IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

NABIHAH AHMED,	)	
PLAINTIFF,	)	CASE NO. SC 082744
	)	SMALL CLAIMS
vs.	)	
	)	HEARING
TRACY BARKLOW, ET AL,	)	MEMORANDUM
DEFENDANTS.	)	

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COMES NOW Plaintiff Nabihah Ahmed, by and through her attorney, Christopher Warnock, and submits her Hearing Memorandum, in order to inform Defendants with regard to some of the legal and factual arguments Plaintiff intends to raise at trial, to assist the presiding judicial officer at trial and to preserve legal and factual issues for appeal.

I. INTRODUCTION

The instant case is part of a coordinated effort on the part of the Tenants' Project and its affiliated attorneys to provide fair play for both landlords and tenants in Iowa City. Plaintiff in the instant action is Nabihah Ahmed, who was a tenant ("Tenant") at 905 N. Dodge #5 in Iowa City. Her landlord was Defendant Tracy Barkalow, who uses Defendant Big Ten Property Management LLC as his rental management entity and TSB Holdings LLC as his property holding entity. In this memorandum Tenant will collectively refer to Mr. Barkalow and his entities as "Landlord".[1]

As the evidence at trial will show Landlord unlawfully fined Tenant for leaving their window open. Landlord refused to return Tenant's security deposit or provide a statement showing the reasons for withholding within 30 days after the termination of the

[1] Mr. Barkalow is a business associate of the Clark Family, the largest landlord in Iowa City, uses their standard lease and is being defended in this action by James Affeldt, their counsel.

tenancy. When Tenant filed suit, Landlord then wrongfully retained portions of the security deposit and claimed that negotiation of the security deposit check constituted an accord and satisfaction.

II. LANDLORD UNLAWFULLY FINED TENANT FOR LEAVING THEIR WINDOW OPEN

As the evidence as trial will show, Landlord deducted $150 for "rent past due" from Tenant's security deposit. That $150 charge resulted from a "fine for open window on 11/22/2011". Under Landlord's standard lease, section 42(a) $150 is "…charged to all apartments with open windows when the heat is on."

This is clearly a penalty and not a charge for damages as Landlord himself characterizes it as a "fine". It is well settled in leases, as in any contract, that a party may not use a lease to profit from a breach of contract by charging a penalty,

> A party seeking to recover for breach of contract is entitled only to be placed in as good a position as the party would have occupied had the contract been performed. *Midland Mut. Life Ins. Co. v. Mercy Clinics*, 579 N.W.2d 823, 831 (Iowa 1998). A party is not entitled to use the breach to better its position by recovering damages not actually suffered. Id. These propositions are equally true when the contract calls for liquidated damages. *Liquidated damages are permitted in contracts as long as they do not constitute a penalty*. *Aurora Bus. Park Ass'n v. Michael Albert, Inc.*, 548 N.W.2d 153, 156 (Iowa 1996); Restatement (Second) of Contracts § 356 (1981). Whether a contract provision is a valid liquidated damages clause or an enforceable penalty is a question of law. *Aurora Bus. Park*, at 155. Liquidated damages are not penalties if they are set at an amount reasonable in light of the anticipated or actual loss caused by the breach. *Rohlin Constr. Co. v. City of Hinton*, 476 N.W.2d 78, 80 (Iowa 1991). In this case, the amount of liquidated damages provided by the contract was not reasonable in light of the actual loss sustained by the breach.

Emphasis supplied, *Grunwald v. Quad City Quality Service, Inc*., 662 N.W.2d 370 at ¶¶31-2. (Iowa App. 2003).

Clearly Landlord is seeking to deter tenants from leaving their windows open and to punish them if they do,

> The parties to a contract may effectively provide in advance the damages that are to be payable in the event of breach as long as the provision does not disregard the principle of compensation. The enforcement of such provisions for liquidated damages saves the time of courts, juries, parties and witnesses and reduces the expense of litigation. This is especially important if the amount in controversy is small. *However, the parties to a contract are not free to provide a penalty for its breach*. The central objective behind the system of contract remedies is compensatory, not punitive. Punishment of a promisor for having broken his promise has no justification on either economic or other grounds and a term providing such a penalty is unenforceable on grounds of public policy.

