IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

| | | |
|---|---|---|
| CHRISTOPHER JANSON,<br><br>Plaintiff,<br><br>vs.<br><br>JOSEPH CLARK, APTS. DOWNTOWN INC.,<br><br>Defendants. | ) | NO. SCSC 084082<br><br>DEFENDANTS' POST-TRIAL BRIEF |

## INTRODUCTION

The crux of Plaintiff's case is that Defendants, Apts. Downtown Inc. and Joseph Clark, "decided to replace the countertops [and sink] in [his] unit even though [he] had not requested them to be repaired and even though . . . no repair was necessary." (Hearing Mem. at 2). Plaintiff also complained about other repairs (changing locks, wall repair, and blinds in the kitchen and bedroom) and cleaning charges, both the need and the amount of the repairs and charges, as well as other lease provisions that never affected Plaintiff. The photographic evidence and testimony at trial showed, however, that the repairs were necessary and appropriate, were allowed under the parties' rental agreement, and were properly charged to Plaintiff and his fellow tenants and recovered from the security deposit. None of Plaintiff's legal arguments are valid. Because the law and the evidence support Defendants' position, they are entitled to judgment in their favor on Plaintiff's claim and their counterclaim for $267.49.

## ARGUMENT

### I. Repairs Were Proper Under The Rental Agreement And The IURLTA.

Despite Plaintiff's protests, Defendants' "preventative maintenance" efforts are not prohibited by the Iowa Uniform Residential Landlord Tenant Act (IURLTA) and are

allowed by the terms of the parties' rental agreement. IURLTA provides that a "landlord and tenant may include in a rental agreement, terms and conditions not prohibited by this chapter or other rule of law including rent, term of the agreement, and other provisions governing the rights and obligations of the parties." Iowa Code § 562A.9. In this case, the parties agreed to "preventative maintenance" in their rental agreement. Such a provision is not "prohibited." The IURLTA enumerates only four provisions that are "prohibited" in leases: (1) a provision that waives rights and remedies under the act; (2) a provision that authorizes a person to confess judgment on a claim arising out of the lease; (3) an agreement to pay the other party's attorney's fees; and (4) an agreement to exculpate or limit the legal liability of the other party or for indemnification of the costs of that liability. Iowa Code § 562A.11(1). Thus, the "preventative maintenance" provision is allowed. In fact, it advances one of the central purposes of the IURLTA, which is to "encourage landlord and tenant to maintain and improve the quality of housing." Iowa Code § 562A.2(2)(b). The IURLTA should be "liberally construed and applied to promote" that underlying purpose. Iowa Code § 562A.2(1). A construction and application of the IURLTA that prohibited landlords and tenants from agreeing to "preventative maintenance" would undermine the purpose of the IURLTA.

Plaintiff argues, however, that the "preventative maintenance" provision conflicts with Iowa Code § 562A.28, which requires seven-day notice from the landlord to the tenant before repairs that are necessary for "health and safety" violations of Iowa Code § 562A.17. This "preventative maintenance" provision does not conflict with that provision. Section 562A.28 merely provides a remedy if the provisions of Iowa Code § 562A.17 are violated by a tenant; it says nothing about prohibiting additional repair and maintenance provisions in agreements between landlords and tenants.

Even if section 562A.28 were applicable, it would not support Plaintiff's argument. To the extent that "notice" is required to implement a "preventative maintenance" provision, notice was actually provided in the terms of the rental agreement. Similarly, Plaintiff's argument that he did not have an "opportunity to cure" fails because the lease agreement clearly allows tenants to perform repairs with "written authorization" from the landlord; in this case, plaintiff never sought such authorization. Plaintiff also argues that replacing the countertop and sink was not a "health and safety" issue. That is irrelevant because these repairs were governed by the rental agreement, not section 562A.28. But if Plaintiff believes Defendant could only repair the countertop and sink because of "health and safety" reasons, there was ample testimony at trial that they needed to be replaced to prevent water damage and other hazards.

