

IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

Brooke Staley, et al.,)
)
Plaintiffs,)
) No. LACV073821
vs.)
) RULING
Tracy Barkalow, et al.,)
)
Defendants.)

FILED
2014 MAR 18 AM 11:14
CLERK OF DISTRICT COURT
JOHNSON COUNTY, IOWA

Hearing was held on January 27, 2014, on Plaintiffs' Second Motion for Summary & Declaratory Judgment and Class Certification, and on Defendants' Cross-Motion for Summary Judgment. Appearances were made by Attorney Christopher Warnock on behalf of Plaintiffs, and by Attorney Robert Hogg on behalf of Defendants. Having considered the file, relevant case law, and written and oral arguments of counsel, the Court hereby enters the following ruling:

FACTUAL AND PROCEDURAL BACKGROUND

The Court incorporates as if set forth in full herein the content of Judge Paul D. Miller's May 17, 2012 Ruling on Plaintiffs' First Motion for Certification as a Class Action and Plaintiffs' First Motion for Partial Summary Judgment and Declaratory Judgment. Judge Miller's Ruling was appealed by Plaintiffs, and the Iowa Court of Appeals issued an opinion on May 30, 2013, reversing and remanding Judge Miller's Ruling.

There essentially were three main areas addressed by the Court of Appeals in its opinion, which can be found at Staley v. Barkalow, No. 12-1031, 2013 WL 2368825 (Iowa App. 2013). First, the Court of Appeals found that a landlord's inclusion of a provision prohibited in Iowa Code § 562A.11(1), even without enforcement, can be a "use" under Iowa Code § 562A.11(2). The Court of Appeals held that when read together, these subsections make a landlord liable for the inclusion of prohibited provisions in a rental agreement, even without enforcement, if the landlord's inclusion was willful and knowing. The Court of Appeals stated that in order to recover damages, the tenant has the burden of proving the landlord willfully used, i.e., willfully included, provisions known by the landlord to be prohibited. Second, the Court of Appeals found that the district court abused its discretion in failing to grant tenants' request for certification of a class, and the Court of Appeals remanded for further proceedings consistent with the opinion. Third, the Court of Appeals found that, on remand, the district court should consider whether the challenged lease provisions are provisions that "shall not be included," and whether the inclusion was made willfully and knowingly.

Following remand, Plaintiffs filed a Third Amended & Substituted Petition at Law & Equity. In their Third Amended & Substituted Petition, Plaintiffs contend Defendant Tracy Barkalow, as landlord, adopted a number of general policies, applicable to all or a large number of tenants, that violate the Uniform Residential Landlord and Tenant Law codified at Iowa Code chapter 562A, as well as the Iowa City Housing Code and the common law implied warranty of habitability. Plaintiffs allege the landlord has made clear his general policies by enforcing them

against tenants and/or publishing them in standardized leases and lease rules. Plaintiffs further allege they have been damaged as a result of the landlord's actions. Plaintiffs seek a declaratory judgment finding that the landlord personally, and acting through his business entities (the other named Defendants), has:

- a. Violated Iowa Code § 562A.7 by executing and using leases and lease rules with unconscionable lease provisions and by enforcing said provisions.
- b. Violated Iowa Code § 562A.11 by executing and using leases and lease rules that forego the tenants' rights under Iowa Code chapter 562A and include indemnification and exculpation clauses.
- c. Violated Iowa Code § 562A.12(3) and (7) by executing and using leases and lease rules that wrongfully withhold the tenants' security deposits, by enforcing said provisions, and by doing so in bad faith.
- d. Violated Iowa Code § 562A.14 by executing and using leases that allow the landlord to fail, at the commencement of lease terms, to deliver possession of the premises to the tenant in compliance with Iowa Code § 562A.15.
- e. Violated Iowa Code § 562A.15 by executing and using leases that allow the landlord to fail to maintain fit premises and by enforcing said provisions.
- f. Violated Iowa Code § 562A.17 by executing and using leases and lease rules that require tenants to exceed their legal responsibilities and by enforcing said provisions.
- g. Violated Iowa Code § 562A.18 by executing and using lease rules that were for an improper purpose, unfair, unreasonable, and evaded the obligations of the landlord, and by enforcing said rules.
- h. Violated Iowa Code § 562A.19 by executing and using leases and lease rules that allow the landlord to enter the tenants' units without proper notice.
- i. Violated Iowa Code § 562A.22 by executing and using leases and lease rules that waive the rent abatement required under Iowa Code § 562A.22(1) and by enforcing said provisions.
- j. Violated Iowa Code §§ 562A.27, 562A.29, 562A.32, 562A.34 and 562A.35 by executing and using leases and lease rules that include penalties and provide for fees and charges that exceed actual damages.
- k. Violated his contractual obligations to the tenants by enforcing unlawful lease provisions, general policies and rules.
- l. Violated the Iowa City Housing Code §§ 17-5-19 and 17-5-20 by executing and using leases and lease rules that require tenants to maintain and repair rental premises and by enforcing said provisions.
- m. Violated the implied warranty of habitability by executing and using leases and lease rules that deprive tenants of safe, sanitary, and clean rental premises and require tenants to maintain and repair rental premises and by enforcing said provisions.

