CLEVELAND MUNICIPAL COURT
CUYAHOGA COUNTY, OHIO
HOUSING DIVISION

NEW LONGWOOD ASSOCS.,
Plaintiff(s)

-VS-

NIKITA PERRY,
Defendant(s)

DATE: APRIL 21, 2010

CASE NO. 09-CVG-12567

JUDGMENT ENTRY

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

Judgment for the plaintiff on plaintiff's complaint. Writ to Issue. Move-out ordered on or after 10 days from the date of journalization.

Judgment for the plaintiff on defendant's counterclaims.

Raymond L. Pianka

JUDGE RAYMOND L. PIANKA
HOUSING DIVISION

SERVICE

A copy of this Judgment Entry was sent by regular U.S. mail and facsimile to counsel for the parties on 4/22/10.

MUNICIPAL COURT
COUNTY, OHIO
HOUSING DIVISION

MAGISTRATE'S REPORT FILED
APR 22 2010
EARLE B. TURNER, CLERK

NEW LONGWOOD ASSOCS.,
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-VS-

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MAGISTRATE'S DECISION

{¶1.} This case came for trial on March 11-12, 2010 before Magistrate Heather A. Veljković, to whom it was referred by Judge Raymond L. Pianka pursuant to Civil Rule 53, to hear testimony, take evidence and render a decision on plaintiff's first cause of action for restitution of the rental premises and defendant's counterclaims. Plaintiff was present, and represented by counsel. Defendant was present, and represented by counsel.

{¶2.} New Longwood, a private landlord receiving subsidies from the federal government to assist with housing payments for qualified tenants, seeks to evict Nikita Perry on the basis of breach of lease. Specifically, New Longwood alleges that Perry has engaged in unlawful criminal activity, interfered with the rights and quiet enjoyment of other tenants, and has allowed unauthorized persons to reside in her unit.

{¶3.} Defendant asserts numerous counterclaims against plaintiff. Prior to the commencement of trial, defendant moved to dismiss counterclaims III, IV and V. Plaintiff not objecting, the magistrate approved dismissal of these claims. The case proceeding to trial on defendant's counterclaims I and II, alleging racial discrimination based on disparate treatment and disparate impact.

{¶4.} Prior to the commencement of trial, the parties entered into stipulations.

STIPULATIONS:

{¶5.} Plaintiff is the owner of the premises located at 2447 East 37th Street, Cleveland, Ohio 44115.

{¶6.} Defendant is a tenant at the premises, pursuant to a written rental agreement ("Lease"), which is attached to the Complaint as Exhibit A.

{¶7.} On April 18, 2009, plaintiff served on defendant a 30-day notice in writing, pursuant to the terms of the Lease Agreement, advising defendant of the termination of her tenancy, which is attached to the Complaint as Exhibit B.

{¶8.} On June 1, 2009, plaintiff served upon the defendant a 3-day notice in writing to vacate the premises, a copy of said notice is attached to the Complaint as Exhibit C.

{¶9.} Defendant's tenancy is federally subsidized through the project-based section eight program. Her monthly rental obligation is $0.

DEFENDANT'S MOTION FOR JUDICIAL NOTICE:

{¶10.} On day two of trial, counsel for defendant filed a Motion for Judicial Notice of Certain FBI, Census Data and Dictionary Definitions. Counsel for plaintiff filed a reply to this motion after the close of trial.

{¶11.} Ohio Rule of Evidence 201(D) provides, "A court shall take judicial notice if requested by a party and supplied with the necessary information." The kinds of facts Rule 201 contemplates are those "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonable [sic] be questioned." Ohio R. Ev. 201(B). The Court, therefore, takes judicial notice that a disproportionate number of Black[1] persons are arrested each year, in proportion to their numbers in the general population.

{¶12.} Defendant asks the Court to take judicial notice of the term "criminal" as set forth in the Oxford American Dictionary, "a person who is guilty of a crime[;] of or involving a crime[;] concerned with crime and its punishment." Deft. Motion for Judicial Notice Ex. A. Plaintiff argues that defendant has hand-picked this definition provided by the Oxford Dictionary, and that many other dictionaries have been published since the 1980 version cited by defendant. Plaintiff provides an alternate definition from Webster's New World Dictionary 2009, defining criminal as "having the nature of crime; being a crime." Pltf. Response Ex. 1. Plaintiff is correct in its assertion that, as is relevant to the instant case in determining the meaning of "criminal activity" as used in the lease, that "criminal" is used as an adjective. The adjective portion of the plaintiff's definition submitted for judicial notice is limited to the following: "of or involving crime, *a criminal offense.*" (Emphasis in original). The Court determines that the adjective definitions supplied by each of the parties are substantially similar, and therefore grants defendant's request to take judicial notice of the dictionary definition of "criminal", limited to its adjective definition entry.

{¶13.} Accordingly, defendant's motion is granted in part, and denied in part.

FINDINGS OF FACT:

{¶14.} The ground alleged for this eviction is breach of lease. Plaintiff alleges that defendant has "engaged in unlawful criminal activity, interfered with the rights and

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[1] The magistrate uses "Black" here because it is the term used in Dr. Salling's report and in the U.S. Census Bureau data upon which that report was based. For purposes of this decision, the magistrate understands this term to have the same meaning as "African-American."

quiet enjoyment of other tenants, and ... allowed unauthorized persons to reside in her unit..." Plaintiff's Complaint, ¶2.

{¶15.} Defendant asserts counterclaims for racial discrimination on the bases of disparate treatment and disparate impact.

