

IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

MICHAEL CONROY, ET AL	)	
	)	CASE NO. LACV022840
PLAINTIFFS,	)	
	)	PLAINTIFFS'
VS.	)	RESISTANCE
	)	TO MOTIONS TO
	)	CONSOLIDATE
APTS. DOWNTOWN, INC., ET AL	)	
	)	EXPEDITED HEARING
	)	REQUESTED
DEFENDANTS.	)	

2012 APR 20 AM 11:31  
 FILED  
 IOWA DISTRICT COURT  
 JOHNSON COUNTY, IOWA

\*\*\*\*\*

Plaintiffs, by and through their attorney, Christopher Warnock, hereby file their Resistance to the Motions to Consolidate, served on plaintiffs' counsel April 17, 2012, and request an expedited hearing, stating as follows:

On March 26, 2012, small claims cases were filed in the Johnson County District Court against Joseph Clark, James Clark and several limited liability companies in *Borer v. Clark*, SC-081695 and *Caruso v. Clark*, SC-081696 ("the small claims actions"). The individual defendants in *Borer* and *Caruso* are part of the Clark family, the property owners of the rental units occupied by the small claims plaintiff tenants, while the limited liability companies are the Clark land-holding entities.

On April 17, 2012, plaintiffs' counsel received identical motions to consolidate filed in the small claims actions and the instant action. The Clarks have requested that the small claims cases be consolidated into the instant action. Plaintiffs' counsel has filed identical resistances in *Borer v. Clark* and *Caruso v. Clark*.

- I. The Small Claims Cases Should Not be Consolidated with the Instant Case
  - A. Consolidation Would be Highly Prejudicial to the Small Claims Plaintiffs And Allow the Clarks to Shield Themselves from Any Landlord Tenant Litigation During the Pendency of this Case

Iowa Rule of Civil Procedure 1.913 provides,

Unless a party shows the party will be prejudiced thereby the court may consolidate separate actions which involve common questions of law or fact or order a single trial of any or all issues therein. In such cases it may make such orders concerning the proceedings as tend to avoid unnecessary cost or delay.

Rule 1.913.

We can see how important the question of prejudice is in considering consolidation when we consider that under the previous civil rule a party could make a bare allegation of prejudice and this was sufficient to prevent consolidation. Under the current rule, prejudice to a party still defeats consolidation, but some prejudice needs to be shown. *Schupbach v. Schuknecht*, 204 N.W.2d 918 at ¶27 (Iowa 1973).

In fact, consolidation would be highly prejudicial for the small claims plaintiffs due to the complexity of the instant case and repeated delays that have taken place. The instant case was filed in December, 2010. Partial summary and declaratory judgment have been pending for almost 6 months, class certification has been pending for 14 months, plaintiffs' original summary judgment motion, filed with the petition, remains in limbo. No substantive ruling of any kind has been made. Discussions between Plaintiffs' and Defendants' Counsel have made it clear that, whatever the trial court may decide with regard to summary and declaratory judgment and class certification, that decision will be appealed on an interlocutory basis, adding at minimum of 12-18 months to the

case. This case makes clear the urgent need for full funding of the Iowa courts, but nevertheless, the reality is that Plaintiffs' Counsel does not see a full resolution being reached earlier than 2014.

By statute parties are entitled to a quick and efficient adjudication of small claims. Under Iowa Code §631.5(2) a hearing is required within 20 days of the appearance of the defendant. By consolidating the small claims cases with the instant case, instead of a trial within 20 days, the small claims plaintiffs will be forced to wait years.

Such delay is particularly prejudicial to the small claims plaintiffs since, like the vast majority of the Clarks' tenants, they are students. They typically only lease from the Clarks for one year and are highly transient. By the time the instant case is resolved all of the small claims plaintiffs will have left the area due to the nature of their presence here as students. Defendants are fully aware of this, "Many of Apartments Downtown's tenants were college students who have since graduated, presumably many have moved away from Iowa City to different parts of the country and the world."<sup>1</sup> The combination of very significant delay, plus additional expense for travel is clearly highly prejudicial for the small claims plaintiffs. On the other hand, Defendants can simply make deductions for any charge they wish from the small claims plaintiffs' security deposit, secure in the knowledge that the small claims plaintiffs' current and future claims and actions are frozen during the pendency of this case and that small claims plaintiffs are unlikely to be able to travel across the country or even from overseas several years from now to pursue their claims. In essence, this motion to consolidate is a motion to dismiss the small claims plaintiffs' claims.