In the pending Second Motion for Summary Judgment & Declaratory Judgment and Class Certification, Plaintiffs first argue that the landlord's leases and lease rules violate Iowa Code chapter 562A in that the landlord's standard lease includes illegal liability shifting and indemnification clauses; the standard lease includes illegal automatic cleaning provisions; the

standard lease includes illegal repair and maintenance shifting provisions; and the standard lease includes illegal fines, penalties, fees and charges exceeding actual damages.

Plaintiffs next argue that inclusion of the prohibited clauses by the landlord was knowing and willful.

Finally, with respect to the class action certification, Plaintiffs assert that pursuant to the Court of Appeals' opinion, the prerequisites for class certification have been established in this case, but if the Court finds that none of the challenged lease clauses in the landlord's lease are illegal, the Court then should deny certification or decertify the class.

Defendants have resisted Plaintiffs' Motion and have filed their own Cross-Motion for Summary Judgment. Defendants first argue that Plaintiffs' Motion for Summary Judgment fails because Plaintiffs have not provided a statement of undisputed facts as required by Iowa Rule of Civil Procedure 1.981.

Defendants next argue that there is no evidence that any of the challenged lease provisions are prohibited by Iowa Code chapter 562A, and thus Defendants are entitled to summary judgment in their favor. Defendants contend Plaintiffs have provided no evidence to support their assertion; Plaintiffs have provided no evidence that they ever were affected by the allegedly illegal exculpation and indemnity provisions; and Plaintiffs have failed to show that any of the allegedly illegal clauses are actually prohibited by Iowa Code chapter 562A. With respect to the indemnity clauses, Defendants assert that under Iowa law, a party cannot be indemnified for its own fault unless the agreement provides for such indemnity in clear and unequivocal language. Defendants claim that because Plaintiffs have failed to show legally and factually that the challenged provisions provide indemnity when Defendants would otherwise be liable under the law, Plaintiffs' Motion should be denied and Defendants' Motion should be granted. With respect to the cleaning fee provision, Defendants argue that Plaintiffs have not presented any evidence on this issue, and the purported "automatic cleaning fee provision" is not listed as a prohibited provision under Iowa Code § 562A.11(1). Defendants further argue the evidence is undisputed that Defendants provided to Plaintiffs the specific reason Defendants withheld their security deposits, and automatic cleaning provisions are not listed as prohibited provisions under § 562A.11. With respect to alleged illegal repair and maintenance shifting, Defendants argue there is no evidence that Defendants illegally shifted any responsibility for making repairs or maintenance to Plaintiffs, or that Plaintiffs were ever required to pay for any of the various repairs or were affected by the provision. With respect to the alleged illegal fines, penalties, fees and charges, Defendants argue that Plaintiffs have not provided any evidence to support this claim, and fines, penalties, fees and charges are not among the provisions that are listed as prohibited in § 562A.11.

Defendants' next argument is that there is no evidence that Defendants willfully used lease provisions known by the landlord to be prohibited, and thus Defendants are entitled to summary judgment in their favor.

Finally, Defendants argue that Defendants Big Ten Property Management, LLC and Tracy Barkalow are not properly named Defendants, and thus are entitled to summary judgment.

Defendants have submitted an affidavit from Tracy Barkalow in support of their Resistance and Cross-Motion.

