

JUDGMENT ENTRY RECEIVED  
FOR JOURNALIZATION

Cleveland Municipal Court  
Housing Division  
Judge Raymond L. Pianka

JAN 17 2012

EARLE B. TURNER, CLERK

Sloan, et al.,  
Plaintiff(s)

Date: January 11, 2012

-v-


Case No: 11-CVG-04935

Greathouse,  
Defendant(s)

JUDGMENT ENTRY; Release of Funds

Upon review, the Magistrate's Report is approved and confirmed. Therefore, the Court makes the following dispositions:

- Counterclaims dismissed without prejudice at defendant's request.
- Judgment is for plaintiff against defendant in the amount of \$1525.00 plus costs and interest from the date of judgment.
- Clerk of Courts is to release the funds on deposit under this case number to plaintiff in partial satisfaction of this judgment. The release may occur no sooner than the fifteenth day after journalization of this entry.

  
\_\_\_\_\_  
Judge Raymond L. Pianka  
Housing Division

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

Plaintiff pro se

William Sloan, et al.  
1914 Sagamore Drive  
Euclid, OH 44117

Defendant's counsel

Andrew S. Pollis  
Milton A. Kramer Law Clinic Center  
11075 East Boulevard  
Cleveland, OH 44106

this 12 day of January 12, 2012

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MAGISTRATE'S REPORT FILED

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Housing Division  
Judge Raymond L. Pianka

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Greathouse,  
Defendant(s)

Magistrate's Decision

{¶1.} This matter came for trial August 23, 2011 before Magistrate Sandra R. Lewis, to whom it was assigned by Judge Raymond L. Pianka pursuant to Ohio Rule of Civil Procedure 53, to take evidence on all issues of law and fact regarding the parties' claims for money damages. Plaintiff present pro se. Defendant failed to appear personally, but was represented by Mr. Pollis.

{¶2.} Prior to commencement of trial, the Court dismissed defendant's counterclaims without prejudice, at defendant's request. The matter proceeded to trial on plaintiff's claims for money damages.

#### FINDINGS OF FACT

{¶3.} Plaintiff is the owner of the six-suite residential rental premises at 3024 East 116th Street, Cleveland, OH 44120.

{¶4.} In August 2010, the parties entered into a written rental agreement for unit #2 of the premises; a copy of that agreement was admitted into evidence as Exhibit A.

{¶5.} Defendant made a security deposit of \$475.00.

{¶6.} Rent was \$475.00 per month. Rent was due on the thirtieth of each month, paying for the next calendar month.

{¶7.} Defendant last paid rent to plaintiff for April 2011, with a balance due of \$100.00.

{¶8.} On May 16, 2011, defendant made a deposit of \$475.00 under this case number as bond. No further deposits under the case number were made.

{¶9.} In July 2011, the Court granted judgment for defendant on the claim for possession. At the time of trial, defendant remained in the premises.

## CONCLUSIONS OF LAW

{¶10.} In the second cause of action, plaintiff seeks back rent, late fees, and property damages beyond normal wear/tear.

{¶11.} With respect to the claim for rent, defendant last paid rent directly to plaintiff for the month of April 2011. The Court finds defendant liable for rent for the months of May through August 2011 totaling \$1900.00 (\$475.00 per month X four months). In addition, defendant is liable for the \$100.00 balance remaining on the rent account as of the last direct payment. The total back rent owed by defendant is \$2000.00.

{¶12.} With respect to the late fee, plaintiff argues the imposition of the late fee is an enforceable lease provision. Defendant argues that the fee is a penalty, and so is unenforceable.

{¶13.} Under Ohio case law, penalty provisions are considered unconscionable. *Sampson Sales, Inc. v. Honeywell* (1984), 12 Ohio St.3d 27, 12 OBR 23, 465 N.E.2d 392. Unconscionable provisions are unenforceable in residential rental agreements. R.C. 5312.14. If the Court finds the late fee provision in this case to be a penalty, the provision will be unenforceable.

{¶14.} In determining whether a fee is a penalty, the Court considers whether the language used by the parties is clear and unambiguous. If it is, the provision is enforceable provided (1) the amount of the fee bears a reasonable proportion to the loss which might foreseeably be sustained, (2) actual damages would be uncertain as to amount and difficult to prove, and (3) the contract as a whole is not manifestly unconscionable, unreasonable, and disproportionate in amount (as to suggest it was not the true intention of the parties). *Berlinger v. Surburban Apt. Mgt. Co.* (1982), 7 Ohio App.3d 122, 7 O.B.R. 155, 454 N.E.2d 1367.

{¶15.} In this case, the language of the provision is clear and unambiguous. Therefore, it is enforceable if it meets the three requirements of *Berlinger*.