Plaintiff also argues that the landlord's repair constituted entry without proper notice. This argument fails because Defendants provided notice to Plaintiff and his fellow tenants that Defendants would be entering the unit to perform "preventative maintenance." When Defendants entered, Plaintiff was present and did not object. To the extent that consent was required, Plaintiff did not withhold consent. There was no evidence that Defendants entered the unit to harass Plaintiff or his fellow tenants. Plaintiff's argument about entry without notice fails.

Finally, Plaintiff complains that the repair costs did not show up on the itemization of deductions from the security deposit. As Plaintiff recognizes, however, the repair cost was converted to "rent" under the terms of the rental agreement. Under the IURLTA, "rent" is broadly defined as any "payment to be made to the landlord under the rental agreement." Iowa Code § 562A.6(9). Defendants provided notice to Plaintiff and his fellow tenants about the need to pay the repair costs. Defendants certainly

never concealed from Plaintiff or his fellow tenants the origins of the rent cost that appeared on the itemization of deductions from the security deposit.

For these reasons, Defendant properly repaired the countertop and sink pursuant to the parties' "preventative maintenance" agreement.

## II. Plaintiff Relies On Unpublished Cases In His Brief That Are Subject To Pending Appeals And Are Not Controlling In This Case.

Throughout his hearing memorandum, Plaintiff relies heavily on unpublished legal authorities, none of which are binding in this court. The substance of Plaintiff's arguments related to these authorities will be addressed in more detail below, but Plaintiff's reliance on unpublished cases needs to be addressed separately. Generally, neither the small claims statute, Iowa Code chapter 631, nor the Iowa Rules of Civil Procedure authorize the citation of unpublished opinions. In the Iowa Rules of Appellate Procedure, the rule allows the citation of unpublished opinions but only "if the opinion or decision can be readily accessed electronically." Iowa R. App. P. 6.904(c). Even then, the rule expressly provides that they "shall not constitute controlling legal authority." Id.

The first unpublished case cited by Plaintiff is DeStefano v. Apts. Downtown, Inc., No. SCSC080575 (Iowa Dist Ct. Small Claims Division filed June 10, 2013). For the reasons given, that case is not controlling, nor does Plaintiff make any argument that res judicata or collateral estoppel applies. Moreover, Plaintiff's counsel failed to acknowledge that a district court appeal in DeStefano is pending – an omission which is especially glaring because Plaintiff's counsel is also an attorney in that case.

A second unpublished case cited by Plaintiff is Ahmed v. Barkalow, No. SCSC 082744 (Iowa Dist. Ct. Small Claims Division filed May 15, 2013). Again, that case is not controlling, and, as counsel for Plaintiff should know, that decision is also subject to a pending appeal that Plaintinff's counsel failed to disclose.

A third unpublished case cited by Plaintiff is Staley v. Barkalow, No. 12-1031 (Iowa Ct. App. filed May 30, 2013). Again, that case was unpublished, is not controlling here, and was limited to reversing on procedural grounds and remanding for certification of that case as a class action. No decision in that case has been rendered on the substantive merits of the claims in that case.

A fourth unpublished case cited by Plaintiff is Uhlenhake v. Professional Property Management, Inc., No. CL-82571 (Iowa Dist. Ct. Small Claims Division filed April 20, 2000). Again, that case was unpublished and is not controlling here.

A fifth unpublished case cited by Plaintiff is Borer v. Clark, No. SCSC 081695 (Iowa Dist. Ct. Small Claims Division filed Sept. 3, 2013). Again, that case was unpublished, Plaintiff does not argue that res judicata or collateral estoppel apply, and is subject to a pending appeal (as Plaintiff's counsel knows but failed to disclose).

This court should disregard the unpublished cases cited by Plaintiff.

