IN THE JUSTICE OF THE PEACE COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY
COURT NO. 17

COURT ADDRESS:
23730 SHORTLY ROAD
GEORGETOWN DE 19947

CIVIL ACTION NO: JP17-14-001161

EMILY D MOORE VS. CARMEN PRICE

SYSTEM ID: 003556
LISA M ANDERSEN
LAW OFFICE OF LARRY W. FIFER
1201-B SAVANNAH ROAD
LEWES DE 199580000

Appearances: Lisa Andersen, Esq. for Plaintiff
Defendant appeared *pro se*
Before: Davis, C.M.; Blakely, D.C.M.; and Comly, J.

Submitted: May, 12, 2014
Decided: June 4, 2014

NOTICE OF JUDGMENT/ORDER

The Court has entered a judgment or order in the following form:

This case is a summary possession action, brought by the Plaintiff, Emily Moore, against her tenant, Carmen Price, for possession and past due rent. Tenant brought a counterclaim for statutory damages related to the landlord's failure to provide essential services and failure to provide notice of the location of the security deposit. The case was originally heard before a single judge on March 28, 2014. Plaintiff objected to the ruling and appealed to a three-judge panel. Trial de novo was held on May 12, 2014. Chief Magistrate Davis, Deputy Chief Magistrate Blakely and Judge Comly constituted the panel. This is the Court's decision after trial. For the reasons set forth below, the Court awards possession to the tenant and a monetary judgment to the landlord in the amount of $6550. As explained below, that amount must be paid within 10 days or the Court will enter an order for possession in favor of the landlord.

Facts

Moore rented an apartment in a multi-unit dwelling on West 4th Street in Lewes to Price and another person on August 21, 2013. The lease executed that day was a month-to-month agreement, with rent fixed at $750 per month. Utilities were to be paid by the tenant under the lease, though testimony revealed that Moore paid the water bill for the entire property because it was not separately metered by the City of Lewes Board of Public Works.

Price contends that this lease was a placeholder because of the swiftness with which she rented and moved into the property and had requested a yearly lease. The parties began negotiating a yearly lease, but the parties agree no yearly lease was ever executed.[1] Upon moving in, Price paid a total of $1500 dollars for the first month's rent and a security deposit. All evidence showed that no additional rental payments have been made since.

On September 6th, Tenant sent a notice to Moore indicating that she was not going to be responsible for gas for the unit since she believed the tanks would actually be used to heat her unit plus an additional unit. In the letter she quoted

[1] Despite there being no yearly lease executed, Defendant testified that she used a draft of the yearly lease under negotiation to show proof of residency to enroll her child in the local school, because the school would not accept the month-to-month version. Landlord had signed the lease previously, and Defendant signed it only for the schooling purpose.

the Landlord-Tenant Code relating to metering and charges for utility services. Price followed up with another letter on September 26th, indicating that the weather was starting to turn cooler and that they were beginning to use space heaters for warmth. Tenant then quotes the Landlord-Tenant Code with regard to the landlord's responsibility to provide essential services. She further states that, until there is heat provided, she will be exercising her right under the Code to withhold two thirds of rent until the matter could be resolved. This notice was sent regular mail, according to testimony.

On September 28th, Moore provided a letter giving two days notice of a walk-through, indicating rent was past due, and indicating that the letter should be viewed as notice that she would "proceed with the termination" of the lease. Due to the non-payment of rent, Landlord further hand delivered on October 3rd and caused to be posted on October 5th a "Notice to Pay Rent or Quit Demand for Payment" form notice with blanks filled in regarding the dates and amounts due. The notice gave four days to cure the delinquency or else deliver the premises to the landlord. It also stated that, failing to do either would result in legal action to recover rent, damages, court costs and attorney fees. Moore took no immediate legal action based on these notices.

On October 10th, Moore gave Price a notice that she must make application for gas service and that the company would be at the apartment on the following Monday to make connections. Moore gave contact information for the preferred gas company and indicated that they would need to access the apartment for the hook-up. When the company arrived Price was home but did not allow access to the apartment, therefore the gas hook-up did not take place.

There is no correspondence or testimony regarding the intervening period, but on November 22nd, Moore sent to Price another letter indicating the tenant is responsible for gas and that Price will be held responsible for any damages resulting from a lack of heat. The note concluded by saying that Price was two months in arrears on rent. Moore took no immediate legal action based on this notice.

This letter was followed on November 25th by a form "Notice to Pay Rent or Vacate." The notice indicated that rent was in arrears in the amount of $1500 plus undesignated late fees. The notice further gave the tenant one day to pay the past due rent amount or surrender possession of the premises to the landlord. The landlord took no prompt legal action based on this notice.

