

**MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(St. Louis City)**

TAMIKA DIAMOND,)	
)	
<i>Plaintiff,</i>)	
vs.)	Cause No. 1322-SC00250
)	
DON EATON REAL ESTATE, INC. &)	Division 27
TEKBOW, LLC,)	
)	
<i>Defendants.</i>)	

JUDGMENT

This matter was called for trial on October 9, 2013. Parties appeared in person and by counsel. Plaintiff's initial small claims petition filed pro se sought repayment of a security deposit and rent previously paid in the amount of Three Thousand Five Hundred Dollars (\$3500.00). Plaintiff's petition was later amended to seek payments made in April and May of 2013, based on a theory of a violation of warranty of habitability, implied covenant of quiet enjoyment and constructive eviction. Plaintiff further seeks recovery for personal property which was stolen from her apartment. Plaintiff, further seeks double her security deposit alleging the deposit was wrongfully withheld Defendant has filed a counterclaim seeking rental arrearage. Evidence was adduced, and this Court took the matter under submission on October 9, 2013.

Upon review of all the evidence, the Court now makes findings and judgment of this matter.

FINDINGS

I Violation of Warranty of Habitability/Implied Covenant of Quiet Enjoyment/
Construction Eviction

Plaintiff seeks recovery of One Thousand Twenty-Five Dollars (\$1,025.00) representing payment of rent in April 5, 2013, and May 21, 2013, respectively, claiming the premises leased by tenant violated the warrant of habitability and violated the covenant of quiet enjoyment and by its condition, caused Plaintiff to be constructively evicted. The property is located at 4131 A Pennsylvania, St. Louis, MO. The owner of the premises is Tekbow, LLC. The property is managed by Eaton Real Estate, Inc. The lease agreement entered into in June 2012; wherein the tenant was to pay \$550.00 per month. The lease was later amended for tenant to pay \$625.00 per month, which would include utilities, specifically electric and gas.

On or about March 27, 2013, Tekbow, LLC was provided a notice of condemnation of 4131 Pennsylvania Avenue, St. Louis, MO, with an order to appear on or before April 6, 2013. Specific defects that were enumerated in the notice of condemnation was to replace worn, buckled rotted and/or missing porch flooring; replace rotted, broken, loose or missing porch joists; repair, replace rotted, cracked, shifted or missing porch supporting columns; and noting that interior structural members are rotten. Plaintiffs allege that this area specifically affected access to the front porch and to her residence.

On April 13, 2013, a sign was posted on the front of 4131 Pennsylvania, which stated: "DANGER! THIS PREMISE IS UNSAFE AND HAS BEEN CONDEMNED. ALL PERSONS ARE WARNED TO KEEP AWAY. BUILDING CODE OFFICIAL – CITY OF ST. LOUIS".

The Court received photographs of the posting on the front of the building (Plaintiff's Exhibit 6, 7 & 8).

Plaintiff testified she had nowhere to go and that she was pregnant and, as such, she remained in the unit. There was contradictory testimony as to whether Plaintiff was advised by the City and by the Defendant, Eaton Properties, that the condemnation was as to the downstairs unit and did not apply to Plaintiff, and that she was in no jeopardy in remaining in her unit. This advice was later countermanded by a St. Louis Police Department P.O. Klipsch who told Plaintiff that she was occupying a condemned residence and, therefore, it was not a habitable structure (see Plaintiff's Exhibit 12).

The Defendant, by way of counterclaim, has alleged a rental arrearage as it relates to the period of time, which is the subject matter of Plaintiff's cause of action. Based upon a ledger submitted by the Defendant, rent in the amount of \$625.00 was owed on March 1, 2013, adding to a rental arrearage in the amount of \$1,082.50.