{¶16.} Perry lives in a two-level apartment unit with her two children. The apartment building is three stories. Perry's unit is located on the second and third levels of the building. There are stairs at the street level that go straight up to Perry's apartment.

{¶17.} Marvin Nelson is Perry's fiancé, and is the father of her children.

{¶18.} Angel Dukes lives in the unit directly below Perry; her fiancé is James Brown.

{¶19.} Stephanie Davis is the property manager for plaintiff.

Plaintiff's First Cause of Action

{¶20.} Perry lived without reported incidents at the premises for some months prior to Dukes moving into the unit directly below her.

{¶21.} Nelson visits the premises every day; he frequently stays overnight there.

{¶22.} Nelson acknowledges the frequency of his visits and overnight stays, attributing them to a desire to be involved in his children's lives as much as possible.

{¶23.} Dukes testified that Nelson lived in the unit above her with Perry, and that she saw him at Perry's unit "every day."

{¶24.} Nelson has been convicted of drug-related charges.

{¶25.} Brown, although living out of state, visits Dukes's premises regularly.

{¶26.} Perry had an informal agreement with Laurie Lovelace, the former resident of the unit occupied by Dukes, whereby Lovelace would let Perry know if the noise caused by Perry's children disturbed her.

{¶27.} Shortly after Dukes moved into her rental unit, tension developed between her and Perry, and among their respective visitors. The underlying source of the tension was not determined at trial.

{¶28.} Jason Leasher, Emiliano Sazo, Scott Johnson, and Virginia Rodriguez are employees of TD Security. TD Security provides security services to the residents at Arbor Park. Leasher, Sazo, and Johnson testified about incidents they witnessed involving defendant.

{¶29.} On September 11, 2008, Dukes flagged down TD Security to make a noise complaint about Perry. Officer Sazo spoke with both Dukes and Perry and gave Perry a verbal warning. Plaintiff's Exhibit D.

{¶30.} On September 22, 2008, Dukes made another noise complaint against Perry, this time by calling TD Security. Officer Leasher responded to this complaint, and discussed the noise situation with Perry. Plaintiff's Exhibit E.

{¶31.} On September 23, 2008, Officers Sazo and Johnson responded to a call from dispatch regarding Perry and Dukes. When Officers Sazo and Johnson arrived, they witnessed Nelson coming down the stairs and stating in a violent manner to Dukes: "I got something for you." As Nelson spoke, he lifted his shirt so as to indicate that he was carrying a weapon. Plaintiff's Exhibit F.

{¶32.} Later in the evening of September 23, 2008, Dukes flagged down TD Security, informing them of problems with Perry. Officer Rodriguez spoke with Dukes, Perry and Nelson and warned Perry to keep the noise down. Rodriguez also recommended mediation in her report. Plaintiff's Exhibit G.

{¶33.} On September 25, 2008, Dukes again flagged down TD Security to discuss the issues she was having with Perry. The responding Officers, Leasher and Garrett, testified that they heard banging noises coming from Perry's unit, and that they issued an NTV to Perry. Plaintiff's Exhibit H.

{¶34.} On September 26, 2008, Dukes flagged down Officer Sazo to reiterate the issues she had been having with Perry. Plaintiff's Exhibit J.

{¶35.} Later on September 26, 2008, Officer Sazo responded to a call about a neighbor dispute between Dukes's brother and Nelson. The Cleveland Police Department also responded. Officer Sazo advised Nelson to retrieve his belongings and leave the premises—and that if he returned he would be subject to arrest for trespass. Plaintiff's Exhibit K.

{¶36.} On October 27, 2008, TD Security responded to a noise complaint call against Perry. From Dukes's unit, the officers heard running and jumping noises coming from Perry's unit. The officers noted in their report that noise from Perry's unit did not stop, even after they issued a NTV to Perry. Plaintiff's Exhibit L.

{¶37.} Plaintiff has a written Transfer Request Policy and Procedures. Plaintiff's Exhibit X.

{¶38.} Defendant twice requested that Plaintiff transfer her to another unit. Plaintiff's Property Manager, Stephanie Davis, testified that Defendant's initial request was denied because she did not meet the requirements for a transfer.

{¶39.} Perry submitted her second Transfer Approval Request Form on November 10, 2008; it was disapproved for lack of medical documentation on December 18, 2008. Plaintiff's Exhibit Y; Defendant's Exhibit A, p. 2.

{¶40.} On December 19, 2008, Plaintiff sent a notice of denial of the transfer to Perry. Plaintiff's Exhibit Z; Defendant's Exhibit A, p. 1.

{¶41.} On December 29, 2008, Perry wrote a letter to indicating that she had additional documentation for her transfer request, and that she "will bring them to Arbor Park." Perry indicated that, in addition to her son being critically ill, she had been having "severe tenant harassment problems" with Dukes. Plaintiff's Exhibit AA; Defendant's Exhibit G.

{¶42.} Perry supplied the additional information regarding her son's health condition to plaintiff on December 29, 2008. Plaintiff's Exhibit BB.

{¶43.} Perry submitted no further requests for transfer or documentation to Plaintiff after the December 29, 2008 letter.

{¶44.} Prior to December 2008, Davis suggested that Dukes and Perry attempt mediation.

{¶45.} Plaintiff contracted with Cleveland Tenants Organization ("CTO") to provide mediation services for neighbor disputes.

{¶46.} Davis relayed contact information for Perry and Dukes to CTO. Mediations were scheduled, but were either canceled by CTO staff, or did not proceed when Perry or Dukes, or both, failed to appear.