On December 8th, tenant sent a letter to the landlord, complaining of confusion over who to deal with on rental matters, as both the landlord and an alleged property manager, Robert Wilkerson, had been providing notices. Mr. Wilkerson occupies one of the other units in the building where tenant resides, and, according to testimony, is trusted to take care of issues at the property. The letter went on to provide a detailed list of alleged defects or issues with the property, since there was no walk-through at the beginning of the lease. In this letter, Price first raised the issue of the location of her security deposit.

In December 19th, Moore sent the tenant a handwritten notice indicating that the month-to-month tenancy was being terminated as of December 21st and that Price had 30 days to vacate the premises. This notice was sent certified mail, and was received by the tenant, according to the green card.

On January 9, 2014, Price sent a letter to Moore and Wilkerson requesting return of her security deposit, quoting the Landlord-Tenant Code. Tenant stated she had given notice requesting the location of her security deposit more than 20 days prior to the new letter, but had gotten no response from the landlord. The letter demanded return of the deposit.

On January 20th, tenant received a handwritten note from Emily Moore; it had been placed on her car and purported to give Price 24 hours to move out. The letter stated the lease had been terminated 30 days previous to the notice. Landlord took no immediate legal action on the notice. This prompted a response letter the next day from Price advising that the Landlord-Tenant Code required not 30 days, but 60, to terminate a month-to-month tenancy.

Moore sent a new handwritten notice on February 11th, indicating that the 60 days would be up on February 21st. The notices advised that rent was in arrears for the months of October through February, but provided no amount due. Further, the letter stated that tenant would be responsible for legal fees, rent, late fees, and damage to the unit. Landlord followed with a handwritten letter on February 28th, indicating that she had filed for possession of the property. No action was actually filed until March 10, 2014, according to court records. That action was based, ostensibly, on the notices of October 3rd and November 25th.

Landlord failed to obtain possession in the first trial, held on March 28th, due to deficiencies in her notices. Tenant received an abatement of the rent due for failure of the landlord to provide an essential service – heat -- and a setoff of twice the security deposit amount for the failure of the landlord to provide the location, or return, the security deposit. This resulted in a judgment of no award of monetary damages to landlord or tenant. Landlord appealed this judgment to a three-judge panel.

After the first trial, tenant again sent a letter requesting the location of her security deposit. The letter was sent certified on April 10th.

Moore hired counsel to assist her in the appeal. Prior to the hearing, the attorney sent a letter notice to the tenant detailing the rent due and giving adequate time to make payment or the lease would be terminated. The attorney specifically stated that the notice was "merely being sent in an effort to be very sure that [her] clients have complied with the Delaware Landlord Tenant Code." The letter further stated that the notice in no way negated the prior notices sent by Moore. Finally, the letter provided a location for the security deposit. It was sent certified on April 29th.

Arguments

Plaintiff contends that tenant has paid no rent since first moving in. The landlord has given repeated notices of the delinquency in rent and that she terminated the month-to-month tenancy. Barring any of landlord's prior notices being found acceptable, counsel's letter of April 29th should form an adequate basis for judgment for possession and a monetary amount for the entire rent due, plus late fees and costs.

Tenant contends that landlord has been in breach of the requirements of the Landlord-Tenant Code in all of her notices. Price further argues that her withholding of rent was justified for the landlord's failure to provide an essential service – heat. Finally, she argues that statutory damages should apply for the failure of the landlord to provide the location of the security deposit.

Discussion

This is exactly the type of case that invites criticism from casual observers of the legal system. We have a tenant who, according to all facts available, has failed to pay rent since the first month. The landlord has tried every way possible to get the tenant to pay rent or to leave the premises. Yet, because of the way the law works, this Court is obligated to award possession to the tenant. People without an understanding of the Landlord Tenant Code could point to this case and say, "See, the system is rigged in favor of the tenant," or "The tenant can always win on a technicality."

The problem with this case is not one of an imbalance in the Landlord-Tenant Code. There are plenty of examples of cases in this court where landlords easily prevail simply by doing what is required under the Code.[2] Nor is this a case based on technicalities or nuances. No, the problem here is that the landlord lacks an understanding of the level of adherence to the Code being a landlord requires and the tenant, being an informed tenant, fully understands how to exploit that situation. It is a complete mismatch, and one that the landlord will always suffer from and the tenant will always get an advantage from.

It is evident from the facts of this case that Mrs. Moore has no idea what her rights or obligations are under the Landlord Tenant Code. The facts surrounding the very first day of this rental relationship provide the first example. Mrs. Moore let the tenant move in the day tenant first looked at the apartment, and had Price sign a lease that neither fully laid out the obligations of the parties, nor did it comply with Delaware law.[3] It was a form lease, not carefully filled out, so it contained errors and omissions that began to cause a strain in the landlord-tenant relationship from the very beginning.