Emphasis supplied, *Rohlin Construction v. City of Hinton*, 476 N.W.2d 78 (Iowa 1991).

In addition to violating the law with regard to liquidated damages and penalties, the Iowa Supreme Court has held that under the Uniform Landlord Residential Landlord Tenant Act ("URLTA") codified at Iowa Code §562A *et seq*, that when a lease is breached a landlord may only recover their actual damages,

> …we agree with [the tenant] that the *landlord is not entitled to recover if no evidence substantiates that actual damage has been sustained*. Section 562A.32 provides the landlord "may have a claim . . . for actual damages for breach of the rental agreement." (Emphasis added.) Even though the aim of the small claims statute is "to secure adjudication of demands for limited amounts quickly, simply, and inexpensively," *Roeder*, 321 N.W.2d at 4, "[j]udgment shall be rendered, based upon . . . a preponderance of evidence." Iowa Code § 631.11(4). Here, the landlord did not present any testimony or other evidence to support the value of its demand for debris removal. In fact, the landlord did not present evidence that Frost's debris was removed. *Absent evidence that actual damages were sustained*, it was error to award any sum for debris removal.

Emphasis supplied, *D.R Mobile Home Rentals v. Frost*, 545 N.W.2d 302 at ¶34-5 (Iowa 1996).

Without any damages due to the window being open Landlord is not entitled to recover for breach of the lease. This is not, however, to argue that the Landlord is without any legal remedy. Under Iowa Code § 562A.27, the Landlord could have issued a seven day letter to the tenant insisting that Tenant not leave their window open and if Tenants continued to do so Landlord could terminate the Tenant's lease. As noted, in addition, if there was actual damage due to the window being open, under Iowa Code §§562A.27&562A.32, the Landlord could recover their actual costs. What Landlord is not permitted to do, however, is punish its tenants with fines or attempt to deter them with penalties.

Finally, charging $150 as a penalty for leaving a window open is unconscionable under Iowa Code § 562A.7 and this Court should not enforce it,

> In considering a claim of unconscionability, we examine the following factors: (1) assent, (2) unfair surprise, (3) notice, (4) disparity of bargaining power, and (5) substantive unfairness. *Gentile v. Allied Energy Prods., Inc*., 479 N.W.2d 607, 609 (Iowa 1991). An agreement is substantively unfair ―if it is _such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.' *Casey v. Lupkes*, 286 N.W.2d 204, 207 (Iowa 1979) (citations omitted). The basic test is whether, in light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . The principle is one of prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.

Frontier Leasing Corp. v. Waterford Golf Associates, L.L.C., No. 0-634 / 10-0019 53-4 , 2010 WL. 4484390 at ¶53-4. (Iowa App. 2010).

The one sided nature of this lease is clear. The lease provisions are in tiny print in a boilerplate contract of adhesion provided to tenants on a "take it or leave it" basis. *Gentile v. Allied Energy Prods., Inc*.,479 N.W.2d 607, 609 (Iowa Ct. App. 1991). The $150 pet penalty, in common with many other portions of Landlord's lease are forced upon tenants and are oppressive. This Court should refuse to enforce this provision because it is clearly unconscionable.

III. FAILURE TO RETURN SECURITY DEPOSIT OR PROVIDE WITHHOLDING STATEMENT

The Uniform Residential Landlord Tenant Act ("URLTA") codified at Iowa Code §562A et seq, provides very clear requirements with regard to security deposits.

> A landlord shall, within thirty days from the date of termination of the tenancy and receipt of the tenant's mailing address or delivery instructions, return the rental deposit to the tenant or furnish to the tenant a written statement showing the specific reason for withholding of the rental deposit or any portion thereof.