{¶47.} Because there were never two parties present for a scheduled mediation, no mediation was ever actually conducted.

{¶48.} Davis testified that there was an apparent period of peace between Perry and Dukes from November 2008 until the end of March 2009.

{¶49.} At approximately 3:30 p.m. on March 27, 2009, Officer Leasher responded to a call from TD Security dispatch regarding a disturbance at Dukes's residence. Perry had complained about the noise level of Dukes's music. After Leasher spoke with both Perry and Dukes, Dukes turned her music down to a level acceptable to both parties. Plaintiff's Exhibit P. Pursuant to Officer Leasher's testimony, Dukes's music was excessively loud, and she was given an NTV. However, he also testified that the attitudes of both Dukes and Perry were normal, and that Dukes had no problem with lowering her music.

{¶50.} Later that evening, Perry was arrested for, and ultimately charged with, felonious assault. TD Security received a call regarding a fight in front of defendant's unit. TD Security, including Officers Johnson and Sazo, and Cleveland Police Officer Jack Steele

responded to the call. Officer Scott Johnson, who wrote the report (Plaintiff's Exhibit M), arrived on the scene with Officer Steele. Plaintiff's Exhibit M. Officer Steele was unavailable to testify at trial because he is deceased.

{¶51.} Officer Johnson and Steele observed a large crowd gathered and saw Perry and Nelson outside of her unit. Specifically, Officer Johnson testified that they saw Perry standing over Brown holding a raised crow bar. Brown was bleeding from the mouth and the back of his head. Plaintiff's Exhibit M.

{¶52.} Officer Johnson further testified that Nelson ran away when he saw the officers.

{¶53.} As he approached, Officer Johnson saw Perry take the crow bar and run inside the house; the crow bar was found behind the door to the apartment unit.

{¶54.} Perry admits that she struck Brown at least two times with a crow bar.

{¶55.} The incident report for March 27, 2009 states that TD Security issued two NTVs: one, to Dukes for subleasing to Brown, and the other to Perry, for subleasing to Nelson and for fighting and failure to control her guests. Plaintiff's Exhibit M.

{¶56.} As a result of the March 27, 2009 incident, Perry was arrested and charged with a felony.

{¶57.} Plaintiff filed an eviction action against Dukes—2009 CVG 12566—contemporaneously with the present matter—2009 CVG 12567.

Defendant's Counterclaims

{¶58.} Defendant is Black.

{¶59.} At the time of the March 27, 2009 incident, all of the tenants at the plaintiff's premises were Black, except one, who was Hispanic.

{¶60.} Prior to hearing testimony from defendant's witness, Dr. Mark Salling, plaintiff stipulated to his status as an Expert Witness for purposes of the Rules of Evidence; plaintiff also stipulated to Dr. Salling's curriculum vitae (Defendant's Exhibit K3).

{¶61.} Dr. Salling generated a report from data collected by the U.S. Census Bureau. Defendant's Exhibit K2.

{¶62.} According to Dr. Salling's data and testimony, in 2000, a disproportionate share of the correctional institution population was Black. In Cuyahoga County, almost 71 percent of the adult population in correctional institutions was Black, whereas only 25 percent of the total adult population was Black. There is a statistically significant difference in these two percentages.

{¶63.} There were significantly more Black persons than White persons incarcerated in both Cuyahoga County and the eight-county region. Defendant's Exhibit K1.

{¶64.} Dr. Salling offered his opinion that, assuming a correlation between the percentage of Black persons incarcerated and Black persons arrested, a policy that permits eviction of a tenant based only on that person's arrest record would have a disparate impact on Black persons.

{¶65.} There was no evidence at trial establishing that plaintiff, or any of its employees, discriminated intentionally against Perry.

CONCLUSIONS OF LAW:

I. PLAINTIFF'S CAUSE OF ACTION FOR POSSESSION

{¶66.} In order to prove its claim in forcible entry and detainer on the basis of breach of lease, New Longwood must prove by a preponderance of the evidence that it has served a notice of termination pursuant to federal law; has served a three day notice in conformity with R.C. 1923.04; and that Perry has breached the terms of her written rental agreement.

The Notices

{¶67.} In the 30 day notice issued to her on April 18, 2009, Perry was notified that her tenancy was being terminated "as a result of your violation of the Lease Agreement." The written notice went on to cite the following provisions of the Lease: Paragraph 13 (General Restrictions), Paragraph 23 (Termination of Tenancy), Lease Addendum for Drug-Free Housing #5 and #6, and House Rules 13, 29 and 34.

{¶68.} The Notice listed the following specific events:

- "September 11, 2008, management received a security report #080APV-2337 regarding a noise complaint and disturbing the rights or comfort of your neighbors. September 22, 2009 [sic], Management received security report #08-APV-2375 regarding excessive noise coming from your unit.

- September 23, 2008 Management received security report # 08-APV-2376 regarding threaten [sic] your neighbor and a disturbance. September 23, 2008, Management received a security report #08-APV-2378 regarding disorderly conduct of you [sic] guest (Marvin Lee Nelson). , [sic] September 25, 2008, management received a security report and you received an NTV #2371 for continuous loud noise coming from your unit and disord [sic] conduct of your guest. September 26, 2008, Management received a security report #08-APV-2382 regarding a disorderly conduct of you [sic] guest.

- September 26, 2008, Management receive [sic] a security report #-8=APV-2386 regarding a disorderly conduct of your guest (Marvin L. Nelson). Mr.