Subsequent to realizing that she had a tenant who was not going to uphold even the most basic obligation under the lease – to pay rent – she resorted to form notices and uninformed efforts to prompt the tenant to leave. Over the course of six months, Mrs. Moore set no less than nine notices regarding rent or the tenant's obligations under the lease. Several were demands for rent, some purported to terminate the lease agreement. Not one of them was effective in the eyes of the law.

The Residential Landlord-Tenant Code is a statutory replacement of the common law dealing with the issue of leasehold agreements. It is well established law that an act, as a statutory remedy in derogation of the common law, is to be strictly construed.[4] As such, the Court has little leeway in determining the rights of the parties when the statutory requirements are set forth with specificity. The notice provisions for both the demand for rent due and the termination of a month-to-month lease are clearly set forth in the statute.

As to notice for rent due, 25 Del. C. §5502 requires landlord to provide a written notice to tenant specifically describing the rent or other allowable fees being demanded. The notice must provide no less than five days for the tenant to

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[2] Many of those cases prompt people to exclaim that the Code favors the landlord. This the Court views as evidence that the Code is, in fact, a balanced protection of the rights of both landlords and tenants.

[3] For example, the month-to-month lease provides for attorney fees in any contest, something specifically precluded by the Code. 25 Del. C. 5111. There are a number of additional violations of the Code provided for in the lease.

[4] *Gould, Inc. v. Dynalectric Co.*, Del.Super. 435 A.2d 730, 732 (1981)

make payment of the amount due, and may be given any day after rent becomes due. Only after the expiration of that five day period[5] may a landlord then bring action for possession of the property.[6] Landlord's attempts at a rent due notice fell short of the requirements by not clearly stating the amount of rent and late fees due; it also demanding attorney's fees in violation of the Code. The first try gave only four days for the tenant to remedy the deficiency, and the second provided only one day to cure.

To terminate a month-to-month tenancy, either party is required to give 60 days' written notice of the desire to end the rental agreement.[7] In this case, landlord's notice failed on that count; the landlord sent a notice stating that the lease would be terminated with only thirty days' notice. When tenant, who obviously has a stronger knowledge of the Landlord-Tenant Code, told the landlord that she was required to give 60 day's notice, instead of following up with an appropriate notice, Mrs. Moore simply waited until the sixty days had elapsed and then attempted to prompt the tenant to leave.

Counsel for Moore has argued, essentially, that "enough is enough." The landlord has made significant efforts to give notice to a tenant who refuses to do the right thing. This Court appreciates the efforts this landlord has gone to ensure notice to her tenant. She put her notices in writing and ensured there was delivery. This is better than some landlords, worse than others, but the Code requires strict adherence for legal effect. The Code places significant demands upon a landlord, but the return is this: as long as the landlord has met those obligations, success in obtaining possession is nearly assured. One could argue that this is an unreasonably high standard to demand of people who rent houses "on the side" or who have been forced into the role of landlord due to the harsh realities of this economy. That is a policy question best left to the legislature; until that body says the standards are different, even casual landlords need to ensure their competence in an admittedly complicated and demanding area of the law.

The difficulty in ensuring every "i" is dotted and "t" is crossed is not limited to landlords. Counsel for Moore also argued that, failing all else, the Court should rely upon the notice the attorney sent in April, between the two trials, to give grounds for eviction. Unfortunately, the Court is able to not give credit for that notice either. Here the statute is clear as well. The Code, relating to appeal procedure for a summary possession action, allows for additional claims or causes of action that were not part of the original case to be presented to the court for adjudication at the de novo appeal.[8] To preserve such a claim, however, the party wishing to bring the new action must file it within five days of the appeal and it must be accompanied by a bill of particulars that identifies any additional issues the claimant wishes to have considered at trial.[9] Eviction based on the new notice would constitute a new cause of action and require compliance with the statute. Counsel's letter is dated April 29th, well after the filing of the appeal, and no bill of particulars indicating that this action would proceed based on a new notice was filed with the Court.

For all of the reasons stated above, the Court declines to award possession to the landlord. That leaves the question of the tenant's counterclaim for statutory damages related to her allegations that the landlord failed to provide essential services -- in this case heat -- and for failure to disclose the location of her security deposit.

The Court will handle the second issue first. While the tenant made a clear demand to know the location of her security deposit under the provisions of the Code[10], testimony was unclear as to how the notices were delivered or whether they were sent directly to the landlord, or through Mr. Wilkerson. What is clear is that neither of the notices was sent certified or registered to the landlord at the address specified in the lease.[11] As such, neither of these demands was effective.

