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No. 73455-5-1

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

2016 JUL 19 PM 3:23
STATIONER
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KEYES, LLC, Respondent,

v.

APEX ENTERPRISES 2014, LLC
dba Apex Adult Family Homes;
MYRNA CONTRERAS; GEORGE P. TREJO III,
and all other Occupants, Appellants.

OPENING BRIEF OF APPELLANTS

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TABLE OF CONTENTS

	Page(s)
A. Assignments of Error	
No. 1	2
No. 2	2
No. 3	2
No. 4	2
Issues Pertaining to Assignments of Error	
No. 1	2
No. 2	2
No. 3	2
No. 4	2
B. Statement of the Case	3-6
C. Summary of Argument	6
D. Arguments	
No. 1	7-8
No. 2	8
No. 3	9
No. 4	9-10
E. Conclusion	10

TABLE OF AUTHORITIES

Table of Cases

Angelo Prop Co. v Hafiz, 167 Wn.App 789, 274 P.3d 1075 (2015).

Barr v. Young, 187 Wash.App 105, 347 P.3d 947 (2015)

Housing Resource Group v. Price, 92 Wash.App. 394, 958 P2d 1099 (1998).

International Raw Matters ltd, 96 Wash.App 431, 979 P.2d 917 (1999)

Lee v. Savage, 38 Wash.App 699, 689 P.2d 404;

MH2 Company v. Hwang, 104 Wn.App 680, 16 P.3d 1272 (2001)

Pham v. Corbett 187 Wash.App 816, 351 P.3d 214 (2015).

Wilson v. Daniels, 31 Wn.2d 633, 198 P.2d 496, (1948).

Statutes

RCW 59.12.030

RCW 59.12.130

RCW 59.18.240.

RCW 59.18.250.

Other Authorities

Washington Residential Landlord-Tenant Act (RLTA)

A. Assignments of Error

No. 1 The Court Commissioner erred in his finding that an eviction was proper under the facts of this case.

No. 2 The Court Commissioner erred in failing to consider that the landlord delivered and accepted rental payment on his 3-Day Notice to Pay or Quit thereby waiving prior Notice to Cure.

No. 3 The Court Commissioner abused his discretion in not setting this matter for trial.

No. 4 The Court Commissioner erred in not reading nor considering tenants documents submitted as evidence.

Issues Pertaining to Assignments of Error

No. 1 Did the Court Commissioner err in finding that an eviction was proper under the facts of this case?

No. 2 Did the Court Commissioner fail to consider that the landlord delivered and accepted rental payment on his 3-Day Notice to Pay or Quit thereby waiving prior Notice to Cure?

No. 3 Did the Court Commissioner abuse his discretion in not setting this matter for trial?

No. 4 Did the Court Commissioner err in not reading nor considering tenants documents submitted as evidence at the Show Cause Hearing

B. Statement of the Case

The tenants entered into a Lease with the landlord on or about March 15, 2015. CP 19, RP.

The residence was the prior home of landlord's mother who passed away in late March 2015. The intent was that tenant would care for landlord's mother as she was then living in an Adult Family Home and landlord wanted her to live in her own home. The lease period was for five (5) years. The landlord's mother was gravely ill and the landlord did not anticipate that she would live longer than a few months.

The landlord knew as stated in the Lease that tenants would reside in the residence pending modifications to the home, which included installation of a sewer system connected to the city's system. The home was serviced by septic tank. Extensive negotiations were made prior to signing of the lease concerning the necessity for a city sewer connection versus a septic tank, as the State of Washington would not license a home as an Adult Family Home if it was connected to a regular septic tank.

Exhibit

10, pages 1 and 2.

The initial lease Mr. Keyes presented to tenants, specified that no rent would be due as long as tenant provided care for his mother. Tenants did not agree to this proposed lease as it was not lawful and a separate agreement was requested to address that issue. As such that provision was removed from the signed lease. CP 19.

On March 5, 2015, Michael Keyes, posted on tenant's front door, a 3-day notice to Pay Rent or Vacate. He also mailed a copy on the same date. Exhibit 1.

Prior to posting the Notice to Pay, landlord, through his attorney, mailed a Notice to Cure, including a demand to repair damages to the front door, demand to repaint, pay late fees totaling \$2,400.00 and provide proof of insurance dated January 22, 2015. CP 19.

Rent was tendered to Mr. Keyes on Sunday, March 8, 2015. CP 15 However, Mr. Keyes said he was out of town and would return the next day. Exhibit 2.

On March 9, Mr. Keyes knocked on the residence door, the home in question. Tenant Contreras opened the door and handed Mr. Keyes the March rent per his 3-day notice. It was contained in an unsealed envelope labeled "Keyes" and contained 3 separate money orders of \$1,000.00 each. Exhibits 4,5,6,7.

Mr. Keyes accepted the envelope, went outside for about 10 minutes, walked back in without knocking. He was gruff saying his attorney told him to not accept the rent. I told him he had already accepted it and he said "No I didn't, stop playing games", threw it on the floor and walked out.

Late Payments. The defendants did make late payments but at no time did Mr. Keyes request late fees until appellant Contreras refused to sign a waiver giving up part of the premises under the lease. Exhibit 13.

Aside from the fact that no request for late fees had ever been made until tenants' refusal to modify the lease, the plaintiff prevented the defendant's use of the outbuilding containing a kitchen, extra room, and a two (2)-car garage. CP 19

A breach of contract, fraud and other claims, is filed in King County Superior Court, Kent, WA under cause number: 15-2-06041-4.

