[Cite as *Moore-El v. Petrella*, 2011-Ohio-710.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94749

KAMILAH MOORE-EL

PLAINTIFF-APPELLANT

vs.

DAVID PETRELLA

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED IN PART, REVERSED
IN PART AND REMANDED

Civil Appeal from the
Cleveland Municipal Court
Case No. 2009CVI007293

BEFORE: Stewart, P.J., Boyle, J., and Gallagher, J.

RELEASED AND JOURNALIZED: February 17, 2011

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MELODY J. STEWART, P.J.:

{¶ 1} Tenant-appellant, Kamilah Moore-El, appeals from a judgment rendered on a magistrate's decision in favor of landlord-appellee, David Petrella, that denied her claim for the return of her security deposit and granted his counterclaim for damages and unpaid rent on a tenancy. Moore-El's six assignments of error challenge various aspects of the court's ruling.

{¶ 2} There is no transcript of the proceedings before the magistrate, so the record on appeal is limited to the original papers. The court refused to adopt Moore-El's

App.R. 9(C) statement of the evidence and ruled that the magistrate's decision would serve as the court's statement of the evidence.

{¶ 3} The magistrate's findings of fact stated that Moore-El had been a tenant of Petrella since August 2002. The house was fully subsidized by the Cleveland Metropolitan Housing Authority ("CMHA") in the amount of $632 per month. Moore-El paid a security deposit of $800 that she received as a gift from her mother. In January 2009, CMHA sent Moore-El and Petrella a notice that it was terminating rent payments due to the premises "not being maintained in a decent, safe and sanitary condition." The notice informed Moore-El that CMHA's contract payments to Petrella would terminate on January 31, 2009 and that if she continued to reside in the premises beyond that date, her lease would become "unassisted," meaning that CMHA "**WILL NOT** make any further rental assistance payments for the unit, even if you continue to reside in the unit." (Emphasis sic.) Moore-El did not vacate the premises and return her keys to Petrella until March 3, 2009, nor did she pay Petrella rent for February or March 2009.

{¶ 4} Moore-El brought this action seeking the return of her security deposit; Petrella counterclaimed for unpaid rent and damage to the rental property. Petrella submitted photographs that the magistrate found documented the premises "in a condition that was damaged above normal wear and tear and would exceed the amount of the security deposit to repair." The magistrate found that Moore-El did not cooperate with Petrella to make the premises accessible for repairs and maintenance during her tenancy.

The magistrate therefore concluded that Petrella did not wrongfully withhold Moore-El's security deposit and that he was entitled to a total of $3,000 for unpaid rent and damage to the premises. The magistrate found that Moore-El was not entitled to judgment on her claims.

{¶ 5} Moore-El filed timely objections to the magistrate's decision on grounds that the magistrate should have offset damages from the security deposit and that she "could prove that all supposed damages were the responsibility of the landlord." The court overruled those objections without opinion and approved and adopted the magistrate's decision.

{¶ 6} Moore-El raises a number of substantive arguments based on a second set of objections to the magistrate's decision that she filed almost two weeks after the court denied her first set of objections and issued judgment. The second set of objections was tardy, so they have no effect. Barring plain error, a party may not assign as error the court's adoption of any factual finding or legal conclusion unless the party has objected to that finding or conclusion of law as required by Civ.R. 53(D)(3)(b). See Civ.R. 53(D)(3)(b)(iv). Recognizing that the plain error doctrine is not favored in civil actions, *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 1997-Ohio-401, 679 N.E.2d 1099, at paragraph one of the syllabus, we decline to address these assignments.

