CLEVELAND MUNICIPAL COURT
HOUSING DIVISION
CUYAHOGA COUNTY, OHIO
Judge Raymond L. Pianka

Jennifer Harris; and
William Harris

Plaintiffs

-vs-

Sharone Winston

Defendant

DATE: March 9, 2005

CASE NO.: 2004 CVG 28660

MAGISTRATE'S DECISION
AND JUDGMENT ENTRY

This case was set for pre-trial conference March 9, 2005. Defendant appeared with counsel. Plaintiffs did not appear. The case proceeded as a default hearing under Civ.R. 53 before Magistrate David D. Roberts.

Magistrate's Decision

Findings Of Fact

1. Plaintiffs and Defendant, prior to October 2003, entered into a rental agreement for property at 1825 Colonnade, Cleveland, Ohio.

2. The agreement provided that Plaintiffs would give Defendant possession of the property in October 2003.

3. Plaintiffs did not provide Defendant with possession of the property until February 2004 because Plaintiffs had not yet repaired a collapsed ceiling at the property.

4. Plaintiffs failed to make other repairs to the property, which had defects including a leak from the upstairs toilet into Defendant's unit, a blocked drain in the kitchen, windows that would not close properly, insufficient heat and hazardous lead paint.

5. Defendant paid $20 to have someone make a furnace repair that Plaintiffs would not arrange and pay for.

6. Under the agreement, the Cuyahoga Metropolitan Housing Authority (CMHA) provided a $503 per month federal subsidy payment to Plaintiffs and Defendant paid $52 per month to Plaintiffs.

7. Plaintiffs received the full $555 contract rent for October 2003 through July 2004.

8. CMHA terminated subsidy payments effective at the end of July 2004, making no payment for August 2004 or thereafter.

9. Defendant did not pay Plaintiffs her $52 monthly share of rent after July 2004.

10. Plaintiffs filed an eviction in about August 2004 that the parties settled by an agreement that provided that Plaintiffs would receive $1200 from the Cleveland Mediation Center, the funds coming from a federal program intended to help Defendant.

11. Defendant vacated the property December 5, 2004, leaving the property in good condition.

12. Plaintiffs have a $600 security deposit, which they have not returned.

13. Defendant through her attorney sent a letter with a forwarding address requesting the return of the security deposit.

Conclusions Of Law

The Court finds for Defendant, in part, on her claims. She shall have judgment for $4060. Plaintiffs' claims are dismissed with prejudice for want of prosecution.

Defendant's Answer and Counterclaim contains four claims, which are labeled Counts I, II, III and IV. The Court will consider Counts II, III and IV, then Count I.

Judgment is for Plaintiff on Count II. Defendant proved that the condition of the property entitled her to damages under Ohio Revised Code §5321.04, which requires landlords to keep property in good repair. The measure of damages for such a claim is "the difference between the rental value of the property in its defective condition and what the rental value would have been had the property been maintained." *Miller v. Ritchie* (1989), 45 Ohio St.3d 222, 227; *Smith v. Padgett* (1987), 32 Ohio St.3d 344, 513 N.E.2d 737.

The Court concludes that for the months of October, November, December 2003 and January 2004, Defendant could not use the property because of a collapsed ceiling. Accordingly, the fair market value of the property was zero.

The Court concludes that for the months from February 2004 to November 2004 and for 5 days in December 2004, the property was worth $250. Water from the upstairs toilet would leak down the stack pipe and into Defendant's unit. The kitchen sink would back up. There were windows that would not close properly. The furnace did not provide sufficient heat, causing Defendant to have to call a representative of the gas

company who diagnosed the problem and showed Defendant how to tighten a loose coil that prevented the furnace from working. Defendant's unit also had lead paint that Plaintiffs did not remedy. These conditions diminished the rental value of the property from the contract rent of $503 but did not diminish its value to zero since Defendant did have use of it beginning in February 2004.

The Cuyahoga Metropolitan Housing Authority provided a $503 per month federal subsidy to pay a portion of Defendant's $555 contract rent. Defendant was obligated to pay the balance of $52 per month. Because the federal subsidy is intended to provide Defendant with decent housing, Defendant is entitled to damages based on the contract rent, not her share of that rent. *Malcom v. Tate*, No. 99-CVH-21689 (Mun. Ct. Cleveland, June 29, 2001); *Kenwood Courts Apts. v. Williams*, No. K90-CVG-1043 (Mun. Ct. Portage Cty. Oct. 25, 1991).

Plaintiffs received the full contract rent of $503 for 10 months from October 2003 to July 2004 for a total of $5030. CMHA stopped paying the subsidy in July 2004. Defendant also stopped paying her portion in July 2004. Plaintiffs also received $1200 as rent for August and September rent, making the total rent they received $6230. Defendant remained in the property until December 5, 2004. She therefore received property worth $250 per month for 11 months and five days (February 2004 to December 5, 2004) for a total value of $2790. Defendant's damages are therefore equal to the difference between $6230 and $2790 or $3440.

