CLEVELAND MUNICIPAL COURT
HOUSING DIVISION
RAYMOND L. PIANKA, JUDGE

WILLIAM RONNY
Plaintiff (s)

-VS-

BRENNAE BOWMAN
Defendant (s)

Date: March 9, 2010

2007 CVG 024072

ORDER

This case is before the Court on the defendant's Objections to the Magistrate's Decision, and the plaintiff's Motion for Relief from Judgment from the same decision. For the reasons that follow, the defendant's objections are sustained, and the plaintiff's motion for relief is denied.

This matter was heard on the scheduled trial date. When the plaintiff failed to appear for trial, the magistrate dismissed plaintiff's claims with prejudice. The magistrate then conducted an ex parte trial, requiring the defendant to prove her case by a preponderance of the evidence. *Ohio Valley Radiology Assoc., Inc. v. Ohio Valley Hospital Assn.* (1986), 28 Ohio St.3d 118.

Objections

Defendant objects, as a matter of law and fact, to the following: (1) finding that defendant's security deposit was $800.00; (ii) failure to award double damages under R.C. 5321.16(C); (iii) failure to award damages for diminution in value; and (iv) failure to award attorney fees for plaintiff's failure to return the security deposit.

Generally, findings of fact are afforded some deference in light of the hearing officer's ability to view and assess credibility, demeanor, etc., *C.E. Morris Co. v. Foley Constr. Co.* (19780, 54 Ohio St.2d 279. Nonetheless, pursuant to Civ. R. 53(D)(4)(d), the Court has conducted an independent de novo review of the decision in this matter. *Stumpff v. Harris,* 2d Dist. No.

Security Deposit

Defendant first asserts that the security deposit should have been found to be $850.00 as asserted in the 2005 written rental agreements, pleadings, deposition filed in this matter, and as evidenced at trial. See respectively Ronny Dep. Ex. C (2005 Agreement), Complaint ¶11, Answer and Counterclaim ¶8, Ronny Dep. 49:13 – 49:23 (March 11, 2008), and Bowman affidavit as attached to Objections at ¶2. And, in fact, the only evidence contra is that of the 2007 Agreement, which indicates a security

deposit of $800.00 Ronny Dep. Ex. E. The objections on this basis are sustained and the Court finds that the amount of the security deposit was $850.00.

Statutory Double Damages

Defendant next objects to the failure to award statutory double damages. R.C. 5321.16. A tenant is able to recover the amount of the security deposit wrongfully withheld together with statutory damages in the same amount if the tenant provides the landlord with a forwarding address. R.C. 5321.16(B) and (C).

The Magistrate's Report and Recommendation states that the defendant never provided testimony or evidence that she provided the plaintiff with a forwarding address. However, defendant's affidavit indicates that she testified to having caused a letter, providing an address and requesting return of the security deposit, to be sent to plaintiff. Affidavit as attached to Objections at ¶3. This is consistent with ¶40 of the answer and counterclaim which indicates that defendant sent the written notice to plaintiff. And, this fact was not disputed by plaintiff in his answer to the counterclaim. Response to Counterclaim ¶¶15, 16. Therefore, defendant's second objection is sustained and the Court finds that defendant provided a forwarding address.

When plaintiff failed to appear at trial, his claims were dismissed. Thus, defendant became entitled to recover the full $850.00 of the security deposit which was wrongfully withheld. And, since this Court has found that defendant sent a notice of forwarding address to plaintiff, defendant is entitled to recover statutory damages under R.C. 5321.16 of an additional $850.00, for a total recovery of this claim of $1700.00

Reduction in Rent

Turning to defendant's third objection, the Magistrate found that because of the problems at the dwelling, the rent should be reduced $50.00 per month for a period of six months, June though November 2007. As correctly noted in the Magistrate's Report, these damages are available to subsidized tenancies based upon the full value of the unit, and not simply on the defendant's portion of the rent, if any. *Kenwood Courts Apts. V. Williams*, o. K890-CVG-21043 (Mun. Ct. Portage Cty. Oct. 25, 1991).

