail to the parties on 12/27/19.