



STATE OF DELAWARE  
JUSTICE OF THE PEACE COURT NO. 13  
1010 CONCORD AVENUE  
CONCORD PROFESSIONAL CENTER  
WILMINGTON, DELAWARE 19802

TELEPHONE: (302) 577-2550

CARLETON COURT ASSOCIATES LP  
DBA CARLETON COURT APARTMENTS

CIVIL ACTION NO: JP13-13-009852

VS

AQUILA RAINEY

ORDER

A trial *de novo* was heard on February 18, 2014. The panel was composed of Deputy Chief Magistrate Lee, Judge Bawa and Judge Ross. Both parties appeared for trial. The Plaintiff was represented by Michael Morton, Esq. and the Defendant was represented by Augusto Cordova Esq. This is the panel's decision on the *de novo* appeal.

Plaintiff filed this action August 1, 2013, seeking possession based on a violation of the Lease, Rules and Regulations and Anti-Drug Policy due to an alleged drug-related criminal act by Defendant's guest. Trial was originally scheduled before a single judge on September 26, 2013. The judge below found in favor of the Plaintiff on the issue of a rules violation, awarding possession. Defendant filed a timely appeal.

Facts

Plaintiff Carleton Court Associates is the landlord in a rental agreement for subsidized housing with Defendant Aquila Rainey. The rental unit is located at 1608 Northway Drive in Newark, Delaware. On April 12, 2013, Osmarie Ortiz, assistant property manager, conducted a scheduled re-inspection of Defendant's unit. Ortiz testified that upon arriving at Defendant's residence, she knocked on the door several times. When there was no answer, she used her keys to enter the unit. Upon entering the unit Ortiz testified that she detected a strong smell of marijuana. As she proceeded up the steps to the living room area the smell became stronger. There were two guests inside the Defendants' apartment, a male and a female. The female, later identified as Nicole Malice, stated she was there helping to clean up. The male was observed coming from the back of apartment, where Ortiz testified she observed smoke in the air. The male grabbed a plastic bag of trash and exited the apartment. Based on training provided by New Castle County Police Department, Ortiz testified that there was no question in her mind that what she smelled inside Defendant's unit was marijuana. Ortiz also testified that she believes drug activity brings other crimes, such as robberies, shootings and prostitution, as justification for the landlord's decision to immediately terminate Defendant's lease. On cross-examination, Ortiz admitted that she did not see anyone using drugs in the Defendant's residence, nor was there any residue or drug paraphernalia present.

Defendant testified she was not at home during the re-inspection, but arrived as the assistant manager was leaving another unit. Defendant testified she learned of the alleged marijuana incident from the apartment manager approximately two weeks after the inspection. She was told that a young lady and boy were in the residence at the time of the re-inspection, and the boy was seen throwing water on the carpet. Defendant testified that she was working a double that day and sent the female guest to her apartment to get her apron. However, because Malice was taking too long, Defendant left work to retrieve the apron herself.

Defense witness Nicole Malice, testified that she and her 12 year old son went to Defendant's home to get her work smock. While she was there, she washed the dishes left in the sink and told her son to grab the trash. When the assistant manager arrived Malice was still rinsing her hands. Malice told the manager the Defendant was on her way home.

After Ortiz concluded the inspections and returned to her office, she wrote a report concerning unauthorized guests and the smell of marijuana in Defendant's unit. The report was forwarded to James Fitzgerald, the landlord's security manager. On May 15, 2013, Plaintiff sent a Notice of Immediate Termination describing the manager's observations on the day of the inspection. In the letter Ortiz described being greeted by two unauthorized guests and the strong odor of marijuana in the unit. The termination notice also listed the provisions of the rental agreement and the rules and regulation violated by the Defendant. Plaintiff further cited 25 Del. C. §5513(b)<sup>1</sup> as a basis for immediately terminating the rental agreement. Although the termination notice contained an incorrect address (Southway Drive instead of Northway Drive), Defendant admitted receiving the notice. Upon receipt of the termination notice, Defendant made a timely request to meet with the manager to discuss the proposed termination. According to the testimony, the meeting was held sometime in May. It was at the meeting that the landlord discovered the May 15<sup>th</sup> letter was sent to the wrong address. After the meeting, the landlord concluded it would move forward with termination. An Amended Notice of Lease Termination was sent to the Defendant, at the correct address, on July 23, 2013.

#### Legal Positions

Plaintiff brings this action for possession on several grounds. First, it relies upon lease provisions addressing unlawful use of the premises (Para. 13), obedience to House Rules (Para. 14), and termination of tenancy due to criminal activity by the tenant, household member or guest (Para.23). Second, it argues the tenant violated Rules and Regulation, Paragraph 20, which holds the resident responsible for the actions of household members, friends, relatives, and visitors while they are on the premises. Third, Plaintiff cites the provisions of the Anti-Drug Lease Addendum which specifically prohibits drug-related criminal activity by the resident, a member of the resident's household, or a guest or other person under resident's control, on or near property premises. Finally, the landlord seeks immediate termination pursuant to the provision of 25 Del. C. §5513(b) which permits a landlord to immediately terminate upon notice, when a breach by a tenant "causes or threatens to cause irreparable harm to any person or property".