The defendant objects to the magistrate's failure to award damages to the defendant in excess of the rent owed by defendant, $684.00. The defendant cites no legal authority for her position.

The magistrate determined that the defendant is entitled to a reduction in rent. However, it is undisputed that defendant did not pay rent for three months. As the reduction in rent owed to defendant did not exceed the rent owed by the defendant, the the magistrate properly declined to award affirmative damages to the defendant. Defendant's third objection is therefore overruled.

Defendant's fourth objection is sustained, and the report is modified nunc pro tunc to delete the award of attorney fees on the claim for return of the security deposit.

45 CFR 1642.3, in effect at the time of trial, prohibited an award of attorney fees to legal services corporations in these circumstances.

The magistrate's report indicated that defendant was to submit an affidavit on the costs of the March 18, 2008 failed deposition. No submission has yet occurred. Defendant having failed to submit the affidavit, the request for sanctions is dismissed for want of prosecution.

Plaintiff's Motion for Relief

Plaintiff's motion for relief from judgment fails to indicate any reason why the plaintiff should be excused for failing to appear for trial. Accordingly, the Court denies the motion.

Conclusion

In conclusion, based upon the objections sustained above, the Court now enters judgment as follows:

1. Defendant's objections are sustained in part. The magistrate's decision is modified to grant judgment for the defendant in the amount of $1700.00, representing: a security deposit of $850.00; statutory damages under R.C. 5321.16 in the amount of $850.00; and $0.00 on the claim for diminution in value of the premises;
2. This judgment does not include an award for attorney fees for the R.C. 5321.16 claim;
3. Plaintiff's motion for relief from judgment is denied.

Judge Raymond L. Pianka
Housing Division

A copy of this judgment entry was sent by regular U.S. mail to parties/counsel on 3/10/10, by

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IN THE CLEVELAND MUNICIPAL COURT
CUYAHOGA COUNTY, OHIO
HOUSING DIVISION

William Ronny **1347 E. 112th St.** **Cleveland, Oh. 44106** **Plaintiff**	)	**Date: June 19, 2008** **CASE NO. 2007CVG24072**
vs.	)	**LANDLORD – TENANT**
Brenae Bowman **12606 Taft Road** **Cleveland, Ohio 44106** **Defendant**	)	**MAGISTRATE'S REPORT AND RECOMMENDATION**

This case was heard 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 property damages and Defendant's counterclaim for loss of value of rental and the return of her Security Deposit.

Plaintiff was not present and not represented by counsel.

Defendant was present and represented by counsel.

The Defendant through Counsel filed a *Motion for Civil Rule 37(d) Sanctions* as Plaintiff allegedly failed to complete his deposition.

Plaintiff's Complaint was dismissed with prejudice as a sanction for Plaintiff's absence from this hearing. An *ex parte* trial was convened on Defendant's Counterclaim as a further sanction for Plaintiff's failure to attend the trial.

FINDINGS OF FACT:

1. The parties had a written agreement for the rental of the premises located at 12606 Taft Ave., Cleveland, Oh. 44108.
2. The rent was $772.00 per month and a security deposit in the amount of $800.00 was paid.
3. The rent was subsidized by CMHA through the Housing Choice Voucher Program.
4. The Defendant testified that initially she paid $228.00 per month and it became zero in March, 2007.
5. The written document from CMHA submitted as evidence by the Defendant contradicted her testimony, as it stated the rent became zero in September, 2007.