Nelson was advised by security to get his belongings and leave the property and if he returns he would be arrested for criminal trespassing.

- October 27, 2008, Management received a security report and you received an NTV #2328 regarding excessive noise. November 7, 2008, Management received a security report #08-APV-2463 regarding a noise complaint. November 8, 2008, Management received a security report #08-APV-2466 and your [sic] received NTV #2380 regarding disorderly conduct and interfering with and [sic] investigation. December 24, 2008, Management receives a security report #08-APV-2544 and you received an NTV #5458 regarding disorderly conduct for you and your guest.[2]

- March 27, 2009, Management received a security report #09-APV-0148 and you receive an NTV#3714 regarding subleasing due to (Marvin L. Nelson) living in your unit and for fighting and failure to control your guest (Marvin L. Nelson).

- March 27, 2009, Management received a security report and a Cleveland Police Report #09-088529 regarding you being charge [sic] for Felonious Assault, Assault and you were arrested.

- April 15, 2009, Management received a security report #09-APV-0189 and you received and [sic] NTV# 2829 for your guest (Marvin L. Nelson) violating a protection order against him."

{¶69.} Exhibit C, the three-day notice New Longwood served Perry on June 1, 2009, contained the same specific information as the notice of termination.

Breach of Lease

1. Unauthorized Occupant

{¶70.} Plaintiff alleges that Nelson is an unauthorized occupant at the premises. A review of the Lease reveals that the contract is between only plaintiff and Perry. The Lease, at paragraph 13, states, "The Tenant shall use the premises only as a private dwelling for himself/herself and the individuals listed on the Owner's Certification of Compliance with HUD's Tenant Eligibility and Rent Procedures, Attachment 1. The Tenant agrees to permit other individuals to reside in the unit only after obtaining the prior written approval of the Landlord." See also 24 C.F.R. § 982.551(h)(2).

{¶71.} The Lease, as submitted to the Court, contains no Attachment 1 to the document indicating who—in addition to Perry—is permitted to live at the premises. Additionally, there was no testimony from Davis establishing authorized occupants in Perry's residence.

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[2] There was neither testimony nor evidence submitted as part of the plaintiff's case regarding incidents that occurred on November 7, 2008, November 8, 2008, or December 24, 2008.

{¶72.} It is plaintiff's burden to prove the elements of the claims it asserts, "by a preponderance of the evidence." *James v. Apel* (June 30, 1999) 11th Dist. App. No. 98-T-0089, 1999 WL 476100, at *3; see also *CMHA v. Rhoades*, Cuyahoga App. No. 87441, 2006 Ohio 4896, at ¶5. The magistrate concludes that in failing to submit Attachment 1 to the Lease indicating who is an authorized occupant, plaintiff has not met its burden on this claim.

2. *Criminal Activity*

{¶73.} Plaintiff also seeks to evict defendant based on criminal activity.

{¶74.} Section 23(c)(6) of the Lease provides that the landlord may terminate the agreement due to "criminal activity by a tenant, any member of the tenant's household, a guest or another person under the tenant's control: a. That threatens the health, safety, or right to peaceful enjoyment of the premises by other residents (including property management staff residing on the premises); or b. That threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises * * *." Criminal conduct of a tenant, a household member, or a guest may be good cause to terminate an assisted housing tenancy regardless of whether the person has been arrested or convicted for the conduct. *Cuyahoga Metro. Hous. Auth. v. Blake* (Mun. Ct. Cleveland, Aug. 19, 1999), No. 98-CVG-05998. Defendant argues that *Blake*, involving public housing, should not be extended to project-based section 8 cases ("PBV"). However, the magistrate concludes that there is a Code of Federal Regulations provision applicable to PBV cases. See 24 C.F.R. § 982.310. Plaintiff's claim for possession as it relates to the alleged criminal activity does not need to satisfy the standard of proof for a criminal conviction. *Id.*

{¶75.} There was no conflicting testimony that, during the incident on March 27, 2009, Perry took a crow bar and hit Brown on the head with it. While Perry raised self-defense, the magistrate does not find the evidence and testimony presented strong enough to establish that she acted in self-defense. Taking into consideration the testimony of the various witnesses at trial, and assessing each witness's credibility, including their demeanor, the magistrate concludes that plaintiff has established by a preponderance of the evidence that the defendant has engaged in criminal activity at the premises, for the limited purpose of being in breach of the terms of the Lease. This conclusion is not intended to indicate that the defendant has been found guilty of having committed a crime; clearly, in a criminal matter, the law requires the prosecution to prove its case beyond a reasonable doubt. These issues remain to be tried in another case, in another court.

{¶76.} The ultimate confrontation between Perry and Brown is unfortunate; it would have been better for all parties involved if Perry and Dukes had engaged in a successful mediation that had ceased their disputes. But, there was never a legal requirement for the plaintiff to provide mediation services. Counsel for defendant has not provided—and the magistrate in reviewing the Lease between the parties could not find—any provision setting forth a requirement for the plaintiff to provide or ensure that actual

mediation services are rendered. It is obviously in the plaintiff's interest to keep harmony and peace in its community. However, plaintiff cannot be held to the unrealistic standard of guaranteeing that its separate residents participate in a mediation program over which it does not control, or to be responsible for providing that the mediation is successful.