Iowa Code §562A.12(3).

As the evidence at trial will show Tenant's tenancy terminated at the end of July 2012. Tenant had provided Landlord with their correct mailing address. When more than 30 days elapsed after the end of the tenancy, Tenant still had not received either the security deposit or the security deposit withholding statement. Tenant contacted Landlord, confirmed that the Landlord had the correct mailing address and informed Landlord that they had not received either the security deposit or security deposit withholding statement.

Landlord insisted that the security deposit check had been mailed to Tenant. Landlord insisted that Tenant pay a $75 fee in order to receive their security deposit,

> Per Iowa Law our company sent a deposit return statement to you on August 20, 2012 to your address on file. Our company has not received that return back in the mail so that makes it clear to us that it was received, delivered or is a US Post Office error. Our company manager has instructed me to let you know that we can stop payment and reissue a new check to you but the bank fees and costs associated with doing that are $75.00. If you agree that we can deduct $75.00 from your check and process and new return please reply back to us in an email approving that and we will do so. If not then we will wait and see when the mail surfaces the Post Office does not loose mail so it has to be somewhere.

September 21, 2012 Landlord e-mail.

Tenant then requested that Landlord send the security deposit withholding statement. Landlord refused to provide either the security deposit withholding statement or security deposit unless Tenant paid a $75 fee.[2]

Under the URLTA Landlord is required to either return Tenant's security deposit or provide a statement of amounts withheld within 30 days after the termination of the tenancy. The statutory requirement is not that landlords attempt to return the security deposit or make best efforts to do so, but requires that landlords actually "return the rental deposit to the tenant". Iowa Code §562A.12(3).

Landlord knew that the security deposit had not been received and yet still refused to return it. Landlord insisted on a $75 fee[3] for re-issuance of the security deposit check, yet there was no evidence that Tenant had received the earlier check

[2] Landlord finally provided partial return of the security deposit on or about October 10, 2012 claiming via e-mail that the US Postal Service had declared Tenant's earlier, verified mailing address, "non-deliverable" and blaming the USPS for the original failure to return the security deposit.

[3] Even if justified a $75 fee is clearly excessive for stopping payment and check re-issuance.

or that Tenant was in any way responsible for its loss. Landlord even acknowledges in its e-mail that the security deposit might be lost in the mail! Clearly, under the statute, once he was made aware that Tenant had not received the deposit, absent some evidence that it was Tenant's fault, Landlord should have immediately sent a new check free of charge to Tenant.

Landlord's refusal to provide the security deposit withholding statement is even more egregious. Landlord lacks even the fig leaf of "bank charges" to justify not providing Tenant with a list of the amounts withheld. By insisting that Tenant pay $75 even to get the security deposit withholding statement Landlord clearly reveals his true motivation, extracting the maximum, and in this case, illegal, profit possible from his tenants.

The URLTA further states,

> A landlord who fails to provide a written statement within thirty days of termination of the tenancy and receipt of the tenant's mailing address or delivery instructions shall forfeit all rights to withhold any portion of the rental deposit…. The bad faith retention of a deposit by a landlord, or any portion of the rental deposit, in violation of this section shall subject the landlord to punitive damages not to exceed two hundred dollars in addition to actual damages.

Iowa Code §§562A.12(4)&(7).

Landlord violated §562A.12(4) since he knowingly refused to provide either the security deposit or security deposit withholding statement within 30 days. Landlord should forfeit any rights to the security deposit. Landlord violated §562A.12(4) since his refusal was clearly in bad faith. The withholding was knowing and willful, there was no evidence that Tenant was responsible for the non-receipt and no basis whatsoever for

refusing to provide the security deposit withholding statement. Landlord should be assessed $200 in punitive damages.

IV. ACCORD & SATISFACTION?

Landlord amended his answer and claimed that because he had written "paid in full" on the memorandum line of the security deposit check, dated October 10, 2012, that this constitutes an accord and satisfaction.

