

IN THE FRANKLIN COUNTY MUNICIPAL COURT  
COLUMBUS, OH

Margaret Johnson

Plaintiff :

vs. :

Case No. 2004 CVI 051580  
Judge Liston

Rolf and Ellen Kates,

Defendants :

PLAINTIFF'S POST-TRIAL BRIEF

I. PROCEDURAL HISTORY

Trial took place on Thursday, June 22, 2005 from 10:30 a.m. until approximately 4:00 p.m. in this matter. Plaintiff claimed that the Defendants unlawfully evicted Plaintiff in violation of OHIO REVISED CODE § 5321.15 when they improperly removed and disposed of Plaintiff's personal property prior to the termination of her tenancy without proceeding with a forcible entry and detainer action and that Defendants unlawfully converted plaintiff's property when they improperly removed and disposed of Plaintiff's personal property prior to the termination of her tenancy without proceeding with a forcible entry and detainer action. Defendants counterclaimed alleging that the Plaintiff had damaged the premises beyond normal wear and tear.

II. FACTUAL BACKGROUND

In July 1998, Plaintiff entered into a lease for the premises located at 3049 Reynard Road, Columbus, Ohio. In approximately early 2002, Defendants purchased 3049 Reynard Road, subject to the Plaintiff's lease and therefore had to honor the terms of that lease during the lease term. Rent at the premises was subject to a Section 8 Housing Certificate that set the rent at a fixed amount. In approximately the spring of 2003, an issue concerning the rental amount charged by the Defendants came to light. It turned out that the Defendants had been charging the Plaintiff too much rent in violation of the Section 8 Housing agreement. In approximately May 2003, Defendants were

forced to return \$1,500.00 to the Plaintiff because of the overcharge. Defendants were also forced to reduce the rental amount to what they should have been charged the Plaintiff. Defendant Rolf Kates became upset with the Plaintiff after he had to reimburse her \$1,500.00 and also had to reduce her rent. In approximately the end of June 2003, he told her that she needed to find a new place to live after reimbursing her the \$1,500.00. He originally told her that she needed to be out of the house on or before July 31, 2003. She contacted him and requested additional time up to and including September 1, 2003 to vacate the premises. Realizing that a lawful eviction action would take almost two months, he agreed to this.

Plaintiff, with the help of several other individuals, began moving from the premises on approximately Friday, August 29, 2003. They continued moving through Saturday, August 30, 2003 and items still remained at the premises as of Sunday, August 31, 2003. Family and friends of the Plaintiff intended to remove the rest of the items on that Sunday. Laura Smothers, daughter of the Plaintiff, returned to the premises on the morning of Sunday, August 31, 2003 after her son, Ronald Smothers received a call from William Carpenter, Jr., an individual who had performed work for Rolf Kates in the past. Mr. Carpenter informed Mr. Smothers that the landlord and individuals that worked for the landlord were removing items from the premises and setting them out next to the street. Only the landlord and the Plaintiff had a key to the premises at this time. When Ms. Smothers arrived at the premises, she observed her mother's items set out by the street. She testified at trial that she also observed a white van parked in the driveway and indications that new tenants had already begun to move in to the premises. It was raining at the time and many of the items had been ruined by the rain. Several items had been already been taken by neighbors and passersby.

At trial, Defendant Kates testified that the new tenants "officially" moved into the premises on October 1, 2003. When asked why he employed the term, "officially," he indicated that they did not start paying rent under the lease agreement until October 1, 2003. When pressed further as to when the tenants really moved in, he indicated that they began moving in on Monday, September

1, 2003. At trial, Defendant Kates testified that his agreement with the Plaintiff was that her last day at the premises would be Sunday, August 31, 2003. He further testified that after that “the items that were (still) there” would cease to belong to her. On cross examination, he indicated that he had given permission to the new tenants to move out any items belonging to the Plaintiff that remained at the premises. Upon further cross examination, Defendant Kates admitted that within this authorization, he implied that the new tenants could keep any of the property that remained at the premises at the time of their move in. Finally upon cross examination, Defendant Kates testified that any items left after August 31, 2003 would cease to belong to the Plaintiff and thus confirmed that he felt he could do as he pleased with those items after that date.

Defendant Kates’ testimony confirms that he was in a hurry to move in the new tenants (who were willing to pay a much higher rent) as he had promised them possession of the premises on September 1, 2003 according to his testimony (or on August 31, 2003 according to the testimony of Laura Smothers). Angry with the plaintiff for making him pay back the rent overages he had charged, he was eager to move her out. Instead of proceeding with an eviction process because he needed to move the Plaintiff out much sooner than that process would allow, he engaged in a self-help eviction and removed her items to the yard where they were ruined by the rain or stolen by passersby. Defendants never filed an eviction action against the Plaintiff but instead engaged in a self-help eviction against the Plaintiff.