Plaintiffs reply that pursuant to the opinion of the Court of Appeals, a lack of enforcement of certain clauses by Defendants does not preclude the Court from considering the legality of such clauses. Plaintiffs assert the only necessary facts are those cited by the Court of Appeals, as stipulated to by the landlord, that Plaintiffs are all present or past tenants with essentially the same lease, and the landlord has approximately eighty tenants with the same or substantially similar leases. Plaintiffs further assert that because the landlord's standard lease includes liability shifting and/or indemnification provisions, the standard lease violates chapter 562A; the automatic carpet cleaning provision in the standard lease is prohibited under chapter 562A because it is a lease provision that agrees to waive or to forego rights or remedies under the chapter; and the legality of the specific charges challenged by Plaintiffs should be determined by the Court. As to the alleged knowing and willful use of prohibited lease provisions, Plaintiffs contend Defendants were fully aware that the challenged provisions were illegal and should not have been included in the standard lease form. Further, as to the claim that Defendants Big Ten Property Management, LLC and Tracy Barkalow are improperly named as Defendants, Plaintiffs contend this issue is premature and should not be disposed of on summary judgment.

Defendants reply that Plaintiffs have not provided any evidence to support their claims, and there is no evidence that Plaintiffs even were aware that the challenged provisions were in their leases. Defendants contend that because Plaintiffs did not respond to Defendants' statement of facts, Defendants' statement of facts should be deemed unchallenged for the purposes of ruling on the Motions for Summary Judgment. Defendants also contend that Plaintiffs have failed to show that any of the challenged indemnity clauses would or could relieve the landlord of any liability arising under law; the allocation of financial responsibility is not prohibited by chapter 562A; Defendants did not believe any of the lease provisions were prohibited; to the extent Plaintiffs claim there is tort liability on the part of Defendants, Plaintiffs have not shown or attempted to show that their allegations of statutory violations would constitute torts under Iowa law; and Big Ten Property Management, LLC and Tracy Barkalow are entitled to summary judgment because Plaintiffs have not contradicted Tracy Barkalow's affidavit stating that based on the roles of the Defendants, there is no liability under these facts for Big Ten Property Management, LLC and Tracy Barkalow.

CONCLUSIONS OF LAW

The Court first considers the parties' Motions for Summary Judgment and Plaintiffs' Motion for Declaratory Judgment. "Summary judgment is appropriate if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." Kolarik v. Cory Intern. Corp., 721 N.W.2d 159, 162 (Iowa 2006) (citing Iowa Rule of Civil Procedure 1.981(3)). "Further considerations when reviewing a motion for summary judgment are summarized as follows:

'A factual issue is material only if the dispute is over facts that might affect the outcome of the suit. The burden is on the party moving for summary judgment to prove the facts are undisputed. In ruling on a summary judgment motion, the

court must look at the facts in a light most favorable to the party resisting the motion. The court must also consider on behalf of the nonmoving party every legitimate inference that can be reasonably deduced from the record.”

Id. (citing Estate of Harris v. Papa John’s Pizza, 679 N.W.2d 673, 677 (Iowa 2004) (quoting Phillips v. Covenant Clinic, 625 N.W.2d 714-717-18 (Iowa 2001))).

“To obtain a grant of summary judgment on some issue in an action, the moving party must affirmatively establish the existence of undisputed facts entitling that party to a particular result under controlling law.” McVey v. National Organization Service, Inc., 719 N.W.2d 801, 802 (Iowa 2006). “To affirmatively establish uncontroverted facts that are legally controlling as to the outcome of the case, the moving party may rely on admissions in the pleadings...affidavits, depositions, answers to interrogatories by the nonmoving party, and admissions on file.” Id. “Except as it may carry with it express stipulations concerning the anticipated summary judgment ruling, a statement of uncontroverted facts by the moving party made in compliance with rule 1.981(8) does not constitute a part of the record from which the absence of genuine issues of material fact may be determined.” Id. at 803. “The statement required by rule 1.981(8) is intended to be a mere summary of the moving party’s factual allegations that must rise or fall on the actual contents of the pleadings, depositions, answers to interrogatories, and admissions on file together with any affidavits.” Id. “If those matters do not reveal the absence of genuine factual issues, the motion for summary judgment must be denied.” Id.