6. The Defendant notified the Plaintiff that she would be moving as of April 30, 2007.
7. The Defendant vacated the premises on or about November 23, 2008.
8. Because the lease renewal date was May 1, CMHA inspected the property in the moth of June.
9. The property failed the initial inspection.
10. The property was re-inspected on or about June 26, 2007.
11. The property failed again.
12. The property was again inspected on July 24 and failed.
13. The last inspection was made on or about September 5, 2007 and again the property failed the inspection.
14. It is unclear as to if and when the property was abated (payment suspended) and when the contract with CMHA was actually cancelled as Defendant failed to provide evidence concerning the abatement and cancellation of the contract.
15. The Defendant testified that the Plaintiff has failed to return her security deposit.
16. The Defendant testified at trial and submitted several documents as exhibits which were admitted into evidence.

CONCLUSIONS OF LAW AND FACTS:

The Defendant through Counsel filed a *Motion for Civil Rule 37(d) Sanctions* as Plaintiff allegedly failed to complete his deposition. This Motion has been rendered partially moot by Plaintiff's failure to appear at trial. Plaintiff's complaint has been dismissed with prejudice. The Defendant's Counsel did not present evidence as to the costs incurred by the Defendant due to the Plaintiff's failure to appear at the continued deposition. The Defendant may file an affidavit as to costs and the Court will consider an award for such expenses.

The Plaintiff did not appear at trial and the court proceeded to conduct an *ex parte* trial pursuant to the Court's procedures. The Court of Appeals has noted that an *ex parte* trial is required when a party has filed responsive pleading. The Plaintiff filed a response to the Defendant's counterclaim, thus the Defendant is not entitled to a default judgment in this case. The Defendant must testify and present evidence to prove her case by a preponderance of the evidence. The Court noted in Tribby:

> Although not raised by the appellant, the trial court's judgment is incorrectly characterized as a default judgment in the transcript of docket and in the top margin of the judgment entry. However, the transcript of proceedings indicates that the trial court, pursuant to local rules, proceeded to hold an ***ex parte* trial** permitting appellant to proceed on the merits.
>
> Parenthetically, it should be noted that a default judgment would not be proper in the instant case. Under Civ.R. 55(A), a default judgment may only be granted where the party has failed to plead or otherwise defend the action. See, also, *Garrison Carpet Mills v. Lenest, Inc.* (1979), 65 Ohio App.2d 251; *Ohio Valley Radiology Assoc., Inc. v. Ohio Valley Hosp. Assn.* (1986), 28 Ohio St.3d 118..
>
> Since appellant filed an answer and counterclaim, the court could not enter a default judgment against her for failing to appear at the pretrial. In *Ohio*

Valley Radiology Assoc., Inc., supra, the court explained the procedure to be followed when a party fails to appear at trial:

"The proper action for a court to take when a defending party who has pleaded fails to show for trial is to require the party seeking relief to proceed ***ex parte*** in the opponent's absence. Such a procedure, which requires affirmative proof of the essential elements of a claim, is diametrically opposed to the concept of default, which is based upon admission and which therefore obviates the need for proof. This is because ***ex parte* trials**, when properly conducted, are truly trials in the sense of the definition contained in R.C. 2311.01. That is, they are 'judicial examination[s] of the issues whether of law or of fact, in an action or proceeding.' 'Issues' are defined in R.C. 2311.02 as follows: 'Issues arise on the pleadings where a fact or conclusion of law is maintained by one party and controverted by the other. * * * ' It is clear that any judgment based upon an ***ex parte* trial** is a judgment after trial pursuant to Civ.R. 58, and not a default judgment under Civ.R. 55. Because Civ.R. 55 is by its terms inapplicable to ***ex parte*** proceedings, the notice requirement of Civ.R. 55(A) was not applicable to the proceedings below in this case. * * *" *Id.* at 122.

In the case *sub judice,* the trial court correctly proceeded with an ***ex parte* trial** affording the appellee with an opportunity to present and prove her case. Appellee did not present any evidence and hence failed to prove her case.. ***Tribby v. Gudzinas,*** *Not Reported in N.E.2d, 1991 WL 18673, Ohio App., 1991, February 15, 1991.*

The Defendant is claiming that (1) the Plaintiff's failure to maintain the property entitles her to recover compensable damages and (2) that the Plaintiff failed to return her Security Deposit in accordance with ORC 5321.16.