Plaintiff argues that it has satisfied the burden to show that an act occurred that violated the lease provisions, House Rules and Anti-Drug addendum as listed in the preceding paragraph. It argues the testimony has established the existence of multiple indicia that marijuana was smoked inside of the

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<sup>1</sup> 25 Del. C. §5513(b) reads in pertinent part: "When a breach by a tenant causes or threatens to cause irreparable harm to any person or property...the landlord may without notice...immediately terminate the rental agreement upon notice to the tenant and bring an action for summary possession; or do both.

Defendant's residence. Plaintiff concluded that the likely parties who engaged in the drug-related conduct were in the Defendant's residence by permission and should be considered guests of the resident. Plaintiff asks that the Court reject any argument for equitable relief from the Defendant. The landlord is required by HUD to take effective efforts to terminate under these circumstances. It is not required to consider alternative resolutions or the hardship that may occur in dispossessing a family, should possession be awarded to the landlord.

Defendant argues that the witness' conclusion that the cloud of smoke was due to marijuana and the two people in the residence generated the smoke is pure speculation. Defense argues that Plaintiff failed to prove, through satisfactory evidence that criminal activity actually occurred in the Defendant's unit. Defendant further argues the evidence does not prove who smoked marijuana or if the smoke was from marijuana. Defendant points to the fact that there were no drugs observed in the unit, so there could be no test to confirm the existence of marijuana. Next, Defendant argues Plaintiff's two month delay before sending a revised termination notice fails to support a claim under 25 Del. C. §5513(b) for immediate termination based on irreparable harm. Finally, Defendant believes the Plaintiff should have considered the hardship in evicting her when other alternative procedures were available, such as banning the non-tenants from the premises.

#### Discussion

In order to evict a public housing tenant on the grounds of drug related activity, the person need not have been arrested, convicted or have evidence against them that rises to the level of a criminal conviction.<sup>2</sup> The burden of proof that the Court must apply is that which is used in civil actions - a preponderance of the evidence. The primary question for the Court to resolve is whether the Plaintiff has been successful in proving by a preponderance of evidence that drug related criminal activity occurred in the Defendant's residence. The U.S. Department of Housing and Urban Development's Public Housing Occupancy Handbook states that this means a landlord, "...cannot simply allege that criminal activity has occurred," but that some sort of evidence be produced.<sup>3</sup> For example, for a drug related eviction, there must be evidence that the substance in question is actually an illegal drug (which the handbook states is usually provided through testimony by a medical examiner or forensic laboratory) and some type of evidence tying it to the tenant or their guest.<sup>4</sup> Additionally, the Public Housing Occupancy Handbook provides a landlord with the discretion to consider circumstances in determining whether to evict for alleged criminal activity, including, "...the seriousness of the offense, whether family members knew or participated in the offense, and the effect the eviction will have on family members not involved in criminal activity."<sup>5</sup>

Here we have the apartment manager, who has some level of training in detecting the smell of marijuana, but considerably less than that of a medical examiner or police officer. According to the manager's testimony, she attended a training session conducted by New Castle County Police Department during which she was exposed to the smell of burning marijuana. It is the training and observation of this witness that Plaintiff relies upon to prove that marijuana was smoked in Defendant's unit. Plaintiff's witness

<sup>2</sup> 24 C.F.R. 966.4(1) (5) (iii) (A) (2003).

<sup>3</sup> U.S. Department of Housing and Urban Development, Public Housing Occupancy Guidebook 204 (2003), [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/public\\_indian\\_housing/programs/ph/rhiip/phguidebook](http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/rhiip/phguidebook).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

also testified that in addition to the smell of marijuana, she observed smoke in the Defendant's housing unit. The witness did not observe either of the guests smoking marijuana, but inferred through testimony that one of them was responsible for the cloud of smoke. The burden of proof deemed necessary to achieve preponderance of evidence that has been established through the consideration of numerous actions within the Justice of the Peace Court involving the smell of marijuana is, "smell plus other indicia."<sup>6</sup> The Panel must decide if smoke is enough to satisfy the "other indicia" element of this standard. For guidance on this issue, the Panel considers cases from other jurisdictions involving eviction from public housing for drug-related activity. These cases were cited in Compton Preservation v. Cannon, as well as Defendant's Answer. In Department of Housing and Urban Development v. Rucker, there was a witness who observed residents/guests smoking marijuana and evidence of drug paraphernalia found within the Rucker's apartment.<sup>7</sup> Similarly, in Housing Authority of Covington v. Turner, the allegation of drug-related criminal activity included the finding of crack cocaine, powdered cocaine and drug paraphernalia in a room in Turner's apartment.<sup>8</sup> Likewise, in Cuyahoga Metropolitan Housing Authority v. Davis, an individual in Davis' apartment was found to be in possession of marijuana.<sup>9</sup> Lastly, in Carrington Way v. Weddington, police went to Weddington's apartment to arrest the defendant on an outstanding capias.<sup>10</sup> While in the residence the officer observed what appeared to be a marijuana stem on the floor. The confiscated stem later tested positive for marijuana. In each of these cases the courts determined the preponderance of evidence standard was met. However, the evidence in these cases is far more compelling than smell of marijuana plus a cloud of smoke that we have in the instant case. There was no direct observation of any one smoking any substance. Neither was any testing conducted to prove the smoke came from burning marijuana. Considering the limited training and exposure of the manager who testified that the smell was marijuana and the lack of physical evidence, the Court is not convinced that marijuana was smoked in the Defendant's unit. Accordingly, it is the opinion of the Panel that evidence in this case fails to satisfy the "smell plus other indicia" standard. Consequently, Plaintiff has failed to prove by a preponderance of evidence that the Defendant or her guests violated a provision of the Lease, Rules and Regulations or Anti-Drug Lease Addendum.

