IN THE CLEVELAND MUNICIPAL COURT
CUYAHOGA COUNTY, OHIO
HOUSING DIVISION

Caraballo	)	Judge Raymond Pianka
Plaintiff	)	Case No. 2005 CVG 00330
vs.	)	ORDER
Moreno	)	Date: August 26, 2005
Defendant	)	

Upon review, the Magistrate's Report is approved and confirmed. Judgment is for plaintiff against defendant in the amount of $1306.08 plus costs and interest from the date of judgment. Judgment is for plaintiff on the counterclaim. Copies to parties.

Judge Raymond L. Pianka
Housing Division

SERVICE

A copy of this Judgment Entry was sent via regular U.S. Mail to:

Plaintiff

Olga Caraballo
2101 Holmden Ave.
Cleveland, OH 44109

Defendant's Counsel

Kevin J. Kelley
Porter Wright Morris & Arthur LLP
925 Euclid Ave. Suite 1700
Cleveland, Ohio 44115

this 2 day of September 2005.

CLEVELAND MUNICIPAL COURT
HOUSING DIVISION
CUYAHOGA COUNTY, OHIO
JUDGE RAYMOND L. PIANKA

Caraballo	)	Date: September 1, 2005
	)	
Plaintiff(s)	)	Judge Raymond L. Pianka
	)	
vs.	)	Case No. 2005 CVG 00330
	)	
Moreno	)	Magistrate's Report and Recommendation
	)	
Defendant(s)	)	

{¶1} This matter came for trial June 16, 2005 and continued for completion on June 22, 2005 before Magistrate Sandra R. Lewis, to whom it was assigned by Judge Raymond L. Pianka pursuant to Ohio Rule of Civil Procedure 53, to take evidence on all issues of law and fact regarding the parties' respective claims for money damages. Plaintiff present pro se. Defendant present and represented by Mr. Kevin Kelley. Trial had.

PRELIMINARY MATTERS

{¶2} Trial in this matter commenced on about June 16, 2005. On or about June 21, 2005, Ms. Torres-Lugo filed notice of her appearance as counsel for plaintiff and a motion for continuance. Since trial had commenced on the 16th, and was set for completion on the 22nd, the motion for continuance was denied.

{¶3} Ms. Torres-Lugo then moved to withdraw as counsel as she was unaware that trial had commenced. The motion to withdraw is hereby granted. Matter proceeded to completion as scheduled.

FINDINGS OF FACT

{¶4} At all times relevant to this action, plaintiff was the owner of the up-and-down duplex residential rental premises known as 3104 Library Avenue, Cleveland, Ohio 44109.

{¶5} At some point in March 2004, the City of Cleveland's Department of Community Development's Division of Building and Housing cited the garage at the premises.

{¶6} On or about July 2004, the parties entered into a written rental agreement for the upstairs unit in the above-mentioned premises. See Defendant's Trial Exhibit A.

{¶7} Defendant made no security deposit.

{¶8} The garage was not included in the written rental agreement.

{¶9} Defendant moved into the premises on or about August 15, 2004.

{¶10} At the time defendant moved into the premises, there were still multiple boxes, containing plaintiff's possession, stored in the premises.

{¶11} Plaintiff's things remained boxed and stored in the premises for one and one-half weeks before the moving van came to move plaintiff and her things to Florida.

{¶12} Defendant was permitted to store personal items in the garage.

{¶13} But, plaintiff told defendant not to put her car in the garage.

{¶14} In spite of this, defendant stored a non-operational car in the garage without plaintiff's permission or knowledge.

{¶15} While the written rental agreement indicates that monthly rent was $500 a month, the parties ultimately agreed to modify the rental amount to $475 a month.

{¶16} Rent was due between the first and the fifth of each month.

{¶17} The lease provided for a late fee of $5 per day when rent was paid after the fifth of the month.

{¶18} Canceled checks and receipts show that at least two other people were authorized to accept rent and to negotiate checks on behalf of plaintiff.

{¶19} Throughout the tenancy, the electrical outlets in defendant's son's bedroom sparked and did not function properly.

{¶20} The overhead light in that room was also broken.

{¶21} Defendant used an extension cord from the kitchen to her son's room throughout the tenancy.

{¶22} Also, the kitchen sink did not drain properly.

{¶23} Defendant carted water to and from the bathroom for use in the kitchen.

{¶24} Defendant's daughter often washed dishes in buckets to avoid using the kitchen sink drain.

{¶25} The balcony had rotten wood at the bases of the corner posts and was in need of repair at the time defendant took possession.

{¶26} At some point in time during the tenancy, defendant's son fell against the balcony and caused further damage.

{¶27} The balcony was not repaired during the tenancy.

{¶28} The building (of which the premises are a part) was for sale throughout the tenancy.

{¶29} Realtors showed the premises many times during the tenancy.