“When two legitimate, conflicting inferences are present at the time of ruling upon the summary judgment motion, the court should rule in favor of the nonmoving party.” Eggiman v. Self-Insured Services Co., 718 N.W.2d 754, 763 (Iowa 2006) (citing Daboll v. Hoden, 222 N.W.2d 727, 733 (Iowa 1974) (“If reasonable minds could draw different inferences and reach different conclusions from the facts, even though undisputed, the issue must be reserved for trial.”)).

“However, to successfully resist a motion for summary judgment, the resisting party must set forth specific evidentiary facts showing the existence of a genuine issue of material fact.” Matter of Estate of Henrich, 389 N.W.2d 78, 80 (Iowa App. 1986). “[The resisting party] cannot rest on the mere allegations or denials of the pleadings.” Id.

Iowa Rule of Civil Procedure 1.1101 provides:

Courts of record within their respective jurisdictions shall declare rights, status, and other legal relations whether or not further relief is or could be claimed. It shall be no objection that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form or effect, and such declarations shall have the force and effect of a final decree. The existence of another remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The enumeration in rules 1.1102, 1.1103, and 1.1104, does not limit or restrict the exercise of this general power.

I.R.Civ.P. 1.1101 (2013).

“The purpose of a declaratory judgment is to determine rights in advance.” Bormann v. Board of Sup’rs in and for Kossuth County, 584 N.W.2d 309, 312 (Iowa 1998). “The essential difference between such an action and the usual action is that no actual wrong need have been committed or loss incurred to sustain declaratory judgment relief.” Id. at 312-13. “But there must be no uncertainty that the loss will occur or that the right asserted will be invaded.” Id. “As with a writ of certiorari, the fact that the plaintiff has another adequate remedy does not preclude declaratory judgment relief where it is appropriate.” Id.

“[D]eclaratory judgment is an action in which a court declares the rights, duties, status, or other legal relationships of the parties.” Dubuque Policeman’s Protective Ass’n v. City of Dubuque, 553 N.W.2d 603, 606 (Iowa 1996). “Declaratory judgments are res judicata and binding on the parties.” Id. “The distinctive characteristic of a declaratory judgment is that the declaration stands by itself, that is, no executory process follows as of course. In other words such a judgment does not involve executory or coercive relief.” Id. (citing 22A Am.Jur.2d Declaratory Judgments § 1, at 670 (1988)).

“The burden of proof in a declaratory judgment action is the same as in an ordinary action at law or equity.” Owens v. Brownlie, 610 N.W.2d 860, 866 (Iowa 2000). “The plaintiff bringing the action has the burden of proof, even if a negative declaration is sought.” Id.

The Court first notes that Defendants have objected to Plaintiffs’ failure to set forth a specific statement of undisputed facts in support of their Second Motion for Summary Judgment, as required by Rule 1.981. The Court concludes that the directive from the Court of Appeals for the district court to consider whether the challenged lease provisions are provisions that “shall not be included” in the landlord’s standard lease necessitates a decision on the claims set forth in Plaintiffs’ Motion regarding the alleged illegality of some of the standard lease provisions. The Court also concludes that the record, when viewed in its entirety, is sufficient to establish that Plaintiffs are seeking legal conclusions on the question of whether some of the standard lease provisions are illegal when viewed in the context of chapter 562A. Because this is a purely legal question for the Court to answer, and because the Court of Appeals has directed the district court to consider whether the challenged provisions are provisions that shall not be included in the standard lease, the Court rejects Defendants’ challenge to the Motion based on Plaintiffs’ failure to include a statement of undisputed facts in support of the Motion. Therefore, the Court proceeds with consideration of whether the challenged provisions are provisions that shall not be included in the standard lease.

Plaintiffs’ first challenge is to the liability shifting and indemnification clauses included in the landlord’s standard lease agreement. Iowa Code § 562A.11 provides:

1. A rental agreement shall not provide that the tenant or landlord:
 - a. Agrees to waive or to forego rights or remedies under this chapter provided that this restriction shall not apply to rental agreements covering single family residences on land assessed as agricultural land and located in an unincorporated area;
 - b. Authorizes a person to confess judgment on a claim arising out of the rental agreement;

c. Agrees to pay the other party's attorney fees; or

d. Agrees to the exculpation or limitation of any liability of the other party arising under law or to indemnify the other party for that liability or the costs connected therewith.