{¶77.} Despite the fact that defendant's criminal case has not yet been brought to trial, this Court must still hear and decide the instant case. Indeed, an action brought in forcible entry and detainer is a summary proceeding; criminal felony trials can take months, if not years, to ultimately conclude. The appeals process, if utilized, may be even longer. "'The underlying purpose behind the forcible entry and detainer action is to provide a summary, extraordinary, and speedy method for the recovery of [the] possession of real estate ***.' *State ex rel. GMS Management Co., Inc. v. Callahan* (1989), 45 Ohio St.3d 51, 55 (citing *Housing Authority v. Jackson* [1981], 67 Ohio St.2d 129, 131). The purpose of the forcible entry and detainer statute 'is to provide immediate possession of real property.' *Housing Authority v. Jackson* (1981), 67 Ohio St.2d 129, 131. The drafters of the statute "were careful to avoid encrusting this special remedy with time consuming procedure tending to destroy its efficacy.'" *Cuyahoga River Associates Ltd. Partnership v. MJK Corp.* (Jan. 18, 1996) 8th Dist. No. 68673, 1996 WL 17292, at *2. To require the landlord to wait to file and prosecute its eviction case would be an undue burden, not only for the landlord, but also for the affected community who may be suffering from potential threats to their health or safety, or breaches of their warranty of quiet enjoyment.

{¶78.} Additionally, Judges of the municipal court systems in Ohio are required to conclude cases within one year from the date of filing. Ohio R. Sup. 39(A). The instant action having been commenced June 11, 2009, the Court is required to conclude this case by June 2010. This rule necessarily contemplates that evictions brought in municipal court based on conduct, and for which the perpetrator may be prosecuted in a criminal case, may be adjudicated in less time than a felony case.

{¶79.} Defendant argues that the eviction case was filed based on arrest records; to the contrary, the magistrate concludes that the eviction action was premised not on the fact that defendant was arrested, but rather the actions of defendant.

{¶80.} The magistrate therefore concludes that defendant has breached the paragraph 23 of the Lease.

3. Quiet Enjoyment

{¶81.} Paragraph 13(e) of the Lease requires the tenant not to "Make or permit noises or acts that will disturb the rights of comfort of neighbors. The Tenant agrees to keep the volume of any radio, phonograph, television or musical instrument at a level which will not disturb the neighbors." In project-based subsidized housing, repeated minor violations of the lease are good cause to terminate the tenancy only if they (1) disrupt the livability of the project, (2) adversely affect the health or safety of another person, (3) adversely affect another tenant's right to the quiet enjoyment of the premises, (4)

interfere with management of the project, or (5) have an adverse financial effect on the project. 24 C.F.R. §§ 247.3(c), 880.607(b)(3).

{¶82.} It is understandable that there is some level of noise coming from the normal day to day activity of a household with two small children. And to the degree that this noise consisted of "the normal, daily noises associated with children," it alone is insufficient to create good cause to terminate an assisted housing tenancy. *Fairborn Apts. v. Walker* (July 24, 1991), Greene Cty. M.C. No. 91-CVG-356. But the magistrate concludes, based on the testimony and evidence presented, that the noise and disturbance from Perry's unit far exceeded what could fairly be considered normal. In addition, while Perry may have had an informal agreement with Lovelace about notifying her when the noise was too loud, Dukes was not bound by the same arrangement. The repeated noise from Perry's unit disrupts the livability of the project, directly and adversely affects other tenant's right to the quiet enjoyment at the premises, and interferes with management of the project.

{¶83.} In addition to the general level of noise coming from the premises—in all the Court heard testimony on 8 separate instances—the magistrate concludes that the incident of March 27, 2009 was a substantial breach of the quiet enjoyment of the residents at Arbor Park. Each of the witnesses who testified about the incident stated that there were a number of onlookers; that people came out of their units to see what the commotion on the street was about.

{¶84.} The magistrate concludes, taking into consideration all of the incidents involving Perry and Nelson, and in particular the event on March 27, 2009, that Perry has breached the quiet enjoyment of other tenants, therefore violating Paragraph 13(e) of the Lease.

III. DEFENDANT'S COUNTERCLAIMS I AND II

{¶85.} The Fair Housing Act of 1968 and its amendments ("FHA") are the principal legislative enactments addressing discrimination in housing, lending and real estate related transactions. The U.S. Supreme Court in *Trafficante v. Metropolitan Life Insurance Co.* (1972), 409 U.S. 205, 209, mandated a "generous construction" of the FHA in order to carry out a "policy that Congress considered to be of the highest priority." Further, the legislative history of the FHA suggests that the statutes should be read expensively in order to "eliminate the adverse discriminatory effects of past and present prejudice in housing." *Resident Advisory Board v. Rizzo* (3d Cir. 1977), 564 F.2d 126, 147. The history of the FHA suggests that its framers meant to eradicate all forms of housing discrimination. The purpose of the FHA is to end racially segregated housing and provide for fair housing throughout the nation. See *South Suburban Housing Cntr. v. Bd. Of Realtors* (7th Cir. 1991), 935 F.2d 868, 882; 42 U.S.C. § 3601. Claims under the Fair Housing Act are to be evaluated like comparable Title VII employment discrimination claims. *Larkin v. Michigan Department of Social Services*, (6th Cir. 1996), 89 F.3d 285, 289.

{¶86.} To achieve these goals, the FHA allows aggrieved persons to bring civil actions based on "discriminatory housing practices." 42 U.S.C. § 3613. Section 3602(f) of Chapter 42 defines "discriminatory housing practices" as actions that are unlawful under 42 U.S.C. §§ 3604, 3605, 3606 or 3617. Thus, eviction policies that have the purpose or effect of discriminating against classes of tenants who are protected by the Fair Housing Act are a discriminatory housing practice. *Betsey v. Turtle Creek Assocs.* (4th Cir. 1984), 736 F.2d 983; *Bouley v. Young-Sabourin* (D. Vt. 2005), 394 F.Supp. 2d 675, 677-78.