---

<sup>1</sup>Defendants' Memorandum of Law [resisting class certification] at 9, served May 5, 2011.

Furthermore, of the three small claims cases filed by plaintiffs' counsel, Defendants have moved to consolidate all three into the instant case<sup>2</sup>. If this Court grants the instant motion, Defendants will continue to move to consolidate any and all small claims actions filed against them, in effect giving the Clarks a "get out of jail free card" insulating them from any and all claims of tenants during the pendency of this case. While Defendants can continue to exercise their legal rights to evict their tenants with a hearing within 15 days,<sup>3</sup> their tenants will be deprived of their statutory right to a speedy small claims hearing and in many cases of any redress whatsoever as their individual small claims are held hostage to the torturous and complex proceedings in the instant case.

B. There Are Insufficient Common Factual and Legal Issues to Consolidate the Small Claims Cases and the Class Action

Iowa Rule of Civil Procedure 1.913 provides,

Unless a party shows the party will be prejudiced thereby the court may consolidate separate actions which involve common questions of law or fact or order a single trial of any or all issues therein. In such cases it may make such orders concerning the proceedings as tend to avoid unnecessary cost or delay.

Rule 1.913.

Therefore in order for these cases to be consolidated, there must be common questions of law or fact. Defendants provide no support for consolidation based on

---

<sup>2</sup> Defendants previously moved to consolidate *De Stefano v. Apts Downtown*, SC 80575 into the instant action. Plaintiffs consented, primarily because it demonstrated that Defendants had abandoned their arguments against class certification. In addition, the case involved the same defendant, Plaintiffs were not aware that Defendants would seek to consolidate every single landlord tenant small claims case into the instant action nor were they aware that the delays in the instant case would be so significant.

<sup>3</sup> Iowa Code §648.5(1) forcible entry and detainer.

common issues other than the conclusory statement, “The underlying issues raised in this case are substantially similar to the issues raised in the small claims proceedings.”<sup>4</sup> The Defendants also state that, “Both the Court and the parties risk conflicting opinions from the District Court and small claims court if these actions proceed independently.”<sup>5</sup>

First of all the plaintiffs and defendants in the instant case are completely different entities and individuals from the plaintiffs and defendants in the small claims actions. The lead defendant in the instant case is Apartments Downtown, Inc. an Iowa corporation that serves as the residential property management company for the Clark family’s rental holdings. Three Guys Holdings is a Clark limited liability company that has been added as a defendant in the instant action, but is not party to the small claims cases.

On the other hand, the defendants in the small claims actions are Joseph and James Clark, members of the Clark Family and several limited liability companies that the Clarks use as the property holding entities for their rental buildings. The plaintiffs in the small claims cases are not the plaintiffs in the instant action.

Defendants had previously vehemently opposed the addition of Three Guys Holdings to the instant case. Joseph Clark stated in his affidavit, “Apartments Downtown Inc is a totally separate and distinct legal entity from Three Guys Holdings, LLP. Each entity files its own separate tax returns. The business operations of each entity are separate from each other.”<sup>6</sup>

---

<sup>4</sup> Motion to Consolidate at 1.

<sup>5</sup> Motion to Consolidate at 3.

<sup>6</sup> Affidavit of Joseph Clark in Support of Resistance to Plaintiffs’ Motion for Summary Judgment at 1, filed June 3, 2011.

Defendants have now changed their tune and are themselves asking this Court to not only add the Clark property holding entities to the instant case, but asking through this consolidation motion that the Clarks personally be added as defendants in the instant action. They are now arguing that far from being separate, unconnected entities, that the Clark family is a single unified operation regardless of the legal entity involved. As they state in their motion, “The Defendants in this small claims proceeding are associated by ownership or occupation with the Defendants in the District Court Action.”<sup>7</sup>

The Defendants make no attempt to actually identify the legal and factual issues in common between the small claims cases and the instant case and in fact, there are no significant common factual issues. In *Caruso v. Clark*, the plaintiff was charged for repairing a bathroom door without any allegation that tenants were responsible for the damage, on information and belief, the landlord overcharged for the repair of the door, then falsely threatened a forcible entry and detainer action by serving a three day notice, in order to coerce plaintiff into paying the door repair charge.

