

PLAINTIFF

Shu Ching Kuo
PO Box 3614
Wilmington, De. 19807

v. **CIVIL ACTION: JP13-10-007555**

DEFENDANT

Arlene A. Holden
PO Box 107
Odessa, DE. 19730

This is a de novo appeal to a three-judge panel from a decision entered July 12, 2010. The panel held trial on the matter on July 26, 2010. Both parties were self-represented.

Plaintiff Shu Ching Kuo brought this action seeking back rent and possession of a rental property located at 8 Melodic Drive in Newark Delaware. The summary possession case was filed May 25, 2010. The original trial was held July 12, 2010 before the Honorable Kathleen C. Lucas, who entered judgment in favor of the Plaintiff for back rent and possession. Defendant Arlene A. Holden appealed.

At trial the Panel heard testimony from Plaintiff Kuo and Harold Leverin Jr., a contractor who worked on the heating unit in the rental property. Kuo introduced documentary evidence as follows: lease agreement dated August 31, 2009; five-day letter dated May 17, 2010; account ledger for Defendant Holden, current LL/T worksheet; February 26, 2010 receipt from Greenberg Supply Co. for oil line; January 5, 2010 letter from Holden complaining about the heating and electrical problems and restricting landlord's access to the residence.

Defendant Holden asserted a counterclaim for lack of heat and air conditioning, roof leaks, heating oil, electrical problems and lost wages while waiting for repair man. The total amount demanded in the counterclaim was \$9,635.00 plus court costs and post judgment interest. Holden presented testimonial evidence from her son Michael Holden; daughter Denise Hampton and stepson William Piattt. Defendant Holden introduced the following documentary evidence: October 1, 2009 letter that was purportedly hand-delivered to the landlord that listed complaints about the heat, broken washer/ dryer and stove; electrical problems: bank statements showing checks made out to the landlord; February 20, 2010 receipt for oil; April 3, 2010 cash receipt for \$900.00; May 17, 2010 unclaimed letter listing complaints about the conditions of the rental property and an unclaimed envelope dated June 17, 2010 that contained copies of letters dated October 1, 2009, January 5, 2010, and June 17, 2010 addressed to the landlord.

FACTS

The parties entered into a lease agreement for the subject property on or about August 31, 2009. The lease called for monthly rent in the amount of \$1,200.00 and \$40.00 late fee if rent was not paid within five days of the due date. The parties entered into a separate agreement to waive the \$1,200.00 security deposit if the tenant performed certain repairs. The repairs included: replacement of carpet in the living room, dining room, family room, hallway, stairway and three bedrooms; replacement of vinyl floor in the second floor rear full bath; installation a new gutter in front of the house. All work was to be completed within three weeks. The only item remaining on the list for repair is the outside gutter.

According to the landlord's testimony, Defendant Holden has not paid rent since April 3, 2010, owing a total \$5,511.057 which included \$200.00 in late fees and \$265.87 for a sewer bill. Although the testimony concerning unpaid rent was not refuted, Defendant Holden argues that she is entitled to deduct two-thirds of the rent because she was without heat during the winter months. Holden made full or partial rental payments from September to April. Her first written notice of withholding two-thirds of the rent was in the June 17th letter. Defendant further avers in her written counterclaim that she should receive credit for \$110.00 in late fees, \$1200.00 for lost wages, \$275.00 reimbursement for heating oil and \$50.00 court costs.

Defendant's son testified he witnessed hand delivery of the October 1, 2010 letter to the landlord. The landlord denies receipt the October 1st letter requesting repair of the heating and air conditioning unit. Witness Hampton observed the poor conditions of the premises at move-in and acted as intermediary to get the lease signed. Witness Piatt testified that he helped install carpets and was present when the nozzle was pulled off the heater for replacement in February.

According to the landlord after she received the January 5, 2010 letter from Holden, she attempted to schedule a day and time when the repairs could be performed, but had difficulty making the arrangements due to the tenant and contractor schedules. The contractor was not able to completely service the heater during his initial visit because the oil tank was empty. Holden had 100 gallons of oil delivered on February 20th. The contractor was back at the residence on February 24, 2010 and found that the heater needed a new part. To date the repairs have not been completed.