{¶30} Plaintiff and/or the realtors failed to give defendant less than 24 hours notice of the showing of the premises on only a couple of those occasions.

{¶31} Defendant valued the premises with the above conditions, lack of notice and other issues at $200 per month.

{¶32} At some point during the tenancy, the garage roof collapsed.

{¶33} Defendant's car and personal property were in the garage at the time of the roof collapse.

{¶34} Defendant presented an estimate for repair to her car dated May 21, 2005 and totaling $1249.

{¶35} The estimate is on a page captioned "Repair Order" and does not include any information about the business entity which made the estimate.

{¶36} Defendant also presented an internet print out showing the cost of a new windshield at $289.72.

{¶37} Defendant presented a write up from Gil Dor Furniture showing a total replacement value of $2770.36 for two nightstands, a dresser with mirror, washing machine, two lamps and two twin mattresses with springs.

{¶38} Rent was last paid for the month of October 2004.

{¶39} Defendant vacated on or about February 8, 2005.

{¶40} The keys were not returned.

{¶41} Upon regaining possession, plaintiff found the premises in need of cleaning and repairs.

{¶42} Defendant's use of the premises caused the following damages beyond normal wear and tear to the premises: marks on walls, two broken windows, dining room carpet damaged, storm door broken, paint spatters on hardwood flooring and locks in need of repair/replacement.

{¶43} Plaintiff testified to, and presented estimates and receipts in support of, costs to correct the above conditions totaling $706.08

CONCLUSIONS OF LAW

{¶44} In the second cause of action, plaintiff seeks back rent, late fees, and property damages beyond normal wear/tear. Defendant denies any liability and counterclaims asserting (i) breach of habitability (under R.C. 5321.04), (ii) breach of quiet enjoyment, (iii) damage to her car and personal property when the garage collapsed and (iv) attorney fees.

Plaintiff's Claims

{¶45} Defendant vacated the premises in February 2005. Defendant asserted that she last paid rent for October 2004. As evidence of this, defendant presented a copy of a rent receipt (Exhibit G), dated October 5, 2004. The receipt bears a signature "Olga Caraballo." Plaintiff denied having written the October 5, 2004 receipt. Notably, the signature on the contested receipt does not match plaintiff's signature on any other receipt plaintiff acknowledged signing, the lease agreement or plaintiff's pleadings in this matter.

{¶46} Defendant asserted that plaintiff's sister accepted rent on Ms. Caraballo's behalf. Several other people, including plaintiff's sisters and boyfriend, were authorized to act on her behalf with regard to the tenancy. For example, defendant's Exhibit F is a rent receipt signed by "Israel Morales," with the additional endorsement "For Olga Caraballo" below.

{¶47} After considering the evidence presented on this issue, the Court finds defendant persuasive that rent was last paid for the month of October 2004. Pursuant to the written rental agreement, defendant is liable for rent for the full months of November through February 2005, or the sum of $1900 ($475 per month X 4 months)

{¶48} The lease provides for late fees in the amount of $5 per day where rent is paid after the fifth of the month. However, under Cleveland Codified Ordinance ("CCO") 375.02, except for Section 8 subsidized tenancies, the total monthly late fee charged is limited to the larger of (i) $25 per month or (ii) 5% of the rent amount. CCO 375.02. The Court finds defendant liable for late fees in the amount of $25 per month for the months of November 2004 through February 2005, or a total of $100 ($25 per month X 4 months).

{¶49} Turning to plaintiff's claim for property damage, several repairs asserted by plaintiff were normal wear and tear. As such, there is no recovery for these conditions. With regard to conditions due to defendant's use of the premises, many of plaintiff's

receipts/estimates include repairs to several conditions and are not itemized. Where this is the case, the Court is left with either accepting or rejecting the general estimate as a whole. Therefore, there is no recovery for repairs where the Court was not persuaded that defendant caused all of the conditions included on the estimate.

{¶50} Plaintiff was persuasive regarding the need for repairs to the marks on walls, two broken windows, damaged dining room carpet, broken storm door, hardwood floors marred by paint spatters and locks. The cost of correction or repair of these conditions was $706.08. Plaintiff is entitled to recover $706.08 for property damages to the premises.

Defendant's Counterclaims

{¶51} As to the counterclaims, defendant sought compensation for (i) breach of habitability, (ii) breach of quiet enjoyment, (ii) damage to her car and personal property which occurred when the garage collapsed and (iv) attorney fees. With regard to the claim of uninhabitability, defendant was persuasive that the kitchen sink did not drain properly, that at least one bedroom had electrical problems, and the balcony was unsafe. There was testimony at trial regarding the inconvenience that these conditions caused. Defendant's daughter carted water back and forth from the bathroom to the kitchen. The family also had to utilize extension cords due to electrical problems.