2. A provision prohibited by subsection 1 included in a rental agreement is unenforceable. If a landlord willfully uses a rental agreement containing provisions known by the landlord to be prohibited, a tenant may recover actual damages sustained by the tenant and not more than three months' periodic rent and reasonable attorney fees.

Iowa Code § 562A.11 (2013). In addressing Plaintiffs' argument regarding the liability shifting and indemnification clauses, the Court relies on the standard lease agreement submitted as Exhibit 1 to Plaintiffs' pending Motion, and to Defendants' February 3, 2012 Brief in Support of Resistance to First Motion for Partial Summary and Declaratory Judgment. The Court notes that Plaintiffs' Exhibit 1 cuts off portions of the standard lease agreement due to a copying problem, thus both parties' submissions of the lease agreement must be considered.

Specifically, Plaintiffs have challenged the use of clauses in the standard lease dealing with parking (section 32(e) of the standard lease); laundry equipment (section 39 of the standard lease); loss of property or injuries sustained by tenants due to theft, fire, rain, snow, wind or otherwise (section 70 of the standard lease); security measures (section 15 of the standard lease); and refrigerators (section 38 of the standard lease). The Court incorporates all of the aforementioned sections of the lease by reference as if set forth in full herein.

The Iowa Supreme Court has held:

We conclude that a landlord, just as any other actor, owes a duty of due care to protect its tenants from reasonably foreseeable harm and

must act as a reasonable person under all of the circumstances including the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk.... The questions of control, hidden defects and common or public use, which formerly had to be established as a prerequisite to even considering the negligence of a landlord, will now be relevant only inasmuch as they bear on the basic tort issues such as the foreseeability and unreasonableness of the particular risk of harm.

Sargent v. Ross, 113 N.H. 388, 308 A.2d 528, 534 (1973) (citations omitted). We agree that this "reasonable care in all the circumstances standard will provide the most effective way to achieve an allocation of the costs of human injury which conforms to present community values." *Id.* (quoting *Mounsey v. Ellard*, 363 Mass. 693, 297 N.E.2d 43, 52 (1973)). This standard

should help ensure that a landlord will take whatever precautions are reasonably necessary under the circumstances to reduce the likelihood of injuries from defects in his property. "It is appropriate that the landlord who will retain

ownership of the premises and any permanent improvements should bear the cost of repairs necessary to make the premises safe....”

Sargent, 308 A.2d at 535 (quoting *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248, 251 (1971)).

A duty of care arising out of a landlord-tenant relationship, like that of an innkeeper and guest under Restatement section 314A, does not make the landlord an insurer. Nor will the rule of law be equally applicable in every case.

The duty in each case is only one to exercise reasonable care under the circumstances. The defendant is not liable where he neither knows nor should know of the unreasonable risk, or of the illness or injury. He is not required to take precautions against a sudden attack from a third person which he has no reason to anticipate, or to give aid to one whom he has no reason to know to be ill. He is not required to take any action where the risk does not appear to be an unreasonable one....

Restatement (Second) of Torts § 314A cmt. e, at 120.

This rule of liability, which requires reasonable foreseeability, must be distinguished from premises liability under Restatement section 344, which arguably presupposes foreseeability. *Martinko*, 393 N.W.2d at 323 (Carter, J., dissenting).

Tenney v. Atlantic Associates, 594 N.W.2d 11, 17-18 (Iowa 1999).

With respect to express contracts for indemnification, the Iowa Supreme Court has held:

Under a contract for indemnification, “one party (the *indemnitor*) promises to hold another party (the *indemnitee*) harmless for loss or damage of some kind....” II E. Allan Farnsworth, *Farnsworth on Contracts* § 6.3, at 108 (2d ed.1998). The indemnitor “promises to indemnify ... [the] indemnitee against liability of [the] indemnitee to a third person, or against loss resulting from [the] liability.” 42 C.J.S. *Indemnity* § 2, at 72 (1991). Generally, no particular language is required to support indemnification, and a written agreement can be established without specifically expressing the obligation as indemnification. See *Jenckes v. Rice*, 119 Iowa 451, 452-53, 93 N.W. 384, 385 (1903); see also *Royal Ins. Co. of Am. v. Whitaker Contracting Corp.*, 242 F.3d 1035, 1041 (11th Cir.2001) (particular language not required as long as intent is clear). An indemnification agreement is created when the words used express an intention by one party to reimburse or hold the other party harmless for any loss, damage, or liability. Robert L. Meyers III & Debra A. Perelman, Symposium, *Risk Allocation Through Indemnity Obligations in Construction Contracts*, 40 S.C. L.Rev. 989, 990 (1989) [hereinafter Meyers & Perelman]. Intent is the controlling consideration. See *Bunce v. Skyline Harvestore Sys., Inc.*, 348 N.W.2d 248, 250 (Iowa 1984); Meyers & Perelman, 40 S.C. L.Rev. at 989. Indemnification is commonly utilized in construction contracts and rental agreements, as well as many other relationships where one party engages in an act at the request of the other or for the benefit of the other, or allows a party to use property belonging to the

other. See Meyers & Perelman, 40 S.C. L.Rev. at 990-91; 42 C.J.S. *Indemnity* §§ 1, 2, at 72.

McNally & Nimergood v. Neumann-Kiewit Constructors, Inc., 648 N.W.2d 564, 570-71 (Iowa 2002).

The Iowa Legislature has stated that a rental agreement shall not provide that the tenant or landlord agrees to the exculpation or limitation of any liability of the other party arising under law or to indemnify the other party for that liability or the costs connected therewith. The Iowa Supreme Court has held that a landlord owes a duty of care to protect tenants from reasonably foreseeable harm. Based on the definition of express contracts for indemnification set forth by the Iowa Supreme Court in McNally, the Court concludes that the aforementioned sections of the standard lease that have been challenged by Plaintiffs (i.e., sections 32(e), 39, 70, 15 and 38) allow exculpation or limitation of any liability arising under the law and/or indemnify the landlord for liability or costs connected therewith. Therefore, the Court concludes that the challenged clauses of the standard lease agreement providing for exculpation and/or indemnification are provisions that shall not be included in the landlord's standard lease. Plaintiffs' Motion for Summary Judgment should be granted on this issue.

The Court next considers Plaintiffs' argument that the standard lease violates Iowa Code § 562A.12 by including automatic cleaning provisions. Iowa Code § 562A.12(3) provides:

3. a. 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. If the rental deposit or any portion of the rental deposit is withheld for the restoration of the dwelling unit, the statement shall specify the nature of the damages. The landlord may withhold from the rental deposit only such amounts as are reasonably necessary for the following reasons:

(1) To remedy a tenant's default in the payment of rent or of other funds due to the landlord pursuant to the rental agreement.

(2) To restore the dwelling unit to its condition at the commencement of the tenancy, ordinary wear and tear excepted.

(3) To recover expenses incurred in acquiring possession of the premises from a tenant who does not act in good faith in failing to surrender and vacate the premises upon noncompliance with the rental agreement and notification of such noncompliance pursuant to this chapter.

b. In an action concerning the rental deposit, the burden of proving, by a preponderance of the evidence, the reason for withholding all or any portion of the rental deposit shall be on the landlord.

Iowa Code § 562A.12(3) (2013).

Plaintiffs have specifically challenged section 37(e) of the standard lease, which the Court incorporates by reference as if set forth in full herein. This clause automatically imposes on tenants certain fees for carpet cleaning regardless of whether the carpet is clean or not. Iowa Code § 562A.12(3) requires a landlord to provide the tenant with a specific reason for withholding any of the rental deposit, and also requires the landlord to prove, by a preponderance of the evidence, the reason for withholding any of the rental deposit, with ordinary wear and tear excepted. Section 37(e) of the standard lease may not be included in the landlord's standard lease because inclusion of section 37(e) permits the landlord to avoid his obligations as defined by the Iowa Legislature in § 562A.12(3). Plaintiffs' Motion for Summary Judgment should be granted on this issue.