In *Borer v. Clark*, the plaintiff was unlawfully charged a \$600 pet fee when there was no damage to the rental premises, then again falsely threatened with a forcible entry and detainer action by serving a three day notice, in order to coerce plaintiff into paying the pet charge.

In addition, on information and belief, Joseph and James Clark, had personal knowledge that their leases contained prohibited clauses and yet willfully used those

---

<sup>7</sup> Motion to Consolidate at 2.

leases. Willful and knowing use of prohibited lease clauses is not at issue in the pending summary judgment in the instant action.

In *Davis v. Walter*, 146 N.W.2<sup>nd</sup> 247 (Iowa 1966) the Iowa Supreme Court held that consolidation was appropriate as, “the two cases consisting of four claims involve many common questions of law and fact. Much of the testimony relates to all causes. Separate trials would have resulted in repetition of testimony.” *Davis v. Walter*, 146 N.W.2<sup>nd</sup> 247 at ¶31.

There is no significant factual overlap between the small claims cases and the instant case. The facts in dispute here will need to be tried individually, whether the cases proceed in the small claims division or are consolidated into the instant case.

With regard to the legal issues raised in the small claims cases the original notices state as follows:

the plaintiff demands from you the sum of \$5,000 individually and/or as a manager participating in tortious conduct and/or under the doctrine of *respondeat superior*, for overcharging for repairs, for violating Iowa Code Chapter 562A, for abuse of process and for violations of the Iowa consumer credit and debt collection statutes, Iowa Code §§537.5201(1)(y) & 537.7103(4)(e), willfully using a rental agreement with known prohibited provisions, plus punitive damages and attorney fees.

*Caruso v. Clark*, SC-081696.

the plaintiff demands from you the sum of \$5,000 individually and/or as a manager participating in tortious conduct and/or under the doctrine of *respondeat superior*, for charging an unlawful penalty and excessive liquidated damages, violating Iowa Code Chapter 562A, for abuse of process and for violations of the Iowa consumer credit and debt collection statutes, Iowa Code §§537.5201(1)(y) and 537.7103(4)(e), for willfully using a rental agreement with known prohibited provisions, plus punitive damages and attorney fees.

*Borer v. Clark*, SC-081695.

Currently pending before this court is Plaintiffs' Motion for Summary and Declaratory Judgment which is concerned solely with the legality of the inclusion of a selected number of provisions in the Clarks' standard leases. This is the only possible source of inconsistent rulings and does not involve the legal issues presented in the small claims cases, i.e., pet fees, overcharging for repairs, abuse of process, unlawful debt collection or knowing and willful use of a rental agreement with prohibited clauses.

Other than the fact that the small claims cases and the instant case are all landlord tenant cases, regulated by the Uniform Residential Landlord Tenant Act, codified at Iowa Code, Chapter 562A, they have no overlapping legal issues. Under Defendants' arguments all landlord tenant cases in Johnson County should be consolidated into the instant case.

C. Defendants' Arguments in the Motions to Consolidate are Inconsistent with Their Earlier Arguments

We should first address Defendants' citation of the Tenants' Project web site<sup>8</sup> and press coverage. Plaintiffs are happy that Defendants have found the web site to be informative and useful. Defendants are correct that Plaintiffs and the Tenants' Project strongly believe that the instant action should be certified as a class action. However, as the Tenants' Project web site also states,

The Clark Family/Apts Downtown class action and Barkalow class action are a way to deal with collective, identical problems affecting a large number of tenants. In particular illegal lease clauses can be dealt with effectively through class actions.

---

<sup>8</sup> Tenants' Project website is <http://www.ictenantsclassaction.com>



However, class actions are not the complete answer. Many landlord tenant problems are individualized, for example, whether cleaning of a rental unit was necessary or who is responsible for particular damage in a unit. These problems need an individualized finding of fact and therefore can only be resolved in small claims court.

Tenants Project web site Small Claims Assistance Page,  
<http://www.ictenantsclassaction.com/smallclaims.html>

Some landlord tenant issues are best dealt with in a single, consolidated proceeding and some issues, of necessity, are individualized and must be dealt with individually.

