

IN THE CLEVELAND MUNICIPAL COURT
HOUSING DIVISION
Raymond L. Pianka, Judge

Vincent F. Gonzalez)
2535 Scranton Road)
Cleveland, Oh. 44113)
Plaintiff)

vs.)

Melba Gonzalez)
3011 Barber Ct.)
Cleveland, Ohio 44113)
Defendant)

Date: August 16, 2011
CASE NO. 2010CVG9940

LANDLORD – TENANT

MAGISTRATE’S REPORT
and
RECOMMENDATION

This case was heard on by Magistrate Ruben E. Pope, III, to whom this case was assigned by Judge Raymond L. Pianka pursuant to Ohio Civil Rule 53, to take evidence on Plaintiff’s claim for back rent and alleged property damage.

The Defendant filed a counterclaim for Breach of Contract and Negligence per se.

Plaintiff was present and not represented by counsel (Plaintiff is an Attorney).

Defendant was present and represented by counsel.

FINDINGS OF FACT:

1. The parties had a written agreement for the rental of the premises located at 3011 Barber Court, Cleveland, Oh. 44113.
2. The lease was a subsidized lease under CMHA’S Housing Choice Voucher Program.
3. The initial term of the lease was April 1, 2008 to March 31, 2009. (The CMHA contract was not approved until 5/20/08).
4. The contract rent was \$578.00 per month and a security deposit in the amount of \$750.00 was paid.
5. In April, 2009 the rent subsidy was reduced to \$541.00 and Defendant became liable for 37.00 per month.
6. The Plaintiff informed the Defendant in June, 2009 that the rent would be 750.00 per month and she would have to pay the difference between \$750.00 and \$541.00. (\$209.00)
7. The Defendant paid the requested amount each month until March, 2010.
8. The Defendant vacated the premises in July, 2010.
9. When the Defendant vacated the premises the Plaintiff sent an itemized list of damages that totaled \$755.00.
10. In February, 2010, the Plaintiff informed the Defendant and CMHA that he would not be renewing the contract on April 1, 2010.
11. The contract was terminated by CMHA in April, 2011.

12. Both parties testified at trial and the exhibits include the lease, alleged repair estimate, Correspondence between the parties and pictures of the property.

CONCLUSIONS OF LAW AND FACTS:

The Defendant was a participant in the Housing Choice Voucher Program that is governed by the U. S. Department of Housing and Urban Development (HUD) and administered by the Cuyahoga Metropolitan Housing Authority (CMHA). The rules governing this program are set forth 24 CFR 882 and the lease addendum which is made part of each lease subsidized by the program. Neither party introduced the lease agreement or addendum as evidence.

The Housing Choice Voucher Program requires that certain rules must be followed during the term of the lease. Plaintiff failed to follow some of these rules. The program allows termination of tenancy at the end of any rental period. (Ohio Eviction and Landlord-Tenant Law (3d ed.), Author: Peter M. Iskin, page 176). The contract was set to expire on March 31, 2010. (It does not matter as to the term character of the tenancy, month to month or year to year, because April 1 was the anniversary of the contract) and the Plaintiff notified both the Defendant and CMHA that he was not renewing the contract. Federal Regulations provide:

(b) Termination of payment: When owner terminates the lease. Housing assistance payments terminate when the lease is terminated by the owner in accordance with the lease. However, if the owner has commenced the process to evict the tenant, and if the family continues to reside in the unit, the PHA must continue to make housing assistance payments to the owner in accordance with the HAP contract until the owner has obtained a court judgment or other process allowing the owner to evict the tenant. The HA may continue such payments until the family moves from or is evicted from the unit.

CMHA also notified Plaintiff that they would not renew the lease as he was in default due to his failure to pay real estate taxes (Defendant's Exhibit H). Since the Defendant failed to vacate the premises at the end of the lease, CMHA may be liable for the payment of the rent not the Defendant. This is in accordance with the above cited regulation.

