

JANEL M. HERRIGAN
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SUMMIT COUNTY
CLERK OF COURTS
IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MARY SLIWINSKI, <i>et. al.</i> ,)	CASE NO. CV 2006-02-0884
)	
Plaintiffs,)	JUDGE COSGROVE
)	
-vs-)	
)	
CAPITAL PROPERTIES MANAGEMENT)	
LTD. <i>et. al.</i> ,)	<u>ORDER</u>
Defendants.)	

This matter comes before the Court on Defendants' Motion to Dismiss. Upon consideration, the Court finds this Motion to be not well taken, and the Motion is DENIED.

FACTS

For purposes of a Motion to Dismiss, this Court accepts the factual allegations of Plaintiffs as true. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. Plaintiffs are tenants of an apartment building in Copley, Ohio, known as the Hunt Club Apartments.¹ Defendants are the owner and manager of that apartment building, and Plaintiffs' landlord. Prior to January, 2004, Defendants provided water and sewage service to the Hunt Club Apartments as part of the tenants' rent.

Prior to January, 2004, Defendants installed meters and began charging tenants of the Hunt Club Apartments. Defendants charged each tenant for their metered use, at a rate above the retail rate for public utilities. Defendants installed meters which were not properly inspected and sealed as required by statute. Defendants also did not register these meters with the Department

¹ The named Plaintiffs assert this matter as a class action. This Court has not yet certified that class. For purposes of this Order, and without deciding, the Court will accept the class as valid and certifiable under Civ.R. 23.

of Agriculture, and did not use qualified personnel to install the meters. These meters did not meet required specifications and tolerances, and were not properly calibrated.

In January 2004, Defendants required that all tenants enter into separate contracts for water and sewer services as a condition of renewing their leases. Under these contracts, tenants paid for water and sewerage at a price above the retail price of the public utility, and the costs were based on individual usage as measured by the installed meters.

On February 8, 2006, Plaintiffs entered a Complaint, and amended this Complaint on July 16, 2006. Plaintiffs assert that Defendant's improper installation of unregistered, uninspected, and improperly calibrated meters makes Defendants' sale of water and sewer services illegal. Plaintiffs further assert that the surcharge to Plaintiffs' water and sewer costs beyond the retail pricing is in violation of the Joint Economic Development District agreement between the City of Akron and Copley Township. Plaintiffs assert that this agreement restricts Defendants from charging greater than the retail public utility rate. Plaintiffs further claim that by taking over the metering, Defendants have become a public water system, providing water and sewer services to Plaintiffs, and that this public water system is operated without a license and in violation of health and environmental statutes. Finally, Plaintiffs assert claims for violation of proper consumer sales practices, conspiracy to restrict trade, violation of the Landlord-Tenant Act, and for fraud. Plaintiffs seek damages in excess of \$200,000 plus costs and attorneys' fees, as well as declaratory and injunctive relief.

Concurrent with this action, Plaintiffs to this case brought an administrative action before the Public Utilities Commission of Ohio (hereinafter PUCO), asserting that Defendants had become a public utility under the governance of PUCO. On May 10, 2006, this action was stayed pending resolution of the action before PUCO. PUCO ultimately dismissed Plaintiffs

claim, finding that Defendants were not a public utility, and therefore PUCO had no jurisdiction. This decision was appealed to the Supreme Court of Ohio, who upheld PUCO's dismissal for lack of jurisdiction on June 28, 2006. *Pledger v. PUC*, 109 Ohio St.3d 463.

On September 1, 2006 Defendants entered a Motion to Dismiss Plaintiffs' Amended Complaint, asserting that Plaintiffs have failed to state a claim upon which relief can be granted. On September 14, 2006, Plaintiffs replied in opposition to this Motion. Defendants entered a reply in support of their Motion on September 25, 2006.

LAW AND ANALYSIS

A motion to dismiss a complaint for failure to state a claim upon which relief can be granted tests the sufficiency of a complaint. In order to prevail, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to relief. *O'Brien v. University Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, at syllabus. The court must construe the complaint in the light most favorable to the plaintiff, presume all of the factual allegations in the complaint as true, and make all reasonable inferences in favor of the plaintiff. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d at 192.