On their counterclaim, Defendants claimed that Plaintiff had damaged the premises during her tenancy. Defendants failed to offer any evidence of the condition of the premises at the time of Plaintiff’s move in as Defendants did not own the premises until early 2002. Defendants did not offer any evidence of the condition of the premises during the tenancy as the landlord “really didn’t check the condition of items at that time” when he was in the house making repairs. Defendants refunded Plaintiff’s security deposit one week prior to trial.

### III. ARGUMENT

#### A. THE LANDLORDS’ ACTIONS CONSTITUTED AN ILLEGAL SELF-HELP EVICTION

Ohio Revised Code §5321.15 makes illegal self-help evictions and reads:

§ 5321.15 Residential premises landlord restrictions.

(A) No landlord of residential premises shall initiate any act, including termination of utilities or services, exclusion from the premises, or threat of any unlawful act, against a tenant, or a tenant whose right to possession has terminated, for the purpose of recovering possession of residential premises, other than as provided in Chapters 1923., 5303., and 5321. of the Revised Code.

(B) No landlord of residential premises shall seize the furnishings or possessions of a tenant, or of a tenant whose right to possession has terminated, for the purpose of recovering rent payments, other than in accordance with an order issued by a court of competent jurisdiction.

(C) A landlord who violates this section is liable in a civil action for all damages caused to a tenant, or to a tenant whose right to possession has terminated, together with reasonable attorneys fees.

Prior to trial, the Defendants' position was that the Plaintiff had removed all of her property from the premises and therefore no self-help eviction could have occurred (See Defendant's Motion for Summary Judgment). At trial, Defendants' position changed. Defendant Rolf Kates admitted that he had removed the Plaintiff's property from the premises. In fact, he testified that after August 31, 2003, any property that remained in the premises ceased to belong to the Plaintiff. He claimed that he had a right to remove the items as the Plaintiff's right to possession expired on September 1, 2003. He also authorized the new tenants to remove the property or dispose of it as they pleased. Defendants blamed the Plaintiff for not retrieving the ruined property from the yard. Defendants also blamed Plaintiff for not entering the property to claim any remaining items after the new tenants had already moved in. Defendants insisted they had not engaged in a self-help eviction as they did not change the locks until sometime later in September.

1. A landlord cannot use self-help eviction measures against a tenant whose right to possession of the premises has terminated.

Ohio Revised Code §5321.15(A) states that "No landlord of residential premises shall initiate any act, including . . . exclusion from the premises . . . against a tenant, or a tenant whose right to possession has terminated, for the purpose of recovering possession of residential premises. . . . In the case of *Edwards v. C.N. Investment Co.*, 27 Ohio Misc. 57, 272 N.E.2d 652

(Muni., Shaker Heights 1971), the landlord took the position that once a tenant held over his term, a landlord could enter the leased premises and remove the tenant's furniture without incurring liability. The court in *Edwards* responded:

It has long been the rule in Ohio that a contract in advance to renounce and waive one's right to appeal to the courts for the redress of wrongs is void and of no effect. (Myers v. Jenkins, 63 Ohio St. 101.)

That position was strengthened by the Court of Appeals of Hamilton County in *Coward v. Fleming*, 89 Ohio App. 485, in which the court held: "A right of entry is not a warrant authorizing the landlord to take the law into his own hands by forcibly ejecting the tenant. The former must resort to his legal remedy to enforce the right and must comply with all the conditions precedent imposed by law."

This court is, therefore, of the opinion that defendant's reentry into plaintiff's suite was violative of law. The fact that defendant has used this technique to regain possession in the past, does not impress upon it the stamp of legality. The court holds that provisions of item No. 7 of the lease are void and unenforceable, and further that a landlord must resort to remedies at law for dispossessing a tenant.

*Edwards v. C.N. Investment Co.*, 27 Ohio Misc. 57, 61, 272 N.E.2d 652 (Muni., Shaker Heights 1971). Defendants' argument that they could re-enter the premises and remove Plaintiff's belongings simply because the tenant's lawful right to possession had ended is without legal support.

2. Defendants' act of removing Plaintiff's possessions from the unit was a self-help eviction prohibited by Ohio law.

Defendants argued at trial that Plaintiff had failed to prove any malicious intent on the part of the landlord in removing her belongings. Defendants also argued that they did not change the locks until sometime later in September 2003. Ohio Revised Code §5321.15 does not require the proof of any intent to be attributed to the landlord nor does it require that the tenant be locked out of the premises. The statute simply states that the landlord shall not initiate any act including exclusion from the premises for the purpose of recovering possession of the premises.

Defendant Rolf Kates did admit on the stand that he had rented the premises to new tenants and that they took possession on September 1, 2003. Laura Smothers testified that she saw the new tenants moving in on August 31, 2003. Defendant Kates excluded Plaintiff from the premises by removing her items and giving possession of the premises to new tenants who immediately took possession. Defendant Kates removed Plaintiff's items for the purpose of recovering possession of the premises.