Plaintiffs next challenge what they characterize as illegal repair and maintenance shifting provisions. Specifically, Plaintiffs assert that the language of the lease requiring tenants to pay for common area damages is illegal. This language is found at sections 30(a) and 33(a) of the standard lease. The version of Iowa Code § 562A.15 that was in effect at the time this action was filed provides:

1. a. The landlord shall:

- (1) Comply with the requirements of applicable building and housing codes materially affecting health and safety.
- (2) Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition.
- (3) Keep all common areas of the premises in a clean and safe condition. The landlord shall not be liable for any injury caused by any objects or materials which belong to or which have been placed by a tenant in the common areas of the premises used by the tenant.
- (4) Maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, air-conditioning, and other facilities and appliances, including elevators, supplied or required to be supplied by the landlord.
- (5) Provide and maintain appropriate receptacles and conveniences, accessible to all tenants, for the central collection and removal of ashes, garbage, rubbish, and other waste incidental to the occupancy of the dwelling unit and arrange for their removal.
- (6) Supply running water and reasonable amounts of hot water at all times and reasonable heat, except where the building that includes the dwelling unit is not required by law to be equipped for that purpose, or the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct public utility connection.

b. If the duty imposed by paragraph "a", subparagraph (1), is greater than a duty imposed by another subparagraph of paragraph "a", the landlord's duty shall be determined by reference to paragraph "a", subparagraph (1).

2. The landlord and tenant of a single family residence may agree in writing that the tenant perform the landlord's duties specified in subsection 1, paragraph "a", subparagraphs (5) and (6), and also specified repairs, maintenance tasks, alterations, and remodeling, but only if the transaction is entered into in good faith.

3. The landlord and tenant of a dwelling unit other than a single family residence may agree that the tenant is to perform specified repairs, maintenance tasks, alterations, or remodeling only:

a. If the agreement of the parties is entered into in good faith and is set forth in a separate writing signed by the parties and supported by adequate consideration;

b. If the agreement does not diminish or affect the obligation of the landlord to other tenants in the premises.

4. The landlord shall not treat performance of the separate agreement described in subsection 3 as a condition to an obligation or performance of a rental agreement.

Iowa Code § 562A.15 (2013). Iowa Code § 562A.17 provides:

The tenant shall:

1. Comply with all obligations primarily imposed upon tenants by applicable provisions of building and housing codes materially affecting health and safety.

2. Keep that part of the premises that the tenant occupies and uses as clean and safe as the condition of the premises permit.

3. Dispose from the tenant's dwelling unit all ashes, rubbish, garbage, and other waste in a clean and safe manner.

4. Keep all plumbing fixtures in the dwelling unit or used by the tenant as clean as their condition permits.

5. Use in a reasonable manner all electrical, plumbing, sanitary, heating, ventilating, air-conditioning and other facilities and appliances including elevators in the premises.

6. Not deliberately or negligently destroy, deface, damage, impair or remove a part of the premises or knowingly permit a person to do so. If damage, defacement, alteration, or destruction of property by the tenant is intentional, the tenant may be criminally charged with criminal mischief pursuant to chapter 716.

7. Act in a manner that will not disturb a neighbor's peaceful enjoyment of the premises.

Iowa Code § 562A.17 (2013).

Iowa Code § 562A.15 requires the landlord, not the tenant, keep all common areas of the premises in a clean and safe condition, and the landlord is required to maintain a fit premises. Pursuant to Iowa Code § 562A.17, the tenant's responsibility is to maintain, in a clean and safe condition, that part of the premises occupied by the tenant. The Iowa Supreme Court has construed § 562A.17(6) as providing that "the landlord may keep the rental deposit only if the damages beyond ordinary wear and tear result from the deliberate or negligent acts of the tenant, or the tenant knowingly permits such acts." Mastland, Inc. v. Evans Furniture, Inc., 498 N.W.2d 682, 687 (Iowa 1993). The Court concludes that the provisions found at sections 30(a) and 33(a) of the standard lease form utilized by the landlord may not be included in the landlord's standard lease because the provisions allow the landlord to avoid his responsibility to keep all common areas of the premises in a clean and safe condition and to maintain a fit premises. Absent a showing that the tenant caused damages beyond ordinary wear and tear resulting from deliberate or negligent acts of the tenant, or the tenant knowingly permitted such acts, the landlord may not shift these repair and maintenance responsibilities to the tenants. Plaintiffs' Motion for Summary Judgment should be granted as to this issue.