The Plaintiff began charging the Defendant \$750.00 per month rent in June 2009. This is in direct contravention to the rules governing the Housing Choice Voucher Program.

In the section 8 voucher program, a landlord may not demand or accept any rent payment from a tenant in excess of the tenant's portion of the contract rent 213/ ("excess tenant rent"). U.S. Department of Housing and Urban Development, Tenancy Addendum, form HUD-52641-A (March 2000), § 5(e); U.S. Department of Housing and Urban Development, HAP Contract, form HUD-52641 (March 2000), part B, § 8(d).

The Contract rent was \$578.00. CMHA was responsible for \$541.00 and the Tenant was responsible for \$37.00. The excess rent paid was \$2,020.00 (10 months times \$202.00). The Defendant is entitled to recover this amount.

Therefore, a landlord may not evict a tenant for nonpayment of excess tenant rent, even if the tenant agreed to pay it. E.g., *McCuller v. Taylor*, No. 00-CVG-13529 (Mun. Ct. Cleveland, July 28, 2000).

And, if a tenant has paid excess tenant rent, and then fails to pay the tenant's portion of the contract rent for one or more months, the excess tenant rent may be set-off against the unpaid rent. See, e.g., *Evans v. Washington*, No. 98-CVI-4274 (Mun. Ct. Akron, Aug. 20, 1998).

A tenant who has paid excess tenant rent also may recover a money judgment against the landlord in the amount of those payments. E.g., *Dennis v. Dudley*, No. 2002-CVG-12760 (Mun. Ct. Cleveland, Jan. 28, 2003); *Fletcher v. Shell*, No. 1998-CVG-23988 (Mun. Ct. Cleveland, Oct. 2, 2000). *Accord Crutchley v. Costa*, No. SP5270/01, 2001 WL 1666007 (N.Y. Dist. Ct. Dec. 6, 2001), *aff'd*, 2002 N.Y. Misc. LEXIS 161 (N.Y. Dist. Ct. Feb. 13, 2002) (Ohio Eviction and Landlord-Tenant Law (3d ed.), Author: Peter M. Iskin, page 230).

The Plaintiff has also alleged that the Defendant caused damage to the property.

When a tenant fails to maintain or use the premises in compliance with the tenant's R.C. 5321.05 obligations, 349/ the landlord may bring an action against the tenant under R.C. 5321.05(C) for actual damages, reasonable attorney's fees, and, where applicable, injunctive relief to secure access to the premises. *O. R. C. 5321.05(c)*.

In an R.C. 5321.05(C) claim, the tenant is not liable for normal wear and tear to the premises. *Johnson v. Brown*, No. 2002-CA-76, 2003 WL 1193795,

No general rule categorically defines the limits of normal wear and tear. In most cases, normal wear and tear includes "injuries to the building due to the gradual deterioration which results from use, lapse of time, and the operation of the elements" and excludes "injuries from the tenant's improper or negligent use of the premises." 49 Am. Jur. 2d Landlord and Tenant § 973 at 946 (1970). This determination is made on a case-by-case basis.

A detailed list of these items were sent to the Defendant and introduced into evidence as Exhibit 20. The defendant denied causing any damage to the property.

1. Premises were left dirty and carpet was cleaned. Coat \$140.00. This item cannot be reimbursed as it is ordinary wear and tear. The Defendant lived in the property for approximately two years. It is reasonable to assume that the carpets would get dirty in that time period. *Schaedler v. Shinkle*, No. CA99-09-025, 2000 WL 1283776 (Ct. App. Brown Cty. Sept. 11, 2000)
2. The stove was dirty and the burner had to be replaced. \$35.00. Again this is an ordinary wear and tear item and no recovery is to be had.