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[5] It is important to note that five days does not really mean five days for purposes of the timing to file suit. 25 Del. C. §5112 requires that any period of time in the Code that is less than seven days shall not include Saturdays, Sundays, or legal holidays in the computation. A landlord who gives five days' notice on a Monday would not actually be able to file suit until the following Monday, assuming no legal holiday occurred during that period.

[6] In *Lasocha v. Weir*, JP16-08-003647, September 2, 2008, the Court, in examining an application for a default judgment, set forth detailed criteria for what a five-day notice requires. The elements set forth therein overstate the statutory requirements. For instance, the first requirement that is listed is that the date of issuance must be on the notice. While that information is helpful to the Court and goes a long way toward proving the landlord's case, this is not a statutory requirement; whether the delivery of the notice falls within the statutory requirements of "any time after rent is due" and providing five days' notice afterward could be proven by testimony or other means, and should not be part of the Court's preliminary examination of a satisfactory five-day notice. The only requirements of the statute are that the notice must: a) be in writing, b) be directed individually to the tenant(s), c) provide adequate notice of the amount of rent due and how that figure was arrived upon, d) allow the tenant no less than five days to cure the deficiency, and e) indicate in some fashion that the lease will be terminated (including indicating that action will be taken for possession) if payment is not made before that date.

[7] 25 Del. C. §5106(d)

[8] 25 Del. C. §5717(b)

[9] *Id.*

[10] 25 Del. C. §5514

[11] 25 Del. C. §5514(h); 25 Del. C. §5113(b)

Tenant sent an additional request via certified mail between the two trials, however, that was responded to by landlord's counsel in a timely manner. As such, there shall be no award for the security deposit issue.

Regarding the essential services claim, tenant is correct that the landlord is responsible for ensuring that a rental unit has heat.[12] However, a landlord and a tenant may contract to obligate the tenant to be responsible for the costs of providing that heat, so long as there is a separation of those costs by unit.[13]. The month-to-month lease provides at Clause 9, "Tenant will pay all utility charges." Mrs. Moore has provided for a heating source and has attempted numerous times to make arrangements for Ms. Price to have propane tanks installed at the unit to provide heat. Ms. Price has refused those efforts at every turn and alleges that the gas lines to which those tanks are attached service more than one unit. Because of the landlord's "failure" to provide heat, tenant has withheld two-thirds of the monthly rent until the issue is resolved.

Ms. Price's allegation that the propane tanks would service more than one unit holds no weight. Aside from a picture showing where the gas line runs into the property, she presented no evidence to support her contention. No expert testified what units the gas lines serviced, and Ms. Price has no personal knowledge of the route of those gas lines once they enter the property. The fact that the property has multiple heating units and at least one other set of tanks in use, gives credence to Mrs. Moore's testimony that the tanks would only service this unit. Ms. Price's testimony on this issue lacks any credibility or authority; it is clear she intentionally avoided all efforts by landlord to remedy the situation. Further, that she withheld the entire rent - not just two-thirds - and did not place any of that money in escrow, indicates to the Court that this issue is simply a ruse. The tenant is attempting to use the Landlord-Tenant Code as a sword rather than a shield, and exploit her greater knowledge of the Code to her unfair advantage. The Court finds that her actions in this case constitute a wrongful withholding of rent on the part of the tenant, bordering on bad faith.

The essential services provisions of the Code allow the Court, when it makes a finding of such wrongful withholding, to impose damages against the tenant.[14] The Court takes that opportunity here. **Judgment is entered in favor of Moore and against Price in the amount of $6575. This accounts for eight months' rent at $750 per month, 14 days of accrued rent since rent was last due at $25 per day, nine months of late charges at $25 per month, plus accruing rent and court costs. Post judgment interest is assessed at the current legal rate of 5.75%.**

Under the provisions of 25 *Del. C.* §5308(d) tenant has 10 days from the date of this order to pay the full amount of the judgment. Plaintiff's counsel is directed to present an affidavit to the Court on or after June 15, 2014 advising whether the tenant has satisfied the judgment within ten days. Failure of the tenant to pay that amount within those ten days will result in an order for possession to the landlord, upon which the landlord may make an immediate application for a writ of possession.[15]

IT IS SO ORDERED, this 4th day of June, 2014.

Chief Magistrate Davis for the Court,

[12] 25 Del. C. §5308(a)
[13] 25 Del. C. §5312
[14] 25 Del. C. §5308(d).
[15] "In the event the Court awards damages or double damages and court costs excluding attorney fees, then the Court shall issue an order requiring such damages or double damages to be paid by the tenant to the landlord within 10 days from the date of the court's judgment. If such damages are not paid in accordance with the Court's order, the judgment for damages or double damages shall become a judgment for the amount withheld, plus summary possession, without further notice to the tenant." 25 Del. C. §5308(d).