E-FILED 2018 FEB 19 3:08 PM JOHNSON - CLERK OF DISTRICT COURT

IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

Joan Walton,	)	
	)	
Plaintiff,	)	
	)	**No. CVCV076909**
vs.	)	
	)	**RULING**
Martin Gaffey,	)	
	)	
Defendant.	)	

On November 13, 2017, Plaintiff's Second Motion for Partial Summary and Declaratory Judgment and Supplement thereto, as well as Plaintiff's Second Motion for Class Certification, came before the undersigned for review. Plaintiff appeared by Attorney Christopher Warnock. Defendant appeared by Attorneys James Affeldt and Dillon Besser.

In Walton v. Gaffey, 895 N.W.2d 422, 423-429 (Iowa 2017), the Iowa Supreme Court affirmed this Court's first summary judgment ruling in this litigation that, "declared that paragraph 20(e) (limiting landlord's liability for any loss of use or consequential damages arising from appliance failure) and paragraph 23 (landlord not liable for damage or loss of any of the tenant's personal property for any cause whatsoever) of the agreement purport to exculpate or limit the landlord's liability in violation of Iowa Code section 562A.11(1)(*d*)." It also affirmed this Court's conclusion that paragraph 29, "the carpet-cleaning provision," was prohibited under the Act because it automatically imposed on Walton a fee without regard to whether the carpet was clean at the end of the lease term and because it authorized Gaffey to withhold the cost of the cleaning from the security deposit without proof that such cleaning was necessary to restore the dwelling unit to its condition at the commencement of the tenancy, ordinary wear and tear excepted." Id. at 425. The Court remanded the case for determination as to whether other provisions of the lease agreement were legally prohibited and for a re-examination of the issues of class certification.

Plaintiff filed her Second Motion for Class Certification and Second Motion for Partial Summary and Declaratory Judgment on October 13, 2017. Defendant has resisted these filings. Plaintiff asserts the class is so numerous that joinder of all members is impracticable, there are questions of law or fact common to the class, and these common issues of law and fact predominate over the individual issues. Plaintiffs also assert that a class action will provide a fair and efficient adjudication of the controversy considering the criteria set forth in Rule 1.263(1). Finally, Plaintiff alleges that, with Joan Walton as the representative party for the class and with Christopher Warnock as class counsel, this will fairly and adequately protect the interests of the class. Plaintiff requests the class consist of all tenants who executed Defendant's standard lease after May 29, 2012, and the relief shall consist of actual and punitive damages and attorney fees. Plaintiff states the common issues for the class action are now whether Defendant knowingly and willfully used a lease containing a prohibited provision (the automatic carpet cleaning provision) and, if so, what is the amount of actual and punitive damages and attorney fees. Plaintiff also seeks a declaration that section 22 of Defendant's standard lease (the smoking

provision) and section 28 of Defendant's standard lease (the unauthorized pet provision) are unenforceable penalties under Iowa Code section 562A.9(1) or unconscionable under Iowa Code section 562A.7, and if so, they are entitled to actual damages or attorney fees.

Defendant resists class certification claiming Plaintiff has failed to prove adequate financial resources are available and the representative cannot adequately protect the interests of the class because questions of fact affecting individual members are possible, the class representative cannot adequately represent the class, and potential members would be harmed by relying on the issues in this case.

Plaintiff claims there are sufficient resources because counsel will advance the costs for the class action. Plaintiff contends there are not individual factual and legal issues that predominate, since Plaintiff seeks class certification only with regard to tenants whose standard lease is identical to Plaintiff's lease. Plaintiff specifies that the challenged lease provisions are now limited to the smoking provision and the pet provision described in the Second Motion for Partial Summary and Declaratory Judgment.

In its opinion, the Iowa Supreme Court held that chapter 562A does not completely displace freedom of contract, and noted that in Iowa Code § 562A.9(1), "[t]he landlord and tenant may include in a rental agreement, terms and conditions not prohibited by this chapter or other rule of law including rent, term of the agreement, and other provisions governing the rights and obligations of the parties." The Court relied on its decision issued in Kline v. SouthGate Property Management, LLC, 895 N.W.2d 429 (Iowa 2017) (decided the same day as this case), in which it held:

> "As we have already noted, some specific categories of provisions are expressly prohibited under the Act. For example, provisions waiving rights and remedies established in chapter 562A are banned, as are those confessing judgment, those exculpating, limiting, or indemnifying another party's liability, and those agreeing to pay another party's attorney fees. *See* Iowa Code § 562A.11(1). Unconscionable provisions are also prohibited. Id. § 562A.7. Beyond these express prohibitions, however, landlords and tenants are free to form residential rental contracts consistent with chapter 562A and the principles of law and equity supplementing it. Id. § 562A.3.
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> "We conclude the summary judgment declaring the fees, charges, and liquidated damages are categorically prohibited provisions must be reversed. We emphasize, however, that the district court did not decide whether any of the fees, charges, and liquidated damage provisions challenged in this case by the tenants are unconscionable under section 562A.7 or unenforceable penalties under any other principle of law or equity supplementing the Act. See id. §§ 562A.7, .9(1). Accordingly, those issues remain for resolution in proceedings on remand."