3. The walls had to be painted and repaired. The Defendant allegedly placed nail holes in the wall. Total cost to repair was \$800.00 and the Plaintiff seeks to recover \$350.00. The testimony was credible and supported by receipts. Plaintiff to recover \$350.00.
4. The Defendant allegedly caused damage to 4 screens (one was missing). The total cost was \$80.00. Again the testimony was credible and supported by receipts. The Plaintiff may recover the \$80.00.
5. Two windows were broken and cost 50.00 to fix. No testimony was given as to how the windows were broken (glass cracked or sash broken) or the causation. Plaintiff failed to prove Defendant caused the damage by a preponderance of the evidence.
6. Defendant allegedly attempted to repair the hot water line under the sink. Cost \$25.00. The testimony was credible and supported by receipts. The Plaintiff may recover \$25.00.
7. Allegedly, light bulbs were removed from the premises. The Cost to replace the bulbs was \$24.16. Again the testimony was credible and supported by receipts. The Plaintiff may recover the \$24.16.
8. The basement door was allegedly damaged by the defendant's dog. The cost to repair was \$25.00. The testimony was credible and supported by receipts. The Plaintiff may recover the \$25.00.
9. In the lease agreement between the parties, the Defendant was responsible for paying to cut the grass. This type of provision is barred by the Ohio Revised Code §5321.05. The Landlord may not shift his responsibility to comply with the provisions of ORC§5321.05.

A rental agreement, or the assignment, conveyance, trust deed, or security instrument of the landlord's interest in the rental agreement may not permit the receipt of rent free of the obligation to comply with section 5321.04 of the Revised Code. Revised Code §5321.13

The Plaintiff is entitled to receive \$504.16 to cover the cost of repairs to the property.

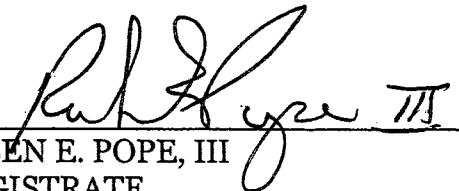
According to the federal regulations, as explained above, the Plaintiff is entitled to recover \$541.00 for each of the months (April May June and July) that the Defendant remained on the premises. (Total=\$2164.00) from CMHA. However, since CMHA is not a party to this action, the court cannot issue a judgment for this amount.

The Plaintiff is entitled to receive \$504.16 from the Defendant. The Defendant is entitled receive \$2,020.00 plus her Security Deposit of \$750.00. for a total of \$2,770.00 less 504.16, which equals \$2,265.84.

JUDGMENT:

Judgment is rendered in favor of the Defendant in the amount of \$2,265.84 plus interest from the date of journalization.

RECOMMENDED:


 RUBEN E. POPE, III
 MAGISTRATE

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 FUTHER INFORMATION, CONSULT THE ABOVE RULES OR SEEK LEGAL COUNSEL.

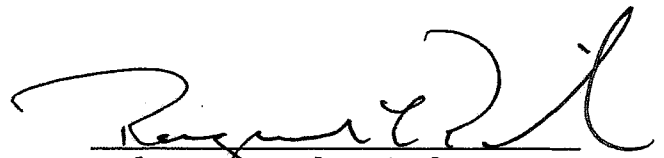
CLEVELAND MUNICIPAL COURT
HOUSING DIVISION
RAYMOND L. PIANKA, JUDGE

Vincent Gonzales	Date: August 15, 2011
Plaintiff(s)	
-VS-	2010 CVG 9940
Melba Gonzales	JUDGMENT ENTRY AND ORDER
Defendant(s)	

The Court, having independently reviewed the Magistrate's Decision, orders the following:

The Magistrate's Decision is approved and confirmed, and judgment is entered as follows:

Judgment is rendered in favor of the Defendant in the amount of \$2,265.84 plus interest from the date of journalization.



Judge Raymond L. Pianka
Housing Division

SERVICE:

A copy of the Magistrate's Report and Recommendation was sent by ordinary U.S. mail on this 15 day of August, 2011 to the following:

PLAINTIFF

Vincent F. Gonzalez, Esq.
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Cleveland, Ohio 44113

COUNSEL FOR DEFENDANT

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Cleveland, Oh. 44113