{¶ 7} Moore-El did preserve her objection that the court erred by denying her a statutory recovery for her security deposit. R.C. 5321.16(B) states that upon the termination of a rental agreement, the landlord may apply any money held as a security

deposit to the payment of past due rent or damages caused to the premises, but only after delivering a written notice of intent to do so, along with an itemized list of the deductions. If the landlord fails to comply with this requirement, the tenant is entitled to recover the money withheld together with an amount equal to the amount wrongfully withheld, and reasonable attorney fees. See R.C. 5321.16(C); *Smith v. Pagett* (1987), 32 Ohio St.3d 344, 349, 513 N.E.2d 737. Id. The magistrate found that Petrella did not comply with R.C. 5321.16(B) by sending Moore-El an itemized list of deductions from her security deposit, but concluded that the damage to the premises caused by Moore-El exceeded the amount of the security deposit.

{¶ 8} The supreme court has emphasized that landlord liability for double damages under R.C. 5321.16(B) arises when a landlord "*both* wrongfully withholds a portion of a security deposit and fails to timely provide the tenant with an itemized list of deductions is liable for damages equal to twice the amount wrongfully withheld and for reasonable attorney fees." Id. at 348-349. (Emphasis sic.) The "failure to comply with R.C. 5321.16(B) and to provide the tenant with a list of itemized deductions renders the landlord liable for double damages only as to the amount wrongfully withheld and not as to the entire amount of the security deposit." *Dwork v. Offenberg* (1979), 66 Ohio App.2d 14, 16, 419 N.E.2d 14.

{¶ 9} The terms "amount due" in subsection (B) and "money due" in subsection (C) of R.C. 5321.16 have been defined as "the security deposit, less any amounts found to be properly deducted by the landlord for unpaid rent or damages to the rental premises

pursuant to R.C. 5321.16(B) or pursuant to the provisions of the rental agreement." *Vardeman v. Llewellyn* (1985), 17 Ohio St.3d 24, 29, 476 N.E.2d 1038. The term "wrongfully withheld" is defined as "the amount found owing from the landlord to the tenant over and above any deduction that the landlord may lawfully make."

{¶ 10} The magistrate found that Petrella did not wrongfully withhold the security deposit because Moore-El failed to make two rent payments and left the premises "in a condition that was damaged above normal wear and tear and would exceed the amount of the security deposit to repair." We have no basis for disputing the magistrate's finding that Moore-El did not pay $632 rent for the months of February and March 2009. In fact, Moore-El makes no argument that she paid any rent after her CMHA rent subsidies were terminated. Under R.C. 5321.16(B), a landlord may lawfully apply a security deposit to the payment of past due rent. By applying Moore-El's $800 security deposit to the $1,264 of past-due rent, Petrella did not wrongfully withhold the security deposit. It follows that his failure to send an itemized list of deductions from the security deposit subjects him to no liability under R.C. 5321.16(C). Id. ("the failure to comply with R.C. 5321.16(B) and to provide the tenant with a list of itemized deductions renders the landlord liable for double damages only as to the amount wrongfully withheld and not as to the entire amount of the security deposit.")

{¶ 11} We question, however, the court's decision to award $3,000 in damages on Petrella's counterclaim. The magistrate did not specify how she arrived at the damages figure nor does the evidence reasonably support it. The record contains a statement of

"claims" encompassing an unpaid water and sewer bill, costs for carpet replacement and trash removal, and other charges totaling $4,997.48. But the only documentation for these expenses is a sewer bill in the amount of $1,261.96 and an invoice for various sewer line repairs in the amount of $700. The magistrate did not, moreover, make any findings as to reasonableness of these expenses — a necessary point given that Petrella claimed Moore-El was responsible for a $1,261.96 sewer bill for a billing period just short of four months. Petrella did offer photographs of the premises that purported to be its condition after Moore-El left, but those photographs alone cannot supplant evidence of actual costs in the form of bills or invoices for the alleged repairs, taking into consideration normal wear and tear during Moore-El's tenancy. We therefore sustain Moore-El's assignment of error in part and remand this case to the court for a new hearing on Petrella's alleged damages.

{¶ 12} This cause is affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

It is ordered that the parties bear their own costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cleveland Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, PRESIDING JUDGE

MARY J. BOYLE, J., and
SEAN C. GALLAGHER, J., CONCUR