Defendants claim that this matter was decided in their favor by the administrative action brought before PUCO. Defendants assert that by dismissing Plaintiffs' complaint before it, PUCO held, and Ohio's Supreme Court affirmed, Defendants' right to resell water and sewer services. This is patently incorrect. PUCO dismissed Plaintiffs' claim based on a lack of subject-matter jurisdiction, and did not reach the merits of any of Plaintiffs' assertions. PUCO held, and the Supreme Court affirmed, that Defendants had not become a public utility through the metering of the water in the Hunt Club Apartments. Therefore, PUCO did not have jurisdiction over the matter. These cases established no substantive precedent regarding any of

Plaintiffs' claims. This Court finds that Plaintiffs have articulated facts, which if accepted as true would sustain each claim brought against Defendants.

As to Plaintiffs' claims based on failure to register, certify and maintain the water and sewer meters, Defendants assert that none of the statutes Plaintiffs rely upon create a private cause of action, and therefore the claims must be dismissed. Plaintiffs respond that they do not seek damages based on the violation of the statute directly, but seek to void an illegal contract due to improperly installed and calibrated water and sewer meters. Plaintiffs further assert that this Court has the authority to determine whether these meters are installed and maintained according to statute, while Defendants assert that the Ohio Revised Code specifically reserve enforcement of these statutes to executive officials. This Court need not address these claims at this time.

For consideration of this Motion to Dismiss, this Court accepts as true the allegations of the Plaintiffs that these meters were knowingly installed in violation of statute.² As such, the contracts which require that water and sewer payments be based upon these meters are void. Defendants' argument that this recourse would not be available to Plaintiffs seems unfounded. Plaintiffs assert facts that demonstrate an intentional effort to bind the tenants to contracts for the supply of water through meters installed in violation of numerous regulations. Such a contract is against public policy and is therefore void. *Diversified Property Corp. v. Winters Nat'l. Trust Co.* (1967), 13 Ohio App.2d 190, 194. Therefore, Defendants' Motion to Dismiss is Denied as to the claims based on failure to properly install, register, and maintain the meters as required by statute.

² These are facts which must be demonstrated as true by a preponderance of the evidence at trial, and the method for such a determination remains an open question at this time.

Plaintiffs have asserted claims under Ohio's consumer sales practices act, and under Ohio's landlord-tenant law. Defendants assert that the actions in this case fall solely within the landlord-tenant act, and that any claim under the consumer sales statutes is preempted. Further, Defendants point to non-binding authority which they argue validates the practices undertaken by Defendants in this case. This court finds neither of these defenses persuasive. This court finds first that the sale of water and sewerage may be an action unrelated to the landlord-tenant relationship, and therefore is not necessarily preempted by the landlord-tenant act.

Next, even under the landlord-tenant act, Plaintiffs have presented facts which, when accepted as true, may violate that act. The parties agree that O.R.C. § 5321.04(A)(6) requires that a landlord provide water to its tenants. Defendants rely on precedent from the tenth district for their argument that while the landlord tenant act requires that a landlord supply running water, the landlord may supply this water at the tenant's cost. *Jenkins v. Roger C. Perry & Co.* (1992), 83 Ohio App.3d 234, 237. However, *Jenkins* specifically excluded any claim that the tenants were being overcharged for the utility. *Id.* at 235. Plaintiffs have articulated facts which demonstrate that Defendants are supplying water through improperly calibrated meters at a price greater than that charged by the public utility. Even if this Court agrees with the holding in *Jenkins*, Defendants have not shown that a landlord may supply water to its tenants through unregulated meters for the landlord's own profit.

Finally, Plaintiffs have articulated facts demonstrating all elements of fraud, and a violation of Ohio's anti-trust law. Plaintiffs have articulated facts that would demonstrate a knowledge and intent to deceive and to restrict trade. Defendants have not presented any compelling defense to either of these claims, and this Court denies the Motion to Dismiss as to these claims.

CONCLUSION

Accepting the facts as asserted by Plaintiffs to be true, this Court finds that Plaintiffs have sustainable claims as to all counts asserted in their Complaint. Therefore, Defendants' Motion to Dismiss is Denied.

IT IS SO ORDERED.


JUDGE PATRICIA A. COSGROVE

cc: Attorney John Wood
Attorney Mark Phillips/Attorney David Mayo