{¶87.} To recover under the FHA, an injured party may proceed under either a theory of disparate impact or disparate treatment. See, e.g., *Simms v. First Gibraltar Bank* (5th Cir. 1996), 83 F.3d 1546, 1555.

{¶88.} The Ohio Fair Housing Act, O.R.C. §4112.02(H) is nearly identical to the Federal Fair Housing Act in its coverage and prevention of discrimination in the renting of housing based on race, color, or national origin.

{¶89.} Counts one and two of defendant's counterclaim are: 1) racial discrimination due to disparate treatment, and 2) racial discrimination due to disparate impact.

A. Racial Discrimination due to Disparate Treatment.

{¶90.} Defendant, in her counterclaim, alleges disparate treatment racial discrimination in violation of both the Fair Housing Act, 42 U.S.C. §3604, et seq., and the Ohio Fair Housing Act, O.R.C. §4112.02(H), et seq.

{¶91.} It is unlawful, based on race or color or national origin, to refuse to rent or to otherwise make unavailable any dwelling, or to discriminate against a person in the terms or conditions of lease of a dwelling. Federal Fair Housing Act, 42 U.S.C. §3604. The United States Supreme Court has held that the FHA (along with Title VII) must be construed expansively to foster the goal of ending rampant racial discrimination. *Trafficante*, supra.

{¶92.} Disparate treatment in Title VII cases presents the most easily understood type of discrimination, and occur where an employer has treated a particular person less favorably than others because of a protected trait. *Ricci v. DeStefano*, supra. Similarly, housing practices motivated solely by considerations of race, color, religion, sex, handicap, familial status or national origin violate the FHA. Discrimination based on intentional consideration of any of these factors is illegal, even if the defendant was not motivated by personal prejudice or racial animus. *Community House, Inc. v. City of Boise*, 468 F.3d 1118, 1123-25 (9th Cir. 2006).

{¶93.} To prove disparate treatment, the alleging party must meet the three part burden of proof test as set out in *Graoch Associates #33 L.P. v. Louisville/Jefferson County Metro Human Relations Commission* (6th Cir. 2007), 508 F.3d 366 at 371 (modifying the *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792 test to fit the FHA framework):

1. "...the [defendant] must state a prima facie case by showing that [s]he is a member of a protected class, that [s]he applied to and was qualified to rent or purchase certain housing, that [s]he was rejected, and that the housing remained available."
2. "...the [plaintiff] may then articulate legitimate non-discriminatory basis for its challenged decision."
3. "...if the [plaintiff] does proffer such a basis, the [defendant] must establish that the articulated reason is pre-textual."

{¶94.} The fact that plaintiff's property manager, Davis, is Black herself is not a barrier to finding disparate treatment in evicting Perry. See, e.g., *Hansborough v. City of Elkhart Parks and Rec. Dept.* (N.D.Ind. 1992), 802 F.Supp. 199.

{¶95.} Defendant argues that in the instant case, the subjective nature of the lease provision permitting a tenant to be evicted because of criminal activity which is not defined allows the property manager to have absolute discretion. Counsel for defendant argues that, if Perry was White, she would not have been subjected to the 'cavalier attitude' of the property manager who simply did not care to conduct a proper investigation and determine whether Perry was 'guilty' of any criminal activity at all, did not keep an investigation file, did not talk to Perry's witnesses, and did not make a reasoned choice of whether Perry engaged in any conduct that would make her a "successful tenant," as discussed in *Bishop v. Pecsok* (D.C.Ohio 1976), 431 F.Supp. 34, 37. Footnote 5 of *Bishop* states, "This Court defines "successful tenant" as one who stays for the period of the lease, pays his rent timely, *and complies with all other provisions of the lease.*" [Emphasis added]. *Id.* at 37. Perry was a successful tenant with no problems or complaints against her—until Dukes moved into the complex. Problems began upon Dukes moving into the premises, and Perry ceased to be a successful tenant as discussed in *Bishop*.

{¶96.} Plaintiff argues that Perry was guilty of numerous noise violations, and, with Nelson, committed criminal activity resulting in their arrest. If the landlord does proffer a basis, as plaintiff here has, the tenant must establish that the articulated reason is pretextual. *Graoch*, 508 F.3d at 371.

{¶97.} The Lease requires defendant to abstain from engaging in criminal activity. It does not require the landlord to conduct a full-blown criminal investigation—the property manager would not be the proper person to perform such a task. Rather, local law enforcement staff would be the appropriate personnel to conduct such investigation; the local prosecutors would then be the proper parties to determine whether a criminal case ought to be brought against the alleged perpetrators.

{¶98.} The statutes governing project-based subsidies and the HUD guidelines are clear: safety is a priority on subsidized properties. The HUD regulations specifically provide that, "The owner may terminate tenancy and evict by judicial action a family for criminal activity by a covered person in accordance with this section if the owner determines that the covered person has engaged in the criminal activity, *regardless of whether the covered person has been arrested or convicted for such activity and without satisfying*

the standard of proof used for a criminal conviction." 24 C.F.R. 982.310. A property manager must be given some latitude in determining, upon a review of the totality of the circumstances, whether criminal activity has occurred on the premises.