> To constitute an accord and satisfaction, where there is a bona fide dispute, it is necessary that the money should be offered in satisfaction of the claim, and the offer accompanied with such acts and declarations as amount to the condition that, if the money is accepted, it is accepted in satisfaction, and such that the party to whom it is offered is bound to understand therefrom that, if he takes it, he takes it subject to such conditions. *A party to whom an offer is thus made has no alternative but to refuse it or accept it upon such conditions, and if he takes it his claim is canceled.*

Emphasis supplied. *THG/Apartments Near Campus v. Blette*, No. 0-237/09-0828 Iowa App. 06/16/2010) at ¶33 citing *Olson v. Wilson & Co*, 58 N.W.2d 381, 388 (1953).

Accord and satisfaction always puts the receiver of the offer in a dilemma, but here Landlord has upped the ante. Put baldly Landlord insists by using the doctrine of accord and satisfaction he can refuse to give back Tenant's security deposit, as he is required by law to do, unless Tenant waives her statutory rights and all claims.

Iowa Code §562A.12 sets out the framework that governs security deposits. Landlords are required to return the deposit within 30 days or give the basis for their refusal. Deductions for security deposits can only be made for certain specified purposes and in an action concerning the security deposit the burden is on the Landlord, by the preponderance of the evidence, to justify their deductions.

Landlord is once again putting self imposed conditions on the fulfillment of his statutory obligations. Landlord acknowledges that Tenant was entitled to partial repayment of their security deposit, but to receive the money that even Landlord agrees is hers Tenant must waive all further claims. If Tenant does not wish to waive her claims or thinks she is entitled to a larger refund, then, according to Landlord, she does not even get the money Landlord feels she is entitled to as she must return the security deposit check. Presumably having made his accord offer and having it rejected Landlord could then keep all of Tenant's security deposit unless Tenant filed suit.

This is clearly not what is complemented by Chapter 562A. The statute clearly places the burden on landlords to quickly return deposits and to justify deductions, both in writing to the tenant and in court. If Landlord fails to comply with the statute he loses all his rights over the security deposit and is subject to punitive damages. Rather than comply with the URLTA Landlord has created his own win/win setup where (1) if he gives back whatever amount he wishes to the tenant he is completely liability free or (2) he keeps the whole security deposit and the tenant has to sue him for it, giving him another bite at the apple at trial.

Iowa Code §562A.3 states that, "*Unless displaced by the provisions of this chapter*, the principles of law and equity in this state… shall supplement its provisions." Emphasis supplied. With regard to the initial return of the security deposit, Tenant asserts that the URLTA overrides the common law doctrine of accord and satisfaction and that landlords may not require tenants to waive all claims as a condition to fulfillment of their statutory obligation to return security deposits.

We should be very clear about the far reaching and drastic implications of what Landlord is asserting. If Landlord is correct and he can use the doctrine of accord and satisfaction along with the initial security deposit return, then an enormous loophole has been created in landlord tenant law. All rights of the tenant evaporate, all statutory violations, all common law breaches and torts are eliminated and all sins committed by the landlord are washed clean by accord and satisfaction. Once the tenant accepts even the tiniest of partial payments, it is game over. If Landlord is correct, then tenants, often penniless undergraduates, are subjected to a particularly cruel choice: take a small amount of money now and lose all rights, or keep your rights and get nothing.

We can also be sure that if this Court decides to side with Landlord that accord and satisfaction will be widely used against tenants. As noted Landlord is a business associate of the Clark Family and is represented by their counsel, so there can be no doubt that the largest landlord in Iowa City, with over 1,000 tenants, will be quickly apprised of a new weapon in their arsenal.

This Court should reject the use of accord and satisfaction and insist that the URLTA be the sole governing authority for initial security deposit returns.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of this document was served on February 13, 2013, via e-mail upon all attorneys of record who have not waived their right to service and/or pro se parties at their respective addresses as shown herein:

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