On March 5, 2013, Plaintiff made a payment of \$750.00, leaving a balance of \$332.00 in arrearage. On April 1, 2013, an additional rental charge of \$625.00 was added, creating a balance of \$957.00. Plaintiff made a payment on April 5, 2013, of \$625.00, again bringing the rental arrearage to \$332.00. On May 1, 2013, the addition of another rental amount coming due, the balance again came to \$992.00. A late fee was charge on May 6, 2013, in the amount of \$35.00, with a rental arrearage of \$992.00. Plaintiff made a payment on May 21, 2013, in the amount of \$400.00, bringing the rental arrearage to \$592.50. Defendant's ledger indicates June 1, 2013, onward and no further payments were made. Defendant alleges a rental arrearage in the amount of \$1,912.50. The ledger further indicates that a "move out charge" was made of \$550.00, and a deduction of the security deposit of \$550.00 was applied.

Under contract principles, a tenant's obligation to pay rent is dependant upon the landlord's performance of his obligation to provide a habitable dwelling during the tenancy. King v. Moorehead, 495 S.W. 2d 65, 75 (Mo. App. W.D. 1973). The materiality of a breach of warranty claimed by tenant shall be determined by factors; among those factors are the nature of deficiency or defect, its affect on life, health or safety of the tenant, length of time it has persisted and the age of the structure. Id. at 76. The violation must affect the tenant's dwelling unit or the common areas which he uses. Id. Where there has been a material breach of implied warranty, the tenant's damages are reasonably measured by the difference between the agreed rent and the fair rental value of the premises as they were during the occupancy of the tenant in the unhealthy or unsafe condition. Id.

This Court believes that the Plaintiff's implied warranty of habitability as to 4131 Pennsylvania was breached. The conditions were not minor housing code violations but required the City of St. Louis to place a condemnation notice on the building. The Court is not convinced that the condemnation would relate solely to only one of the units at this address. The building code lists the violations that there was a structural defect which affected the common areas that the tenant would use, the front entry to her home. The Department of Public Safety Violation Code Report indicates, not specific to either unit, to replace rotten broken loose and missing porch joints; and repair/replace rotten cracked shifted and missing supporting porch columns.

It was the further opinion of an official from the St. Louis Metropolitan Police Department that the structure was uninhabitable. This Court believes the fair market value of the premises during this period of occupancy is \$325.00. Accordingly, the

Court finds that during the period of tenancy of April, May, and June 2013, comes to \$975, also to include the past rental arrearage of \$332.50 Defendant was owed \$1,307.50.00. Plaintiff paid Defendant \$1,025.00 in rent and, as such, Defendant is owed \$282.50

II Security Deposit

On June 4, 2013, Plaintiff filed a claim in Court alleging a violation of Missouri Statute as it relates to her security deposit of \$550.00. On June 13, 2012, Plaintiff paid to Defendant, pursuant to a lease agreement, \$550.00 as a security deposit. Although the testimony was that Plaintiff removed her possessions and no longer resided in the premises after June 30, 2013, as she was advised by a St. Louis Metropolitan Police Officer that it was illegal for her to remain there as the property had been condemned and is uninhabitable. The Court is restrained to find Plaintiff was constructively evicted upon the posting of the condemnation notice as she remained in the unit. S.L. Motel Enterprises, Inc. v. East Ocean 751 S.W.2d 114,118 (Mo. App. E.D. 1988). However, upon the admonition of the police officer, it is reasonable to believe that Plaintiff had been evicted constructively. Ray Realty Co. v. Holtzman 119 S.W.2d 981 (Mo. App. 1938) On July 9, 2013, counsel for Defendant entered their appearance and received the possession of the keys from Plaintiff's counsel. Due to the above, Defendant did not return the security deposit of \$550.00; however, charged Plaintiff \$500.00 for a "move out charge".

The Court received no testimony and can find nowhere in the lease documents the applicability of a "move out charge". In addition, Defendant testified that they did send notice of their intention to withhold the security deposit to Plaintiff but send it to the

residence which they knew had been vacated. Defendant offered no testimony as to why they did not provide this notice pursuant to Section 535.300, RSMo, to Plaintiff's counsel. As such, no security deposit or inspection notice, pursuant to this statute, has been sent to Plaintiff. Further, the Court finds no basis for a "move out charge" as assessed to Plaintiff.