Id. at 442-43.

It does not appear that Plaintiff is alleging that Defendant cannot prohibit smoking. Rather, Plaintiff argues that the no smoking provision, in combination with a $500 fine, is a penalty provision. The provision provides: "SMOKING. Smoking is NOT ALLOWED in the dwelling unit or interior common areas. If caught smoking in dwelling unit or interior common areas a $500 fine will be enforced." Plaintiff claims parties to a contract are not free to provide a penalty for its breach. See Rohlin Const. Co. v. City of Hinton, 476 N.W.2d 78, 80 (Iowa 1991). Plaintiff claims that the inclusion of the word "fine" shows that Defendant has contractually imposed a penalty, and establishes the punitive nature of the provision.

Defendant claims the $500 fine for smoking is not subject to § 562A.11(1), and the use of the word "fine" does not render the provision to be categorically prohibited. Defendant states the appeal decision establishes that liquidated damages provisions are allowed in lease contracts, and Plaintiff has provided no evidence that the $500 fine provision is unenforceable or unconscionable, including as to whether $500 is an unreasonable amount.

The parties have provided a number of examples of the different definitions that can be applied to the word "fine." However, in the context of this contract, the word "fine" could well be interpreted no differently than the Iowa Supreme Court evaluated the terms, "fees, charges, and liquidated damages." In the opinion issued in this case, the Supreme Court noted that Plaintiff had filed a motion for partial summary judgment and declaratory judgment in the proceedings before the District Court, in which Plaintiff "sought a declaration that the above-mentioned lease provisions imposing charges, fines, penalties, liquidated damages, or other fees are prohibited because…a landlord can recover only actual damages from tenants under the Act." Walton v. Gaffey, 895 N.W.2d 422, 434 (Iowa 2017). In determining that "fees, charges, and liquidated damages provisions challenged by the tenant in this case are not prohibited under the Act," this Court notes the Supreme Court did not make any specific distinction between fees, charges, and liquidated damages and its previous reference to these items in conjunction with "fines" and "penalties." Rather, it appears the Supreme Court's ruling is intended to mean that all of these types of monetary amounts fall within the parties' ability to freely form residential rental contracts consistent with chapter 562A and the principles of law and equity supplementing it.

The Supreme Court's apparent interpretation is buttressed by looking at the two comparable provisions that remain at issue: the no smoking fine and the unapproved pet "fee." Paragraphs 22 and 28 make it clear that the premises are considered smoking-free and pet-free, except for therapy pets. Both mandate a payment of $500 for violation of the provision. Both could be enforced more than once during the tenancy. Both may also be incentives for some prospective tenants to sign the lease. Though there may be a question of whether the fine or fee for each is reasonable, that does not establish the illegality of either as a matter of law under the Supreme Court's decision. Thus, this Court agrees with Defendant that Plaintiff is not entitled to summary judgment with regard to Paragraphs 22 and 28.

Plaintiff again asks the Court to certify this case as a class action. "Members of a class may sue or be sued on behalf of their class if both of these are shown: (1) The class is so

numerous or so constituted that joinder of all members, whether or not otherwise required or permitted, is impracticable. (2) There is a question of law or fact common to the class. Iowa R. Civ. P. 1.261." Comes v. Microsoft Corp., 696 N.W.2d 318, 320–21 (Iowa 2005).

"Before certifying a class, a court must make these specific findings:

"*a.* The requirements of rule 1.261 have been met.
b. A class action should be permitted for the fair and efficient adjudication of the controversy.
c. The representative parties fairly and adequately will protect the interests of the class. Iowa R. Civ. P. 1.262(2)."

Comes v. Microsoft Corp., Id, at 321.

Plaintiff has refined her requested class to include:

" all tenants who executed Landlord's standard lease, after May 29, 2012;

'The relief sought is actual and punitive damages and attorney fees, as well as a declaratory judgment with regard to whether or not §22 of Landlord's standard lease, the smoking provision and §28 of Landlord's standard lease, the unauthorized pet provision, are unenforceable penalties under §562A.9(1) or unconscionable under §562.A7.

"The issues for the class action are:

(A) Did Landlord knowingly and willfully use a lease containing a prohibited provision, i.e., the automatic carpet cleaning provision?