Finally, Plaintiffs challenge the inclusion in the standard lease of a variety of fees, fines, penalties and charges that Plaintiffs claim violate the requirement that landlords can only recover actual damages for a tenant's breach of a lease or violation of chapter 562A. In support of this argument, Plaintiffs have submitted Exhibit 4 to their Motion, which is described as an "Example Listing of Charges in Excess of Actual Damages in Barkalow Standard Lease." However, in the pending Second Motion for Summary Judgment, Plaintiffs have not set forth with specificity sections of the standard lease that they seek to have declared illegal. Rather, Plaintiffs generally argue that Defendants cannot recover anything other than actual damages for a tenant's breach of a lease or violation of chapter 562A. Further, Plaintiffs contend that a residential lease cannot include liquidated damages provisions. The Iowa Supreme Court has held that a landlord is not entitled to recover if no evidence substantiates that actual damage has been sustained. D.R. Mobile Home Rentals v. Frost, 545 N.W.2d 302, 306 (Iowa 1996). Considering the language utilized by the Iowa Legislature in chapter 562A in conjunction with the Iowa Supreme Court's holding that actual damage must be sustained in order for a landlord to recover, the Court concludes that a landlord may only recover actual damages that are proven to be owed to the landlord under the standards espoused in chapter 562A. Therefore, Plaintiffs' Motion for Summary Judgment should be granted on this issue.

The Court next considers Plaintiffs' argument that inclusion of the prohibited clauses by the landlord was knowing and willful. Plaintiffs contend there is no way the landlord could not have known that many of the clauses used in the standard lease are illegal. Defendants counter with an affidavit from Tracy Barkalow stating that Defendants did not know about any prohibited provisions in the standard lease. This is a fact question to be resolved by the trier of fact. Credibility determinations will be required to be made on Tracy Barkalow's testimony on the question of whether the illegal clauses were included knowingly and willfully. Therefore, both parties' Motions for Summary Judgment should be denied on this issue.

Further, the Court concludes there are genuine issues of material fact on the question of whether Big Ten Property Management, LLC and Tracy Barkalow have been properly named as Defendants. The trier of fact will be required to consider testimony and evidence regarding the entities serving as landlord(s) in determining whether Big Ten Property Management, LLC and Tracy Barkalow have been properly named as Defendants. Defendants' Motion for Summary Judgment should be denied on this issue.

Next, the Court considers Plaintiffs' Second Motion for Class Certification. The Iowa Court of Appeals has determined that certification of a class is appropriate under these facts. Therefore, this matter should be and is certified as a class action. Plaintiffs' counsel shall take all appropriate steps to effectuate this certification pursuant to the Iowa Rules of Civil Procedure.

RULING

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Summary Judgment is granted as to Plaintiffs' request for a finding regarding the legality of the challenged lease provisions. The Court hereby declares that the lease provisions challenged by Plaintiffs, as described in their Second Motion for Summary Judgment & Declaratory Judgment, are illegal and should not have been included in the standard lease utilized by Defendants. Plaintiffs' Motion for Summary Judgment is denied on the question of whether Defendants' inclusion of the challenged lease provisions was knowing and willful.

IT IS FURTHER ORDERED that Defendants' Cross-Motion for Summary Judgment is **DENIED**.

IT IS FURTHER ORDERED that Plaintiffs' Second Motion for Class Certification is **GRANTED**. This matter is certified as a class action.

Court Administration shall schedule a trial setting conference, with trial to be scheduled on the fact questions of whether Defendants knowingly and willfully included prohibited clauses in their standard lease, and whether all Defendants are liable as landlords in this case.

Dated this 18th day of March, 2014.

Clerk to notify.

~~pdf/ajg~~

DL S. Russell
DOUGLAS S. RUSSELL, JUDGE
Sixth Judicial District of Iowa

Date: 3-19-14
Mailed To: J. Pfeiffer
C. Boyer
C. Warnock
Court Administration

regular mail -
unable to email -
scanned & emailed
to the parties as a
courtesy.

By: [Signature]
Clerk's Office Personnel Responsible
for Mailing Document

FILED
2014 MAR 18 AM 11:14
CLERK OF DISTRICT COURT
JOHNSON COUNTY, IOWA