It is in fact, Defendants who have been breathtakingly inconsistent in the arguments that they have made to this Court. We have already mentioned their turnabout with regard to the appropriateness of including their property holding limited liabilities companies in the instant action.

In arguing against class certification, Defendants repeatedly asserted that, “a class action does not offer the most appropriate means of adjudicated [sic] the claims and defenses...due to the fact-based nature of these claims individual lawsuits provide a much more appropriate means of settling disputes.”<sup>9</sup> “Overall each case requires a specific factual inquiry...the representative class members could not adequately present the claims of potential class members as every potential class member’s claim is very different and factually unique. Therefore individual questions predominate over common questions and the representative plaintiffs could not adequately present a complaint in a ‘unified proceeding’”<sup>10</sup>

---

<sup>9</sup> Defendants’ Memorandum of Law [resisting class certification] at 9, served May 5, 2011.

<sup>10</sup> Defendants’ Memorandum of Law [resisting class certification] at 7, served May 5, 2011.

In seeking consolidation, Defendants are suddenly arguing the diametrical opposite. Now the factual and legal issues are “substantially identical”. Now Defendants argue that, “Counsel for the Plaintiff in this small claim acknowledges...that the appropriate forum for addressing the issue raised herein is a *class action*.”<sup>11</sup> In twenty years of practice counsel has never before encounter such open and blatantly inconsistent arguments. When the time comes to decide class certification in the instant case, will the Defendants will do another 180 degree flip and argue against class action certification on the grounds that individual small claims actions are appropriate?

In asking for consolidation, Defendants have clearly waived any objection to the Clarks family personally, and all of their operating and property holding entities, being added as defendants in the instant case. Furthermore, they have explicitly accepted that class certification is appropriate in the instant action. Nevertheless, both their arguments against class certification and in favor of consolidation are unconvincing. When a landlord’s standard leases contain identical illegal provisions, clearly this is appropriate as a class action. For determining the facts of individual cases, however, there is no judicial efficiency in joining multiple cases, when those facts must ultimately be tried separately. Class certification in the instant case is likely to result only in ensuring that landlords use legal leases. Tenants will still likely need to pursue their individual causes of action in small claims courts.

---

<sup>11</sup> Emphasis supplied, Motion to Consolidate at 1.

## II. Conclusion

It is worthwhile to briefly examine the documents attached to the petitions in *Borer v. Clark* and *Caruso v. Clark*. Included is an affidavit from Rockne Cole, a member of the Iowa Bar, stating that he was told by an employee of the Clarks that they issued three day notices of eviction “just to get their tenants’ attention” and that they had no intention of eviction. We can see Ms. Borer’s Transaction Listing, provided to her by the Clarks, showing a \$600 pet fee, followed by two separate charges for three notices. The pet fee remains unpaid, but Ms. Borer was never evicted. Similarly Ms. Caruso also informs Counsel that she received a three day notice in an attempt to collect her door repair charge, yet was never evicted. There is no indication Ms. Borer and Ms. Caruso were singled out by the Clarks, rather abuse of process and violation of the Iowa debt collection statute appear to be business as usual for the biggest landlord in Iowa City.

Defendants’ Motion to Consolidate is a desperate attempt to prevent these facts from coming out in a court of law. Defendants are willing to abandon their class certification arguments and put themselves personally into the instant case, just so long as they can deep six these small claims cases.

Granting Defendants’ Motion to Consolidate is not only highly prejudicial to the these particular small claims plaintiffs, but sends out a strong message to all residential tenants of Clarks, “you have no rights, because you have no remedy. File a small claims case and it will be buried for years.”

Respectfully submitted,

---

CHRISTOPHER WARNOCK AT0009679  
532 Center Street  
Iowa City, IA 52245  
(319) 358-9213  
chriswarnock@gmail.com

ATTORNEY FOR PLAINTIFF

### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of this document was served on April 20, 2011, via e-mail and/or first class mail, postage pre-paid, upon all attorneys of record who have not waived their right to service and/or pro se parties at their respective addresses as shown herein:

James Affeldt  
Elderkin and Pirnie, P.L.C.  
115 First Avenue SE  
P.O. Box 1968  
Cedar Rapids, IA 52406  
Attorney for Defendants

---

Christopher Warnock