{¶99.} Here, Davis testified that she reviewed the incident reports, had a meeting with the security personnel, and even met with both Perry and Dukes. Davis made a calculated business decision to evict Perry because of the problems at the premises. It is particularly important to note that Davis appeared not to think that Perry was wholly at fault: eviction proceedings were brought against Dukes, too. Taking these actions into consideration, the magistrate concludes that it was not unreasonable, unlawful, or discriminatory, that plaintiff commenced the within action.

{¶100.} Defendant concedes that *Cuyahoga Metro. Hous. Auth. v. Blake* (Mun. Ct. Cleveland, Aug. 19, 1999), No. 98-CVG-05998 remains good law in appropriate cases, that a tenant may be evicted without arrest and conviction. But, defendant argues, if there is a disparate impact and the fact that an arrest without conviction is not reliable evidence that the tenant engaged in any misconduct at all, then the landlord has a heavy burden to prove that the tenant is not a successful tenant and has been guilty of misconduct sufficiently egregious to warrant their eviction from housing of their choosing.

{¶101.} The magistrate acknowledges that the current system may have its limitations, in that it allows for the possibility of a tenant who is ultimately acquitted of criminal charges to be evicted from subsidized housing. However, it is this summary nature that protects the best interests of all of the successful tenants who adhere strictly to the requirements of their Leases. Perry is being evicted because of her underlying conduct, which constitutes a breach of the terms of the Lease. This is no different than if there was any other breach of Lease, e.g., nonpayment of rent, in that the preponderance of the evidence standard applies.

{¶102.} Here, in reviewing the evidence and testimony submitted, the magistrate concludes that, the plaintiff having had proper grounds to evict the defendant, the defendant has failed to meet her burden of proof with respect to her claim for disparate treatment discrimination.

B. Racial Discrimination due to Disparate Impact.

{¶103.} Defendant also alleges in her counterclaim that plaintiff's actions result in discriminatory impact in violation of both the Fair Housing Act, 42 U.S.C. §3604, et seq. and the Ohio Fair Housing Act, O.R.C. §4112.02(H), et seq.

{¶104.} Title VII prohibits both intentional discrimination, known as "disparate treatment," as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities, known as "disparate impact." *Ricci v. DeStefano* (2009), 129 S.Ct. 2658, 174 L.Ed.2d 490. To show

disparate impact, defendant[3] must demonstrate that a facially neutral policy or practice has the effect of discriminating against a protected class of which she is a member. *Blaz v. Barberton Garden Apartment* (6th Cir. 1992), No. 91-3896, 972 F.2d 346 (Table Unpublished). Title VII and the FHA "are part of a coordinated scheme of federal civil rights law enacted to end discrimination." *Huntington Beach*, supra. Title VII analysis is useful in determining the appropriate test for disparate impact claims under the Fair Housing Act. *Trafficante*, supra. Title VII and FHA precedent can be used, likewise, to interpret Ohio's fair housing laws.

{¶105.} In determining what conduct produces a discriminatory effect in violation of the FHA, courts must consider the strength of the aggrieved party's showing of discriminatory effect balanced by the strength of the aggrieving party's interest in taking the challenged action. *Arthur v. City of Toledo* (6th Cir. 1986), 782 F.2d 565, 577. In *Graoch*, supra, the court added the *Arthur* analysis onto the third prong of the *McDonnell-Douglas* burden shifting test, "To determine whether a defendant's proffered business reason is a pretext for discrimination, or whether an alternative practice exists that would achieve the same business ends with less discriminatory impact, we must consider the strength of the plaintiff's statistical evidence of disparate impact and the strength of the defendant's interest in maintaining the challenged practice." *Graoch* at 373. Thus, the test for disparate impact under the FHA is:

1. The aggrieved party must make a prima facie case of discrimination by identifying and challenging a specific housing practice, and then showing an adverse effect by offering strong statistical evidence of a kind or degree sufficient to show that the practice in question has caused the adverse effect;
2. If the aggrieved party makes a prima facie case, then the aggrieving party must offer a legitimate business reason for the challenged practice;
3. The aggrieved party must demonstrate that the aggrieving party's reason is a pretext for discrimination or that an alternative housing practice exists which would achieve the same business ends with a less discriminatory impact. And, in order to evaluate the aggrieved party's showing, the court must consider the strength of the aggrieved party's showing of discriminatory effect against the strength of the aggrieving party's interest in taking the challenged action.[4]

{¶106.} To establish a prima facie violation of the FHA, the party asserting the claim only need prove that the challenged action had a discriminatory effect. See *Buckeye Comm. Hope Found. v. City of Cuyahoga Falls* (2001), 263 F.3d 627, rev'd on other grounds, 538 U.S. 188, 123 S. Ct. 1389, 155 L.Ed.2d 349 (2003). Thus, under the FHA, the party asserting such a claim must show: 1) the occurrence of certain outwardly neutral practices and 2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices. *Tsombanidis v. West Haven Fire Dept.* (2d. Cir. 2003), 352 F.3d 565.

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[3] Typically, in cases brought pursuant to the FHA, the aggrieved party is the plaintiff; however, here, the party alleging racial discrimination is in the defendant / counterclaimant. The magistrate has utilized the terminology of the present case, where appropriate, to illustrate the application of law.

[4] *Graoch* at 374.