DISCUSSION

The Court finds sufficient evidence to support Plaintiff's claim for back rent and late fees. However, the claim made at trial for \$265.87 for an outstanding sewer bill was not proven.

The Court is not persuaded that the tenant properly notified the landlord concerning the heating problem in October. We find it incredulous that the tenant waited until January to send a follow-up notice to the landlord concerning a heating problem, initially presented in October, and not corrected. Upon receipt of the January 5th letter, the landlord made an immediate attempt to get a contractor over to the residence. The Court received two slightly different

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versions of the January 5th letter, both in the Defendant's handwriting. In one version of the letter, Holden implies that she would not use the heater until it is serviced and would not put oil in the tank until she knew it was in working order. This statement is consistent with the testimony of the contractor, that there was no oil in the tank when he went to make repairs. However, the Court believes Holden had 100 gallons of oil delivered on February 20, 2010. The necessary part was purchased on February 26, 2010, but according to Heverin's (contractor) testimony the repair has not been completed.

The Defendant relies on 25 Del C. §5308 as authority to withhold rent, which reads in pertinent part:

- (a) If the landlord substantially fails to provide hot water, heat, water or electricity to a tenant, or fails to remedy a condition which materially deprives a tenant of a substantial part of the benefit of the tenants bargain in violation of the rental agreement; or in violation of a provision of this Code or in violation an applicable housing code and such failure continues for 48 hours or more, after tenant gives the landlord actual or written notice of the failure, the tenant may:
 - (2) Upon written notice to the landlord, keep two-thirds per diem rent accruing during any period when hot water, heat, water, electricity or equivalent substitute housing is not supplied. The landlord may avoid this liability by a showing of impossibility of performance.

The Defendant references the Landlord Tenant Code as authority to withhold rent, but failed to provide written notice to the landlord as required by the Code before doing so. It was in the June 17th letter that Holden states she is allowed to deduct two-thirds of her rent for lack of heat. By that date, she had already missed May and June rental payments and owed a balance from March and April.

The Landlord Tenant Code places a duty on the landlord to make repairs necessary to supply heat to the rental property after actual notice of the problem. Similarly, a tenant has an obligation to allow the landlord reasonable access to make the repairs.

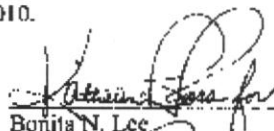
CONCLUSION

As to Plaintiff's case-in-chief, Plaintiff has proven by a preponderance of evidence that rent is due and owing as follows: March (\$420) April (\$1,200) May (\$1,200) June (\$1,200) and prorated July. Rent has continued to accrue since the trial, therefore the landlord is entitled to the full month of July (1,200) and August (\$1,200) and \$39.45 per diem. Holden did not comply with the law when she withheld her rent, therefore she is liable for late fees in the amount of \$240.00 (March through August).

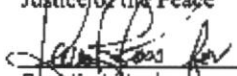
As to Defendant's counterclaim, the Defendant has proven by a preponderance of evidence that she is entitled to rent abatement due to landlord's failure to make repairs and provide heat to the rental property. The rent will be abated for the months of January, February and March \$2,400. The testimony and evidence is persuasive that the landlord had actual and written notice of the heating problem in January. However, the heater was never repaired. Additionally, the tenant will be given credit of \$275.00 for oil purchased, but not used. The amount awarded on the counterclaim will be deducted from the award to the Plaintiff for back rent and late fees. The Defendant failed to establish a right to an award for the rest of the counterclaim

For all the reasons discussed above, final judgment is awarded in favor of Plaintiff Shu Ching Kuo and against Defendant Arlene Holden in the amount of \$3,985.00, \$40.00 court costs, possession, and \$39.45 per diem until possession.

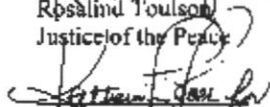
It is so ordered this 31st of August 2010.



Bonita N. Lee
Justice of the Peace



Rosalind Toulson
Justice of the Peace



Robert Lopez
Justice of the Peace