## III. Plaintiff Failed To Show That Defendant Used Excessive Or Unreasonable Charges For The Repairs Performed.

Plaintiff argues that Defendant's charges were in excess of "actual and reasonable cost or fair and reasonable value" under Iowa Code § 562A.28. As discussed above, that section does control what parties can agree to for preventative maintenance. Moreover, the evidence at trial showed that the repairs by Defendant are actually more cost-effective and ensure quality better for future tenants than alternative repair options. In other words, the charges are "fair and reasonable" compared to hiring a contractor who would charge more with less assurance of quality. Plaintiff presented absolutely no evidence about what he thinks the repairs should have cost.

Moreover, Plaintiff's complaints about charging "overhead" and "ordinary costs of business" are misplaced because all businesses need to recoup their "overhead" and

"ordinary costs" of business; those costs are built into what every business charges to perform repairs, just like attorneys build into their fees the costs of insurance, office space, support staff, legal research, continuing legal education, wages and benefits, etc. Plaintiff's argument about "actual damages" is similarly irrelevant because the terms of the lease agreement control and, in addition, Iowa Code § 562A.28 allows recovery of the "fair and reasonable value" of the repairs performed, not "actual damages," which is the standard under other provisions of the IURLTA, Iowa Code §§ 562A.29, 562A.32, 562A.34, 562A.35, which are not applicable in this case.

Plaintiff's reliance on DeStefano and Ahmed do not support Plaintiff's position. As discussed above, those cases are not properly considered in district court for a small claims case, both cases are subject to appeals, and both cases were obviously decided on different factual records. Likewise, Plaintiff's reliance on D.R. Mobile Home Rentals v. Frost, 545 N.W.2d 302 (Iowa 1996), is misplaced. In Frost, the court reversed an award of $25 for debris removal because the landlord did not present any evidence of any "actual damage" that it suffered from the debris (e.g., such as evidence that it removed the debris or what it would have cost to remove the debris), perhaps because the landlord did not file a brief to contest the tenant's appeal. In this case, by contrast, Defendant presented evidence of the work it performed and its cost of performing that work. That evidence is more than adequate to show "actual damage" under Frost.

## IV. Plaintiff Cannot Complain About Other Alleged "Illegal" Lease Provisions Which Did Not Affect Plaintiff In Any Way.

Plaintiff contends that the rental agreement contained other provisions that were "illegal," including a provision for "automatic carpet cleaning fees" and alleged "illegal repair and maintenance shifting provisions." Neither of these provisions are implicated under the facts of this case. Whatever the alleged "automatic carpet cleaning fee," that

fee was not charged to Plaintiff in this case, nor did Plaintiff testify that he was affected in any way by the alleged "illegal" provision. Likewise, Plaintiff was not affected by the alleged "illegal" repair and maintenance shifting provisions because the evidence at trial was uncontroverted that the repairs were necessary because of damage in that portion of the unit under the exclusive control of Plaintiff and his fellow tenants. In other words, the repairs in this case were not "common area" repairs. Thus, Plaintiff was not affected in any way by the lease provisions about which his counsel complains. Plaintiff lacks standing to address these provisions without showing they somehow actually affected him. Nothing in the Staley decision, even if this court considers that decision, authorized every tenant to roam through rental agreements to challenge rental provisions unrelated to actual conduct at issue in the case.

Even if the court considers Plaintiff's claims on the merits, Plaintiff cannot show that the challenged provisions are "illegal." For the carpet cleaning issue, Plaintiff relies heavily on Chaney v. Breton Builder Co., 720 N.E.2d 941 (Ohio Ct. App. 1998). Plaintiff's counsel failed to acknowledge that Chaney has been abrogated on other grounds by Parker v. I&F Insulation Co., 730 N.E.2d 972 (Ohio 2000). Moreover, there was evidence in this case that carpet cleaning was justified by lack of cleaning by Plaintiff and his fellow tenants and so they were properly charged Defendant's cost of cleaning the carpets.