As noted above, The Defendant resided in the Plaintiff's property under a lease subsidized by the Housing Choice Voucher Program (formerly called the Section 8 program). The lease between the parties was due to be renewed on May 1, 2008, however on or April 1, 2007, the Defendant notified the Plaintiff that she intended to vacate the premises on or about April 30, 2007.

Under the terms of the agreement with the Cuyahoga Metropolitan Housing Authority (CMHA), the Plaintiff was required to maintain the property in accordance with their housing standards. The property was inspected in June and did not pass. The Plaintiff fixed some items and the property was again inspected in July. Again the property failed the inspection. The property was inspected for the final time in September, 2007. The Defendant continued to live on the property until November, 23, 2007 even though she had indicated that she planned to move on or about April 30, 2008.

The Ohio Revised code provides that:

A) If a landlord fails to fulfill any obligation imposed upon him by section 5321.04 of the Revised Code, other than the obligation specified in division (A)(9) of that section, or any obligation imposed upon him by the rental agreement, if the conditions of the residential premises are such that the tenant reasonably believes that a landlord has failed to fulfill any such obligations, or if a

governmental agency has found that the premises are not in compliance with building, housing, health, or safety codes that apply to any condition of the premises that could materially affect the health and safety of an occupant, the tenant may give notice in writing to the landlord, specifying the acts, omissions, or code violations that constitute noncompliance. The notice shall be sent to the person or place where rent is normally paid.

(B) If a landlord receives the notice described in division (A) of this section and after receipt of the notice fails to remedy the condition within a reasonable time considering the severity of the condition and the time necessary to remedy it, or within thirty days, whichever is sooner, and if the tenant is current in rent payments due under the rental agreement, the tenant may do one of the following:

(1) Deposit all rent that is due and thereafter becomes due the landlord with the clerk of the municipal or county court having jurisdiction in the territory in which the residential premises are located;

(2) Apply to the court for an order directing the landlord to remedy the condition. As part of the application, the tenant may deposit rent pursuant to division (B)(1) of this section, may apply for an order reducing the periodic rent due the landlord until the landlord remedies the condition, and may apply for an order to use the rent deposited to remedy the condition. In any order issued pursuant to this division, the court may require the tenant to deposit rent with the clerk of court as provided in division (B)(1) of this section.

(3) Terminate the rental agreement. Ohio Revised Code §5321.07.

The Housing Choice Voucher Program inspects the property at least annually and if the property fails the inspection twice, the rent is abated. The third failure results in the termination of the contract. This rent for this property was abated in July and the contract was cancelled in September.

The Defendant is seeking to be compensated for the Plaintiff's failure to maintain his property. The Courts have stated:

> A tenant who resides in assisted housing has standing to bring an R.C. 5321.04 contract claim. Foss v. Reddy, No. 68836, 1995 WL 643811 (Ct. App. Cuyahoga Cty. Nov. 2, 1995). See also 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). But cf. Budac v. Nahmi, No. 14901, 1991 WL 115908 (Ct. App. Summit Cty. June 19, 1991) (ODHS payment for security deposit). . **Peter M. Iskin, Ohio Eviction and Landlord-Tenant Law (3d ed. 2003) 332**

The question in this case is becomes: What, if any, damages is the Defendant entitled? The Defendant must prove her damages by a preponderance of the evidence, if she is to recover