The Court will also grant Defendant $20 in out-of-pocket expenses for the furnace repair that Plaintiffs would not make. Defendant is also entitled to return of her $600 deposit, having properly requested it and having done no damage to the property. Defendant's total damages are therefore $4060 (the sum of $3440, $20 and $600).

Defendant testified that she paid her mother $150 per month for October, November and December 2003 and January 2004 so that she could live with her mother. The Court will not grant Defendant recovery of these out-of-pocket expenses because the Court is making Defendant whole by relieving her of entire obligation to pay rent for these months.

Defendant also testified that she paid for movers to move her belongings when she left the property in December 2004. The Court will not award damages for this cost because Plaintiffs did not cause Defendant to have this cost. Had Plaintiffs fully performed under the agreement, Defendant would still have had the burden of moving her belongings once the lease terminated.

The Court dismisses Count III as moot because Defendant's damages under O.R.C. §5321.04 are the same as any damages she has from any breach of an implied warranty or habitability under common law. This Court does not need to reach the question, then, of whether an implied warranty of habitability exists as a cumulative remedy independent of O.R.C. §5321.04. *See Shroades v. Rental Homes, Inc.* (1981), 68 Ohio St. 2d 20, 427, N.E.2d 774.

As to Count IV, the Court concludes that Defendant failed to prove any damages from Plaintiffs' negligence. Defendant testified that Plaintiffs failed to abate the hazard of lead paint at the property and that her son had elevated lead levels. But this testimony alone did not establish what portion, if any, of her son's lead levels were caused by Plaintiffs' failure to abate lead at the property. Nor did Defendant prove the dollar value of any damages based on her son's exposure to lead.

As to Count I, the Court concludes that Defendant failed to prove her claim for damages from a retaliatory eviction.

A tenant may pursue a claim for damages from a retaliatory eviction even if the tenant cannot assert retaliation as a defense to the eviction because the tenant is not current in rent. "R.C. 5321.02 and 5321.03 are not mutually exclusive. Even though a landlord has brought an action in forcible entry and detainer against a tenant who is in default of rent, that tenant is not precluded from bringing an action for retaliatory eviction for the reasons set forth in R.C. 5321.02. Whether the landlord evicted the tenant for failure to pay rent or [as retaliation] is a question of fact." *Maurer v. Gabriel*, 1996 WL 1740 (9th Dist). Accord, *Cliffs Apts. v. Bembry*, 56 Ohio Misc. 37, 383 N.E.2d 1170 (Mun. Ct. Cleveland 1978). Thus, Defendant's failure to pay rent for August 2004 does not prevent her from pursuing her claim of retaliation.

But a tenant has the burden of proving that her landlord decided to evict her in response to an activity protected by O.R.C. §5321.02. *Karas v. Floyd* (1980), 2 Ohio App. 3d 4, 6, 440 N.E.2d 563, 566 (2nd Dist.). In this case, Plaintiffs filed a first eviction shortly after Defendant complained to the City of Cleveland Health Department. But evidence that an eviction followed shortly after protected activity does not create a presumption of unlawful retaliation. *Howard v. Simon* (1984), 18 Ohio App. 3d 14, 480 N.E.2d 99 (8th Dist.). Defendant must prove that Plaintiffs' decision was in response to her complaints.

The Court is not convinced that Plaintiffs had this retaliatory motive. Defendant did not provide any testimony or evidence suggesting that Plaintiffs were intent on evicting her. To the contrary, she testified that Plaintiffs reached an agreement with her to allow her to continue renting the property. The agreement allowed the Cleveland Mediation Center would provide $1200 to Plaintiffs as rent for August and September 2004. Plaintiffs filed this second eviction action only after receiving no rent for October 2004. The Court concludes that it is more likely than not Plaintiffs filed this eviction because Defendant did not pay any October rent or otherwise reach an agreement with them to continue in possession (as, for instance, an agreement to work to restore the CMHA subsidy after Plaintiffs made repairs).

The Court will not award Defendant punitive damages because Defendant did not prove fraud, insult, or malice, in addition to actual damages resulting from Plaintiffs' behavior. *Brookridge Party Center, Inc. v. Fisher Foods, Inc. (1983), 12 Ohio App.3d 130, 12 OBR 451, 468 N.E.2d 63; Allen v. Lee (1987), 43 Ohio App.3d 31, 538 N.E.2d*

1073. Malice is shown by evidence of hatred, ill will, revenge, or "a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." *Preston v. Murty (1987), 32 Ohio St.3d 334, 336, 512 N.E.2d 1174, 1176; Villella v. Waikem Motors, Inc. (1989), 45 Ohio St.3d 36, 37, 543 N.E.2d 464, 466.* Defendant's testimony established that Plaintiffs were neglectful but not that they acted out of malice.

Decision

Judgment shall be for Defendant in the amount of $4060 plus costs with interest from the date of judgment.

Mag. David D. Roberts

Judgment Entry

The *Magistrate's Decision* is approved and confirmed. Judgment shall be for Defendant in the amount of $4060 plus costs with interest from the date of judgment.

JUDGE RAYMOND L. PIANKA

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 the following on 2/15/05. MKC

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