For the repair and maintenance shifting argument, all the IURLTA requires is for a landlord to "[m]ake all repairs" to "keep the premises in a fit and habitable condition." Iowa Code § 562A.15(1)(b). The IURLTA does not prohibit an agreement between a landlord and tenant for the tenant to pay those repairs after they have been made. As stated above, under the IURTLA, parties are free to agree to provisions "not prohibited." Iowa Code § 562A.9. An agreement that assigns financial responsibility for repairs made by the landlord is not prohibited by Iowa Code § 562A.11. This is especially true

for the repairs made in this case which were necessitated by the acts and omissions of Plaintiff and his fellow tenants.

For these reasons, Plaintiff's arguments about "illegal" provisions related to carpet cleaning and repair and maintenance shifting should be rejected.

## V. Plaintiff Did Not And Could Not Show "Knowledge" Of A "Prohibited" Provision In The Rental Agreement.

Even if Plaintiff could be found to establish the use of a "prohibited" provision in the rental agreement, there is no legal or factual basis to support Plaintiff's argument that Defendant willfully used a provision known by Defendant to be prohibited. Plaintiff makes many strong assertions – e.g., alleging "bad faith" – but then makes nonsensical arguments that simply do not apply in this case. For example, Plaintiff complains that a landlord should know from reading the act that attorney fee provisions in a lease are prohibited, but Plaintiff does not cite any attorney fee provision. Plaintiff argues that Defendant should be "presumed" to know that various provisions are "illegal," but the evidence showed that Defendant's lease was approved by its legal counsel and no court had ruled that any provision was invalid at the time of the rental agreement. Plaintiff argues that the lease provisions were specifically found "illegal" in DeStefano, yet Defendant "left" the charges in the lease – but that ignores the fact that DeStefano was not decided until June 10, 2013, well after the rental agreement was entered into by Plaintiff and Defendant and after most of the conduct relevant to this case. (Plaintiff's counsel also failed to inform the court that DeStefano was subject to a pending appeal.)

The bottom line is that Plaintiff did not – and could not – show that Defendant "willfully used" a provision in the rental agreement "known by the landlord to be prohibited," which is the controlling standard under Iowa Code § 562A.11(2). As discussed above, there was nothing prohibited, illegal, or improper about Defendant's

"preventative maintenance" agreement. There was nothing excessive or illegal about the amount of Defendant's charges. Even if this court were to determine in hindsight that a provision was excessive or unconscionable as applied under the facts and circumstances of this case, that does not make it "known to be prohibited." Plaintiff's claim for "the maximum punitive damages" should be denied.

## VI. Plaintiff Is Not Entitled To Any Attorney's Fees, And Such Fees Cannot Exceed $5,000 Jurisdictional Maximum.

Plaintiff is not entitled to any attorney's fees because, for the reasons given above, Plaintiff should not be a prevailing party. Even assuming that Plaintiff prevails on some portion of the case, Plaintiff should not be entitled to any attorney's fees. First, Plaintiff is not paying any attorney's fees because this is part of "the Tenants' Project," as Plaintiff concedes. Second, Plaintiff has not made any showing of the amount or reasonableness of "fees" incurred. At a minimum, Defendant is entitled to separately challenge any claim for "fees" that Plaintiff may later present.

Plaintiff argues that his "fees" can somehow be recovered in excess of the jurisdictional limit of small claims court. That is not true. The maximum "amount in controversy" for a claim in small claims court is $5,000 "exclusive of interest and costs." Iowa Code § 631.1(1). Case law holds that when an element of damages is not excluded from the maximum amount, it is included. Garza v. Chavarria, 155 S.W.3d 252, 256 (Tex. Ct. App. 2004). Under Iowa law, it is settled that the word "costs" does not include "attorney's fees," Turner v. Zip Motors, 245 Iowa 1091, 65 N.W.2d 427, 432 (1954), and thus such fees are not excluded from the jurisdictional limit, but rather are included under the jurisdictional limit. In other words, when the damages and attorney's fees sought exceed $5,000, the small claims court lacks jurisdiction. See Iowa Code §

631.1(1). If such a claim exceeds $5,000, a defendant is entitled to the enhanced procedural protections of a case tried in district court under the rules of civil procedure.