If the tenant resides in assisted housing (see Section III.A., above), 284/ the measure of general damages is not based on the tenant's share of the subsidized rent, but rather is based on the full market rental value of the premises in their defective and non-defective condition, like any other tenancy. 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). Accord Committed Cmty. Assocs. v. Crosswell, 250 A.D. 2d 845, 673 N.Y.S.2d 708 (1998) (implied warranty of habitability); Cruz Mgmt. Co., Inc. v. Wideman, 417 Mass. 771, 633 N.E.2d 384 (1994) (same). But see Wallpe v. McCurdy, No. 84-CV-36081 (Mun. Ct. Hamilton Cty. Oct. 15, 1985). But cf. Brown v. August, No. 01-CA-0024, 2002 WL 22877 (Ct. App. Wayne Cty. Jan. 9, 2002) (VA payment for rent).
The rationale for this position is summarized in Wideman, 417 Mass. at 775-76, 633 N.E.2d at 387 (citations omitted) (emphasis added):
"Damages for breach of the implied warranty of habitability are measured by the 'difference between the value of the dwelling as warranted (the rent agreed on may be evidence of this value) and the value of the dwelling as it exists in its defective condition."

.... This measure of damages is purely compensatory. It "gives a tenant the benefit of the bargain because the implied warranty of habitability is part of the bargain" the tenant makes with a landlord when the tenant agrees to pay rent.... Recovery on this basis is neither a windfall to the tenant nor an award of punitive damages. It is compensation for the infringement of a contractual right.... Whether or not the tenant is required to pay in rent the full value of the apartment as warranted, the tenant is nonetheless entitled to damages based on the value of the premises in a liveable condition..It is, after all, the tenant who suffers when conditions in an apartment violate the implied warranty of habitability. **Peter M. Iskin, Ohio Eviction and Landlord-Tenant Law (3d ed. 2003) 332**

The Defendant testified that her portion of the rent was originally $228.00, but that it was reduced to zero in February, 2007. This testimony was contradicted by the submission of a letter from CMHA indicating that her portion of rent was not reduced to zero until September, 2007. The Defendant testified that she stopped paying in February or March, 2007.

The measure of general damages in an R.C. 5321.04 contract claim is the difference between the rental value of the premises in their defective condition and the rental value of the premises without the defective condition. Miller v. Ritchie, (1989); 45 Ohio St. 3d 222, 543 N.E.2d 1265 Smith v. Padgett, 32 Ohio St. (1987).3d 344, 513 N.E.2d 737 . **Peter M. Iskin, Ohio Eviction and Landlord-Tenant Law (3d ed. 2003) 330**

The Supreme Court noted in Miller that rarely, If ever does the defective property have a value of zero, but subsequent courts noted that in egregious circumstances the rent may be reduced to zero. Egregious has been defined as no heat, no water or standing

water/ sewage on the premises. . **Peter M. Iskin, Ohio Eviction and Landlord-Tenant Law (3d ed. 2003) 331**

The items that caused the property to fail the inspections were not serious and do not warrant a substantial reduction in the rent owed. The items were:

1. Electrical Hazards/Faulty Wiring-knockout caps need for the breaker box.
2. (Tub or Shower) Caulking needed
3. Defective Paint Present-Porch-scrape and paint
4. Light Fixture- Missing/Broken/Loose-replace the motion detector bulb
5. Yard-hole/over-growth/excess debris
6. (Handrails) 4 or more steps-Not present-leading to the second floor.
7. Tripping Hazard-Repair/replace floor material-properly attach carpet to the stairs
8. Floor-smoke detector-missing/no battery/inoperable
9. Floor-support needed-repair weak areas in floor

Items 2, 4, 6, 7 and 9 were not corrected per the July inspection. Items 2, 7 and 9 were not corrected per the September inspection. Under the rules of the Housing Choice Voucher Program the rent was abated in July and the contract was cancelled in September. The only remedy prescribed by CMHA rules.

Under O. R. C. §5321.07 the tenant is entitled to chose his or remedy from the list stated above, namely:

- Deposit rent
- Request the court to order the landlord to fix the property
- Terminate of the contract

If the tenant does not elect one of the above remedies, they are not precluded from filing a counter-claim for the condition of the property in response to the Landlord's complaint for back rent due and owing.