{¶16.} Plaintiff produced no evidence of the amount of the fee in relation to loss sustained. In fact, when questioned by counsel, plaintiff stated that the loss was simply not having the money when due. There was no evidence of what plaintiff's bank would charge in the event plaintiff's own checks were dishonored or plaintiff's account was overdrawn due to the lack of the funds. Absent evidence of foreseeable losses, the Court cannot conclude that the fee was in reasonable proportion to the loss which might be sustained.

{¶17.} Nor did plaintiff produce evidence that actual damages would be uncertain or difficult to prove. Plaintiff did not identify any type of loss he would sustain in the event of a late payment. Having failed to suggest any actual damages he might suffer, the Court cannot find that the actual damages plaintiff likely would suffer would be uncertain as to amount or difficult to prove.

{¶18.} There was no evidence that the written rental agreement as a whole was unconscionable or unreasonable. However, the requirements of *Berlinger* are in the conjunctive; plaintiff having failed to show meet the first two of the three requirements, the late fee provision is unenforceable.

{¶19.} The Court does note that defendant cites to a number of cases where late fees ranging from \$1500 to \$60 per month were unenforceable. See *Berlinger*, supra (\$1500 per month for mere presence of motorcycle), *Siara Management v. Nedley* (October 15, 1992), Eighth Dist. No. 61433 (\$100 per month late fees in relation to \$618 monthly rent), and *200 West Apartments v. Foreman* (September 15, 1994), Eighth Dist. No. 66107 (\$60 per month late fees in relation to \$225 monthly rent). However, a court might well find that a monthly late fee of \$25 is proportional to a monthly rent amount of \$475.

{¶20.} The conclusion that the late fee provision is a penalty is consistent with the language of the written rental agreement itself. The rental agreement, drafted by plaintiff, uses the term "penalty" in both the title of the late payment provision and in the text of the provision regarding a "penalty of \$25.00" for late payment. The plaintiff's own characterization of the provision as a penalty indicates an intent to coerce performance or to punish.

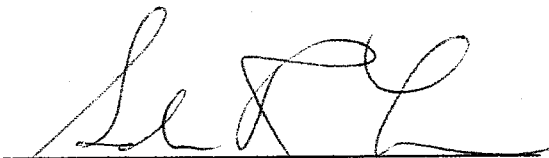
{¶21.} In light of plaintiff's own characterization of the provision as a penalty, the lack of evidence to establish the reasonableness of the amount in relation to foreseeable losses, and the lack of evidence to establish the uncertainty or difficulty of proof of losses, the Court finds that plaintiff failed to establish a legal basis for award of late fees in the present matter.

{¶22.} Turning to the claim for property damage, plaintiff sought recovery of the cost to repair a door at the premises. However, the premises is part of a building including six suites. Plaintiff failed to present evidence that defendant caused the damage to the door. Therefore, the Court finds that plaintiff failed to establish by a preponderance of the evidence that defendant was liable for damage to the door. There is no recovery on this claim

{¶23.} In summary, plaintiff is entitled to recover \$2000.00 in back rent. Defendant is entitled to credit of her security deposit of \$475.00. Offsetting plaintiff's recovery from defendant's credit, the Court finds for plaintiff against defendant in the amount of \$1525.00 plus costs and interest from the date of judgment. Counterclaim dismissed without prejudice at defendant's request.

{¶24.} Funds currently held on deposit under this case number are to be released to plaintiff in partial satisfaction of this judgment.

Recommended:

  
Magistrate Sandra R. Lewis

ATTENTION: A PARTY MAY NOT ASSIGN AS ERROR ON APPEAL ANY MAGISTRATE'S FINDING OF FACT OR CONCLUSION OF LAW UNLESS THE PARTY TIMELY AND SPECIFICALLY OBJECTS TO THAT FINDING OR CONCLUSION AS REQUIRED BY CIV. R. 53(E)(3). ALL OBJECTIONS TO THE MAGISTRATE'S DECISION MUST BE FILED IN WRITING WITHIN FOURTEEN DAYS OF THE JOURNALIZATION OF THIS DECISION. OBJECTIONS MUST BE FILED EVEN IF THE TRIAL COURT HAS PROVISIONALLY ADOPTED THE MAGISTRATE'S DECISION BEFORE THE FOURTEEN DAYS FOR FILING OBJECTIONS HAS PASSED. OBJECTIONS MUST COMPLY WITH THE OHIO RULES OF CIVIL PROCEDURE, AND THE LOCAL RULES OF THIS COURT. FOR FURTHER INFORMATION, CONSULT THE ABOVE RULES OR SEEK LEGAL COUNSEL.

SERVICE: A copy of this Magistrate's Decision was sent via regular U.S. Mail to:

Plaintiff

William Sloan, et al.  
1914 Sagamore Drive  
Euclid, OH 44117

Defendant's counsel

Andrew S. Pollis  
Milton A. Kramer Law Clinic Center  
11075 East Boulevard  
Cleveland, OH 44106

this 12<sup>th</sup> day of January 12.