Next the Court addresses Defendant's argument that Plaintiff's 14 week delay between the April 12<sup>th</sup> inspection and the July 23, 2013 Amended Notice of Immediate Termination fails to support a claim under 25 Del. C. 5513(b) involving a finding of material breach of the lease agreement that causes or risks irreparable harm.<sup>11</sup> In Wilmington Housing Authority v. Kenneth Thompkins, the Defendant was allowed to remain in the unit for more than 60 days after the alleged violent act occurred and the Plaintiff did not send the notice terminating the Defendant tenancy until more than 3 weeks after the alleged violent act occurred. The Thompkins Court ruled that Plaintiff's actions did not support a claim under 25 Del. C. 5505(b) for irreparable harm.<sup>12</sup> Likewise, in Carrington Way v. Fleming, two witnesses testified that while conducting an inspection of the windows in Defendant's unit, they detected a strong smell of marijuana. The inspection occurred April 10, 2009, but the notice of immediate termination was not sent until July 2009. The Court wrote "As to Plaintiff's claim of irreparable harm, the time lapse in between the alleged violations

<sup>6</sup> Compton Park Preservation Associates, LLC v. Cannon, Civil Action No. JP13-12-017651 (January 23, 2014)

<sup>7</sup> Department of Housing and Urban Development v. Rucker, 535 U.S. 125 (U.S. 2002)

<sup>8</sup> Housing Authority of Covington v. Turner, 295 S. W. 3d 123 (Ky. Ct. App. 2009)

<sup>9</sup> Cuyahoga Metropolitan Housing Authority v. Davis, 197 Ohio App. 3d 311 (Ohio Ct. App. 2011).

<sup>10</sup> Carrington Way v. Jamie Weddington, Civil Action No. JP13-09-011103 Appeal *de novo* (October 6, 2009)

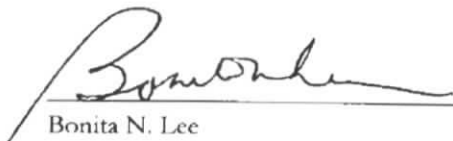
<sup>11</sup> Plaintiff's Amended Answer and Affirmative Defenses brief, dated February 15, 2014, Fifth Affirmative Defense

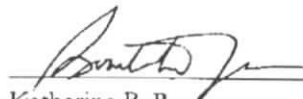
<sup>12</sup> Wilmington Housing Authority v. Thompkins, Civil Action No. JP13-97-1743 Appeal *de novo* (August 6, 2007)

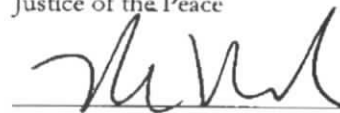
and the immediate termination letter make somewhat of a mockery of that theory<sup>13</sup>. In both of those cases, Plaintiff was denied possession. In this case, the manager testified that it was during an inspection on April 12, 2013 that she detected the smell of marijuana with an accompanying cloud of smoke in the Defendant's unit. An initial Notice of Immediate Termination was sent May 15, 2013, but to an incorrect address. An amended Notice of Immediate Termination was sent to Defendant's correct address on July 23, 2013. Plaintiff filed the summary possession case on August 1, 2013. The Court finds Plaintiff's delay does not support a claim under 25 Del. C. §5513(b) relating to a material breach of the lease that causes or threatens to cause irreparable harm.

After considering the testimony and evidence presented in this case, the Court holds Plaintiff failed to prove by a preponderance of evidence its right to possession. Judgment and possession is awarded to Defendant Aquila Rainey against Plaintiff Carlton Court Associates.

It is so ordered this 17<sup>th</sup> day of April, 2014

  
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Bonita N. Lee  
Deputy Chief Magistrate

  
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Katharine B. Rose  
Justice of the Peace

  
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Nina M. Bawa  
Justice of the Peace



<sup>13</sup> Carrington Way v. Fleming, Civil Action No. JP13-09-008743 (November 18, 2009)