There Defendant asserts that she was damaged by the Plaintiff's failure to repair his property. The items listed in the CMHA report were primarily cosmetic and do not warrant a major deduction in the monthly rent due and owing. It is recommended that the rent be reduced $50.00 per month for the period June trough November, 2007.for a total of $300.00 (six (6) months times $50.00). This is offset by the rent due and owing of $684.00 (three (3) months times $228.00) for the months of June, July and August. The Defendant is not entitled to recover any money for the damages claimed. Since the Plaintiff's claim was dismissed as a sanction for a failure to appear, any monies due and owing to the Plaintiff will not be awarded as a further sanction for his failure to appear at trial and his continued deposition.

As noted above this was not a default hearing, but a trial. It was incumbent upon the Defendant to prove her case by a preponderance of the evidence.

The Plaintiff was required by ORC 5321.16 to send a letter to the Defendant outlining the details of the disposal of her Security Deposit. The Plaintiff failed to do so.

The statute also requires the Plaintiff to return the Security Deposit to the Defendant within thirty (30) days of her move out.

The Defendant is entitled to recover her security deposit in the amount of $800.00 plus Attorney fees. Although the statute also provides for double damages for the Defendant, the Defendant did not provide any testimony or evidence that she provided the Plaintiff with a forwarding address as required by the statute; therefore she cannot recover the double damages.

> The security deposit procedure provisions of the Landlord-Tenant Act, effective November 4, 1974, imposed specific, articulated criteria upon both the landlord and tenant with regard to the assessment of tenant damages as well as the return of security deposit.
>
> The trial court's judgment is inconsistent, as a matter of law, with the specific provision of R.C. 5321.16(B) requiring the tenant to deliver a notice in writing of his forwarding or new address.
>
> This section further identifies the specific consequence of failure to provide such address, i.e., the tenant is not entitled to R.C. 5321.16(C) damages and attorneys fees.
>
> Prescott v. Makowski (1983), 9 Ohio App.3d 155, is inapposite. The Cuyahoga Court of Appeals based its decision on the fact that the landlord had actual knowledge of the former tenant's new address. Prescott, 9 Ohio App.3d at 156. In the instant case, however, the trial court did not find that the landlord-appellant had actual knowledge of appellees' forwarding address, but that the landlord had reasonable grounds to believe 'the tenants could be contacted through a local business.' The trial court would require landlords to exercise reasonable efforts to locate their former tenants; Precott did not place such a requirement on landlords.
>
> Tenants must strictly comply with the dictates of R.C. 5321.16(B) unless the landlord has actual knowledge of the forwarding address. cf. Sherwin v. Cabana Club Apartments (1980), 70 Ohio App.2d 11, 17; Goldstein v. Spitz (1986), 30 Ohio App.3d 246, 248; Seymour v. Ernsthausen (Feb. 14, 1986), Fulton App. No. F-85-7, unreported (holding that 'simply leaving behind, on the kitchen counter, a piece of cardboard with an address scrawled upon it' did not satisfy R.C.5321.16(B)). ***Waldenmyer Enterprises v. Bolek,*** *Not Reported in N.E.2d, 1987 WL 11872 Ohio App., 1987 May 28, 1987 (Approx. 1 page).*

The Defendant is entitled to recover her security in the amount $800.00 plus attorney fees. Counsel may submit an affidavit to substantiate the amount of the fees incurred in this case.

JUDGMENT:

Judgment for the Defendant in the amount of $800.00 plus costs and interest. Counsel for the Defendant to submit an affidavit regarding legal fees and costs incurred as a result of Plaintiff's failure to appear at continued deposition.

RECOMMENDED:

RUBEN E. POPE, III
MAGISTRATE

APPROVED:

JUDGE RAYMOND L. PIANKA
CLEVELAND MUNICIPAL COURT
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 FUTHER INFORMATION, CONSULT THE ABOVE RULES OR SEEK LEGAL COUNSEL.

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SERVICE :

A copy of the Magistrate's Report and Recommendation was sent by ordinary U.S. mail on this 24 day of June, 2008, to the following:

apv

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