(B) If so what are the amount of actual and punitive damages and attorney fees?

(C) Whether or not §22 of Landlord's standard lease, the smoking provision and §28 of Landlord's standard lease, the unauthorized pet provision, are unenforceable penalties under §562A.9(1) or unconscionable under §562.A7?

(D) If so what is the amount of actual damages and/or attorney fees?"

The parties have entered a Stipulation that more than fifty tenants signed the lease during the time in question. Further, there are clearly questions of fact, as posed by Plaintiff, that are common to all members of the proposed class: whether Defendant knowingly and willfully used the prohibited carpet cleaning provision, and whether the smoking and unauthorized pet provisions are unenforceable or unconscionable. Thus, this Court finds that the requirements of Iowa R. Civ. P. 1261 have been met. The fighting issue is whether the proposed class should be certified under Iowa R. Civ. P. 1.262.

Rule 1.262(2)(*b*) requires the court to find that a class action will promote a fair and efficient adjudication of the controversy. Rule 1.263(1) provides thirteen criteria the district court should consider in determining whether the prerequisite of rule 1.262(2)(*b*) have been satisfied.

"'The factors in rule 1.263(1) center on two broad considerations: achieving judicial economy by encouraging class litigation while preserving, as much as possible, the rights of litigants-both those presently in court and those who are only potential litigants. (Citations omitted.)'" Comes, supra., at 321. "'The rule does not require the district court to assign weight to any of the criteria listed ... [n]or does the rule require the court to make written findings as to each factor....(Citations omitted)'" Comes, id.

Three claims of illegality remain in this litigation. One relates to the level of knowledge Defendant had when using the carpet cleaning provision that has already been declared illegal. The other two will require a court to determine whether the smoking and pet provisions are unenforceable or unconscionable, questions on which individual judges may disagree. Further, as individual cases, the specter of scheduling and adjudicating more than fifty cases, even in small claims court, could derail an already vulnerable court schedule in an understaffed county. When that is combined with the possibility of inconsistent legal findings on the predominate issues of liability, a class action is definitely favored.

Defendant's major ground of opposition to class certification focuses on the perceived difficulties of being able to properly assess and apportion damages. This is premised on the allegation that the class representative has not had any of the allegedly illegal provisions enforced against her. Thus, she would not be able to adequately prove any actual damages. First, it is unclear at this juncture whether Defendant has enforced any of these provisions against any tenant. Thus, the Court does not know if there are sufficient numbers to allow a claimant to ask for a subclass or opt out of the litigation. See Court Rule 1.262(3) (c). Second, this Court finds that the potential individual damages are such that individual litigants may not find it affordable or practical to litigate all the issues on their own. Third, much of the relevant evidence to a punitive damages assessment can be made on a class basis. Finally ". . ., the mere fact that there may be damage issues unique to different class members does not preclude class certification where there are common issues of liability. (Citation omitted.)" Legg v. West Bank, 873 N.W.2d 756, 760 (Iowa 2016). Thus, this Court finds that the predominance of the common liability issues over the damages issues as well as the logistical benefits of a class action favor certification under Rule 1.263(1).

The final issue for the Court is whether Plaintiff can adequately represent the members of the class. Iowa Court Rule 1.263 (2). "When a court denies a class certification based on a representative being inadequate, 'there are usually special circumstances or a combination of factors involved.' *Stone v. Pirelli Armstrong Tire Corp.,* 497 N.W.2d 843, 847 (Iowa 1993). Though not an exhaustive list, special circumstances this court has found in the past include when other members of the class lack confidence in the representative and when the representatives lack credibility. *Id.*" Legg v. W. Bank, 873 N.W.2d 756, 762 (Iowa 2016).

Here, the attorney for Plaintiff is admittedly experienced in litigating similar class-based issues in the landlord-tenant arena. Also, he has pledged to finance the litigation to its

completion. Defendant has offered no evidence to rebut this. Finally, this Court cannot foresee a circumstance where Plaintiff's prosecution of this litigation would come into conflict with other members of the class. Thus, the Court finds that Plaintiff can adequately represent the interests of class members.

Based on the foregoing, this Court now **ORDERS:**

Plaintiff's Motion for Summary Judgment as to lease provisions 22 and 28 is denied.

Plaintiff's Request for Class Certification is granted. The Class will consist of all tenants who executed Landlord's standard lease after May 29, 2012. The liability and damages issues shall be as set out in Plaintiff's request.

The Court Administrator shall schedule a trial setting conference, after which the parties shall submit a proposed order governing discovery and dispositive motion deadlines.

Clerk to notify.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV076909	JOAN WALTON V. MARTIN GAFFEY

So Ordered

Patrick R. Grady, Chief District Court Judge,
Sixth Judicial District of Iowa