Plaintiff only asserted late fees and interest after defendants refused to waive their rights to part of the premises. Plaintiff attempted to rent out part of the premises that defendant already had leased 10 months after commencement of the lease. Exhibit 13. Defendants refused to sign this document and thereafter, the plaintiff retained an attorney demanded late payment fees along with other unreasonable demands.

Rent was current so there was no basis to evict the defendants. Plaintiff accepted March 2015 rent on March 9, 2015 thereby waiving any prior defects enumerated in his January 22, 2015 Notice to Cure. CP 19

C. Summary of Argument

The lease entered into by the parties was a five (5) year lease. The lease was a combination residential and commercial lease. The commercial end would not commence until the home was modified to allow for an Adult Family Home under strict specifications by the state of Washington.

Throughout the lease term, numerous requests were made to the landlord to start the duties he agreed to per the lease language. CP 15, 19. He did nothing. RP

Landlord, 10 months into the lease said he wanted to rent the outbuilding to another tenant. Tenant said no as they could not operate an Adult Family Home if another tenant was on the same property. Within the month, he retained an attorney than began sending 3-day notices and Notices to Cure. CP 15.

Landlord served a 3-Day Notice to Quit on March 5, 2015, for rent due on March 2015. He thereafter, accepted the rent payment. Tenant believes in good faith, that landlord waived any Notice to Cure he served prior to the 3-Day Notice he served in March. RP

D. Arguments

Argument One

Good cause did not exist for terminating tenant's occupancy. *RCW 59.18.240.*

The Court Commissioner failed to submit this matter to be heard at a trial to consider the extensive exhibits, testimony and evidence submitted by tenants. The Washington Residential Landlord-Tenant Act (RLTA) prohibits a landlord from taking or threatening to take reprisals or retaliatory action against the tenant because of any good faith and lawful... (2) Assertions or enforcement by the tenant of his rights and remedies under the [RLTA].” Where a landlord has multiple reasons for taking an adverse action against a tenant, the proper analysis is to determine whether retaliation or discrimination is “substantial motivation factor” test in mixed-motives. *Allison v Seattle Housing Authority, 118 Wn.2d 79, 96; 821 P.2d 34 (1991).*

The tenants in this matter asserted that landlord Keyes was retaliating against in violation of RCW 59.18.250. A rebuttable presumption of retaliation arises if the landlord initiates elate termination proceedings within 90 days after the tenant makes a good faith and lawful assertion of rights. *Port of Longview v International Raw Matters Ltd, 96 Wash.App*

431, 979 P.2d 917 (1999); *Lee v. Savage*, 38 Wash.App 699, 689 P.2d 404; RCW 59.12.030; RCW 59.18.250.

Whenever an issue of fact is presented by the pleadings it must be tried by a jury...RCW 59.12.130.

Argument two

No. 2 The plaintiff landlord, Michael Keyes, waived cure of stated defaults in his January 22, 2015 Notice to Cure by serving tenants with a 3-Day Notice to Pay on March 5, 2015 and by accepting payment of March 2015 rent on March 9, 2015.

Tenant received a 3-Day Notice to Pay on March 5, 2015. On March 8, 2015, she tendered the rent amount due under the 3-Day Notice. Landlord was not accessible as he was out of town on the due date and stated he would receive the rent the following day at the rented home. The practice of the parties was that landlord would collect the rent due at the home. The landlord waived his January 29, 2015 Notice to Cure by accepting rent due on March 9, 2015.

Acceptance of rent will likely be deemed to waive the notice *Wilson v. Daniels*, 31 Wn.2d 633, 198 P.2d 496, (1948).

Argument three

No. 3 The Court Commissioner abused his discretion in not setting this matter for trial.

Counterclaims and affirmative equitable defenses are allowed in an unlawful detainer action when based on facts, which excuse a tenant's breach. *Barr v. Young*, 187 Wash.App 105, 347 P.3d 947 (2015).

..In tenant's claim that landlord breached implied warranty of habitability; with evidence presented to sustain claim, matter heard at trial. *Pham v. Corbett* 187 Wash.App 816, 351 P.3d 214 (2015). *Angelo Prop Co. v Hafiz*, 167 Wn.App 789, 274 P.3d 1075 (2015).

Argument four

No. 4 The Court Commissioner did not read nor consider tenants documents submitted as evidence.

This matter is appealed from a Show Cause Hearing held and determined within an hour's time despite tenant submitting affirmative defenses and exhibits. The court commissioner accepted into evidence with no objection by landlord's attorney, a binder containing 20 exhibits, two witness declarations, and an Answer. Despite the issues raised, the court did not set this matter for trial.

The Landlord served a 3-Day Notice to Pay, accepted rent payment due for March in March thereby making the issue of an Unlawful Detainer moot. *MH2 Company v. Hwang*, 104 Wn.App 680, 16 P.3d 1272 (2001). *Housing Resource Group v. Price*, 92 Wash.App. 394, 958 P2d 1099 (1998).

E. Conclusion

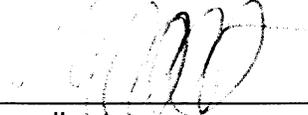
That this action be dismissed

Rent was current so there was no basis to evict the tenants. Keys accepted March 2015 rent on March 9, 2015 thereby waiving any prior defects enumerated in his Notice to Cure dated January 22, 2015.

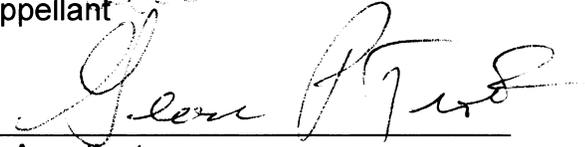
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January 19, 2016

Respectfully submitted,



Myrna Contreras, Pro Se Appellant



George P. Trejo, III, Pro Se Appellant