This Court finds that Defendant wrongfully withheld Plaintiff's security deposit in the amount of \$550.00, and as such, Plaintiff is due double the amount.

Wherefore, the Court finds in favor of the Plaintiff as to her claim as to the security deposit in the amount of \$1,100.00.

III Theft of Tenant's Property

On June 29, 2013, Plaintiff returned to her rental unit to find that Defendant had posted on her front door a sign stating, "This unit has been declared abandoned unless Chantelle is notified by 6-27-13 at 636-866-4192." The notice of abandonment as obviously was placed prior to June 27, 2013. Further, Plaintiff, upon arriving at the unit, had learned that her unit had experienced a break-in. The point of entry appeared to be through a side door for which Defendant maintained control. Plaintiff contacted the police and listed a series of items that were stolen and advised the Defendant that her unit had been broken into and that the point of entry was the door in which the Defendant maintained. It was later learned that the Defendant had, at or around 7:30 p.m., boarded up the point of entry of the burglary. The next day, June 30, 2013, Plaintiff returned in the morning to learn that additional items had been stolen from the unit. Again, Plaintiff contacted the police department, listing additional stolen items, and advised the Defendant that the unit had again been broken into. Testimony regarding

the side door was that it was a door with no doorknob and with a deadbolt lock. It appears from the police report that the burglars had kicked in the door to obtain their entry.

The landlord has a duty to exercise ordinary care to keep the person or the premises he retains control over in a reasonably safe condition for the use intended and is liable for damage resulting from a failure to perform that duty. Stubbs v. Panek, 829 S.W. 2d 533 (Mo. App. 1992). The owner of an apartment building has a duty to use due care to make the premises safe as against foreseeable risks. Aaron v. Havens, 758 S.W. 2d 446 (Mo. Banc. 1998). Where a landlord undertakes to repair leased property, he becomes liable to tenant for injuries resulting from the negligence in making the repairs. Dovino v. Gen. American Life Ins. Co. 127 S.W.2d 732 (Mo. App. 1939)

The Defendant posted on Plaintiff's premises a notice of abandonment, so any passerby could surmise that the unit was abandoned making it assessable to a potential burglary. Plaintiff offered no evidence as to Defendant's negligence in securing the door as to the first break-in. However, the Court finds that as to the second break-in related to the items noted stolen on June 30, 2013, the Defendant is liable, as it was foreseeable that this door was unsecured. Particularly given the fact that the door was not secured or boarded up until late on the evening of June 29, 2013, this provided ample opportunity for the burglars to return and steal additional items belonging to the Plaintiff. It is noted in the police report the items were reported stolen on June 30, 2013, were as follows: a 52" flat-screen television valued at \$250.00; a DVD player valued at \$50.00, and a baby stroller valued at \$200.00.

The Court finds for Plaintiff against Defendant as to the failure to maintain reasonably safe conditions against foreseeable risks to the tenant and awards Plaintiff \$500.00 in damage.

JUDGMENT

It is the Order and Judgment of this Court to find in favor in Plaintiff against Defendant in the amount of One Thousand Six-Hundred Dollars (\$1,600). It is further the Order and Judgment of this Court, as to Defendant's counterclaim, finds in favor of Defendant as to back rent damages in the amount of Two Hundred Eighty Two Dollars (\$282.50). It is hereby the Judgment of this Court for a net judgment in favor of Plaintiff in the amount of One Thousand Three-Hundred Seventeen Dollars and Fifty Cents (\$1,317.50).

Cost assessed against Defendant.

SO ORDERED:

Date

**HONORABLE CHRISTOPHER E. McGRAUGH
DIVISION 27**

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was mailed, postage pre-paid to Donald Beimdiek, Attorney for Plaintiff, 100 No. Tucker, Suite 726, St. Louis, MO 63101, and to Don Eaton Real Estate, Inc., & Tekbow, LLC, through counsel, Kathryn Davis, Bonnie A. Stroup, Attorneys for Defendant(s), 420 Strassner, St. Louis, MO 63144, on this _____ day of October, 2013.

Clerk of the Circuit Court.