Plaintiff cites Ayala v. Center Line, Inc., 415 N.W.2d 603 (Iowa 1987), and Maday v. Elview-Stewart Sys., Co., 324 N.W.2d 467 (Iowa 1982), for his argument that attorney's fees are taxed as costs. The question in those cases was not the maximum jurisdictional limit of the small claims court, but rather whether attorney's fees should be determined by the court as opposed to a jury. A careful reading of Maday shows that "attorney's fees" recoverable under the landlord-tenant act are not "costs" for purposes of the maximum jurisdictional limit of small claims court. First, the statute at issue there treated "costs" and "attorney's fees" as separate items of recovery. 324 N.W.2d at 470. Because the Legislature treated them separately there, it does not make sense that the Legislature would have included "attorney's fees" within the word "costs" in the small claims statute. Second, Maday cited a general rule that recognized that statutory attorney's fees were "in the nature of costs," not as costs themselves. Id. at 469 (citing 20 Am.Jur.2d Cost § 72 (1965)). Third, Maday cited favorably but distinguished another case, Dyche Real Estate Fund v. Graves, 380 N.E.2d 767, 769 (Ohio Ct. App. 1978), which held that "the award of attorney fees under a landlord-tenant act is in effect a part of the damage awarded to the tenant for proving the landlord's proscribed act and is to be submitted to the jury." Maday and Ayala do not support Plaintiff's position. Any attorney's fees to be awarded to Plaintiff would be governed by the $5,000 maximum.

**VII. No Judgment Can Be Entered Against Joe Clark Individually.**

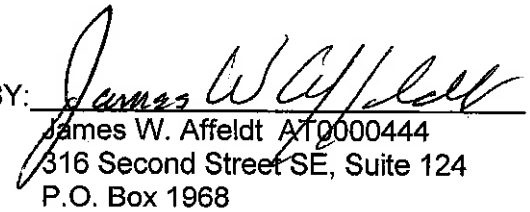
Plaintiff asserted this claim against two Defendants, Apts. Downtown Inc. and Joseph Clark. For the reasons given above, no judgment should be entered against either Defendant. In addition, no judgment may be entered against Joe Clark because he is not a "landlord" for purposes of the IURLTA. Under the IURLTA, a "landlord" is

defined as the "owner, lessor, or sublessor" of the dwelling unit, and in some cases the "manager" of the premises. Iowa Code § 562A.6(5). There is no evidence in this case that Joe Clark individually is the "owner," "lessor," "sublessor," or "manager" of the premises. For this additional reason, Clark is entitled to judgment in his favor.

**CONCLUSION**

For these reasons, Defendants, Apts. Downtown Inc. and Joseph Clark, are entitled to judgment in their favor on Plaintiff's claim, and Apts. Downtown Inc. is entitled to a judgment of $267.49 on its counterclaim.

ELDERKIN & PIRNIE, P.L.C.

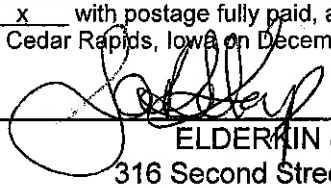
BY: 

James W. Affeldt AT0000444
316 Second Street SE, Suite 124
P.O. Box 1968
Cedar Rapids, IA 52406-1968
(319) 362-2137
FAX (319-362-1640)
jaffeldt@elderkinpirnie.com

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all parties to the above entitled cause by enclosing the same in an envelope addressed to each such attorney at his respective addresses disclosed by the pleadings of record herein, _____ hand delivered / __x___ with postage fully paid, and by depositing said envelope in a United States Post Office depository in Cedar Rapids, Iowa on December 20, 2013



ELDERKIN & PIRNIE P.L.C.
316 Second Street SE, P.O. Box 1968
Cedar Rapids, IA 52406

Copies to:

Christopher Warnock
532 Center Street
Iowa City, IA 52245

C. Joseph Holland
Holland & Anderson LLP
123 N. Linn St., Suite 300
P.O. Box 2820
Iowa City, IA 52244-2820