{¶107.} To succeed on a claim of disparate impact, the party asserting such a claim is not required to produce evidence of intentional discrimination. See, e.g., *Munoz v. Orr* (5th Cir. 2000), 200 F.3d 291, 299. Instead, a disparate impact claim challenges neutral policies that create statistical disparities which are equivalent to intentional discrimination. Id. When deciding a disparate impact claim under the FHA, the court uses the same burden-shifting framework applied in Title VII cases. Under this framework, the plaintiff must first establish a prima facie case by "showing that the challenged practice of the defendant actually or predictably results in racial discrimination; in other words that it has a discriminatory effect." *Summerchase Ltd. P'ship I v. City of Gonzales* (M.D. La. 1997), 970 F. Supp. 522, 528. In the event the plaintiff establishes a prima facie case, the burden shifts to the defendant to demonstrate that its actions furthered, in theory and in practice, a legitimate business necessity or governmental interest and that no alternative would serve that interest with less discriminatory effect. *Huntington Branch* (2nd Cir. 1988), 844 F.2d at 936. Upon the landlord satisfying its burden, the presumption created by the prima facie case drops out and the tenant must then prove that the reason proffered by the defendant is a pretext for discrimination. *Betsey v. Turtle Creek*, supra.

{¶108.} "[N]ot every housing practice that has a disparate impact is illegal." *Graoch Associates # 33, L.P. v. Louisville/Jefferson County Metro Human Relations Com'n* (6th Cir. 2007), 508 F.3d 366, 374.

{¶109.} Defendant argues that, under Title VII cases, courts have long recognized that policies which disqualify individuals for employment based on their history of arrest without conviction is presumed to impermissibly discriminate against Black persons because such policies have a foreseeable disparate impact on this group. In support of its argument, defendant cites the EEOC Policy Guidance which states that "conviction records constitute reliable evidence that a person engaged in the conduct alleged since the criminal justice system requires the highest degree of proof ("beyond a reasonable doubt") for a conviction. Therefore, to justify the use of arrest records, an additional inquiry must be made. Even where the conduct alleged in the arrest record is related to the job at issue, the employer must evaluate whether the arrest record reflects the applicant's conduct. It should, therefore, examine the surrounding circumstances, offer the applicant or employee an opportunity to explain, and if he or she denies engaging in the conduct, make the follow-up inquiries necessary to evaluate his or her credibility.

{¶110.} Here, it is defendant's burden to prove its prima facie case showing that the challenged practice of the plaintiff actually or predictably results in racial discrimination. *Summerchase Ltd.*, supra. Defendant challenges the alleged practice of evicting based on arrest record. Defendant failed to establish that plaintiff has a practice of evicting tenants based on arrest record, or that plaintiff specifically attempted to evict Perry based on her having been arrested. Defendant called Dr. Salling to testify regarding the percentage of incarcerated Black persons. As he testified, according to 2000 census data, a disproportionate share of the correctional institution population was Black (in Cuyahoga County, almost 71 percent of the adult population in

correctional institutions was Black, whereas only 25 percent of the total adult population was Black). However, Dr. Salling was unable to discern among the population the underlying reason for incarceration (i.e., conviction as opposed to being held for arraignment). The fact that there was a disproportionate number of incarcerated Black persons in 2000 does not establish that evicting a tenant due to criminal activity at the premises (as defined by the civil burden of proof) results in disparate impact racial discrimination. That fact that most—perhaps all—Arbor Park tenants arrested and most—perhaps all—Arbor park tenants evicted are Black, under these circumstances, is reflective only of the fact that most—according to testimony, all but one—tenants are Black.

{¶111.} The magistrate concludes that defendant did not establish that eviction due to arrest record was a practice of the plaintiff or that Perry in particular was evicted because of her having been arrested due to the incident on March 27, 2009; rather, as plaintiff established, it pursued this case because of Perry's actions in relation to the incident on March 27, 2009, as well as for having an unauthorized guest and for breach of the Lease's quiet enjoyment requirement. Plaintiff could have legally pursued this case even if Perry had not been arrested. *Blake*, supra.

{¶112.} Even assuming, arguendo, that defendant established a prima facie case, the plaintiff has established a valid legal reason for evicting her: she engaged in criminal activity at the premises, she had an unauthorized resident living at the premises, and she was in breach of the quiet enjoyment clause of her Lease. These are all non-pretextual business justifications for evicting the defendant.

{¶113.} Defendant argues that a lesser restrictive measure—mediation—could have been taken to avoid the eviction process. As discussed, supra, while plaintiff voluntarily provided access to mediation services, it cannot be held to the standard of forcing unwilling participants to attend, or to resolve their disputes through mediation. In acknowledging that it would have been better for the Perry and Dukes to peacefully resolve their differences, the magistrate also concludes that it is not plaintiff's responsibility to ensure that this is the result of the mediation process.

{¶114.} Also as discussed above, actions commenced in forcible entry and detainer are summary in nature; it is not a legal requirement that the landlord wait until a corresponding criminal proceeding is concluded prior to taking action to evict.

{¶115.} For these reasons, the magistrate concludes that the facts applied to this case result in the defendant failing to meet her prima facie case. As such, the magistrate concludes that defendant cannot prevail on this counterclaim.

RECOMMENDATION:

{¶116.} Judgment for the plaintiff on plaintiff's complaint. Writ to Issue. Move-out ordered on or after 10 days from the date of journalization.

{¶117.} Judgment for the plaintiff on defendant's counterclaims.

Heather A. Veljkovic

MAGISTRATE HEATHER A. VELJKOVIĆ
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(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 Magistrate's Decision was sent by regular U.S. mail and facsimile to counsel for the parties on 4/22/10. BF