{¶52} While defendant valued the premises with these conditions at $200 per month (equaling an abatement of $275 per month), the Court is not persuaded that such a significant abatement is warranted. Defendant and her family did have roof over their heads, a place to prepare food (albeit inconvenient in its lack of a functioning sink) and a place to sleep/store possessions. The Court finds defendant entitled to an abatement of $200 per month throughout the tenancy due to the problems with the kitchen sink, electrical service and loss of use of the balcony. Defendant's abatement totals $1300 ($200 per month X 6.5 months).

{¶53} Defendant also sought damages for breach of quiet enjoyment stemming from lack of notice of, and the multiple times that, the premises was shown to potential buyers during the tenancy. However, the premises was for sale at the time defendant rented it. The fact of multiple showings, and the inconvenience that would occur with the showings, was clearly foreseeable to defendant. Multiple showings were not unreasonable under these circumstances.

{¶54} Defendant admitted that there were only a couple times when plaintiff or her realtors failed to give proper notice of the access for showing. Defendant also failed to testify to inconvenience or other injury or damage that arose due to the lack of proper notice. While a breach of a statutory duty may constitute negligence per se, a claimant must also show injury and causation. *Shroades v. Rental Homes, Inc.* (1981), 68 Ohio St.2d 20, 427 N.E.2d 774, 22 OO3d 152. In the present matter, defendant has failed to meet her burden

of proof on all elements of this claim. There is no recovery on this basis.

{¶55} Defendant sought recovery for items damaged when the garage roof collapsed. Plaintiff asserted that the garage was not included in the rental agreement and therefore, she had no liability for the damage to defendant's possessions and car stored in the garage without permission.

{¶56} The written rental agreement is silent as to the garage. Plaintiff had been cited by the City of Cleveland Department of Building and Housing for the condition of the garage in early 2004. This fact makes it unlikely that plaintiff would agree to allow use of the garage without significant repairs being made. But at the time defendant took possession, plaintiff's things remained in the premises, boxed and ready for the movers. Neither plaintiff nor her property managers knew that defendant's car was in the garage until after the roof collapsed.

{¶57} Considering the conflicting evidence on this issue, the Court finds that defendant's possessions were stored in the garage with plaintiff's implied permission, if not express permission, due to plaintiff's things remaining in the premises at the time defendant moved into the premises. With regard to the car, the Court finds that defendant stored the non-operational car in the garage without plaintiff's permission or knowledge.

{¶58} When defendant stored the car in the garage without permission or knowledge, she did so as a trespasser. A property owner owes only the duty to refrain from willful or wanton misconduct with regard to a trespasser. There was no evidence of willful or wanton conduct presented with regard to the garage. And the Court notes that defendant declined to file her claim with plaintiff's insurance company. Judgment is for plaintiff on the claim for damages to the car stored in the garage without permission.

{¶59} Even were this not the case, defendant failed to present evidence from which the Court could determine the proper amount of damages. At trial, defendant presented one photo of the damaged car still in the garage. There was no evidence of the condition of the car prior to the garage collapse. And there were no clear photos of the actual damage to the car after the collapse. The car was admittedly non-operational. Defendant failed to provide sufficient evidence from which the appropriate measure of damages could be determined. Having failed to sustain her burden of proof on this claim, judgment is for plaintiff.

{¶60} Finally, with regard to the personal property stored in the garage, the measure of damages is the difference between the value of the personal property immediately before the damage and immediately after the damage. *Cooper v. Feeney* (1986) 34 Ohio App.3d 282. 518 N.E. 2d 46 (12th Dist. 1986). Where personal property is totally destroyed, the measure of damages is the reasonable market value of the property immediately before its destruction, less any salvage value. *Id.* Replacement value is just one factor to consider.

{¶61} In this case, defendant presented only evidence of full replacement value. There was no evidence to establish the value of the property in the garage prior to damage. Thus, there is no basis from which to determine the measure of the damage. In light of the fact the Court finds defendants entitled to recover nominal damages of $100 for this claim.

{¶62} In summary, plaintiff is entitled to recover $1900 in back rent, $100 in late fees, and $706.08 in property damage, for a total recovery of $2706.08. Defendant is entitled to recover an abatement of $1300 for conditions on the premises and nominal damages of $100 for the property damaged when the garage collapsed, for a total of $1400. Offsetting plaintiff's recovery from defendant's credit, the Court finds for plaintiff against defendant in the amount of $1306.08 plus costs and interest from the date of judgment. Copies to parties.

Recommended:

Magistrate Sandra R. Lewis

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(E)(3). 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 Judgment Entry was sent via regular U.S. Mail to:

Plaintiff

Olga Caraballo
2101 Holmden Ave.
Cleveland, OH 44109

Defendant's Counsel

Kevin J. Kelley
Porter Wright Morris & Arthur LLP
925 Euclid Ave. Suite 1700
Cleveland, Ohio 44115

this 2 day of September 2005.