At trial, Defendants blamed the Plaintiff for not retrieving the ruined property from the yard. Defendants also blamed Plaintiff for not entering the premises to claim any remaining items after the new tenants had already moved in. In the same breath, however, Defendant Kates admitted on the stand that he had authorized the new tenants to remove any remaining items belonging to Plaintiff and that this authorization implicitly permitted the new tenants to either keep or dispose of Plaintiff's items as they saw fit. Plaintiff could have attempted to enter the premises and obtain any remaining property that had not been ruined in the rain or stolen by passersby. If such property existed in the premises, her attempt to reclaim it would have likely resulted in a severe breach of the peace given the landlord's implicit authorization to the new tenants to keep any items they desired.

3. Plaintiff offered testimony as to the reasonable value of the items she lost as a result of the Defendants' actions and Defendants offered no evidence against this.

At trial, Plaintiff and her daughter testified to the following items lost as a result of the

Defendants' actions and to the reasonable market value of them:

Panasonic Camcorder - \$300  
Swinn Bike - \$99  
Christmas tree - \$132  
Decorations - \$125  
Anne Klein Dresses - \$350  
Silk Shirts - \$280  
Designer shoes - \$500  
Pants - \$120  
Housecoats - \$80  
Long underwear - \$28  
Sweaters - \$300  
Support hose - \$50  
Jewelry box - \$45  
Jewelry - \$299  
Perfumes - \$100  
Hats - \$300  
Suitcases - \$387  
Comforter sets - \$74.75  
Printer - \$199  
Desk Organizer - \$59.99  
Leather loveseat - \$400  
Baking pans and pots - \$110  
Stove - \$200  
Glucose Monitor - \$39  
Candleholders - \$58  
Silverware set - \$80  
Hutch - \$189  
Video sets - \$1750  
Rugs - \$30  
Baker's rack - \$49  
Picture fram \$20  
Bathroom rug - \$20  
Bathroom accessories - \$100  
Lamps - \$60  
Stuffed animals - \$350  
Hat boxes - \$100  
Sleeping gowns - \$300  
Leather coat - \$175  
Microwave stand - \$65

Defendants offered no evidence contradicting these values. Plaintiff seeks total damages in the amount of \$7,923.74 plus reasonable attorney's fees. Plaintiff will make a motion for attorney's fees upon the Court's finding in her favor.

B. DEFENDANTS FAILED TO CARRY THEIR BURDEN OF PROOF AS TO DAMAGES TO THE PREMISES.

1. Defendant must provide evidence of the move in condition of premises to be awarded damages.

The party who brings an action must prove the allegations in the counterclaim by a preponderance of the evidence. This is called the burden of proof. In a case brought pursuant to R.C. 5321.16 involving the disposition of a security deposit, the landlord bears the burden of proving the right to withhold any portion of the deposit. *Paxton v. McGranahan* (1985), 25 OBR 352; *Zeallear v. F&W Properties*, 2000 Ohio App. LEXIS 3321 (attached hereto).

Defendants failed to offer any evidence of the condition of the premises at the time of Plaintiff's move in as Defendants did not own the premises until early 2002. Defendants did not offer any evidence of the condition of the premises during the tenancy as the landlord "really didn't check the condition of items at that time" when he was in the house making repairs. Without evidence of the condition of the items at the time of move-in or at some time after move-in, the landlord cannot sustain a damages claim because he has left the Court to guess at what the value/condition of the items were at move-in. A Court can only make findings based on the evidence.

Defendants sought \$1700.00 to replace the carpeting in the premises. Defendants offered no evidence as to the age of the carpeting at the time they replaced it nor did they offer evidence of the condition of the carpeting at any time prior to move-out. The carpeting could have been several years old at the time Plaintiff moved in in 1998 and in need of replacement at that time. It's useful life could have already expired prior to move in. Plaintiff testified that the carpeting was not new when she moved in but that she did not know how old it was at the time of her move in. She testified that it was worn in several places at move in.

If the carpet's useful life was seven years and it was seven years old at the time of move-out, Defendants cannot charge the plaintiff for replacing the carpeting: Defendants would have already realized the full value of the carpeting at that time. If the carpet's useful life was seven years and it was six years old at the time of move-out, Defendants can only charge one seventh of the \$1700.00

they are seeking (\$242.86). Given the lack of evidence presented at trial, the Court would have to engage in speculation as to the age of the carpeting. As the Court cannot speculate as to the age of the carpeting, it cannot award damages for the replacement of the carpet.

Defendants also sought \$140.74 for replacement of damaged basement ceiling; \$87.54 for replacement of burned counter-top; \$120 for water damage because of improper removal of refrigerator; \$60.88 for repair of broken storm windows; and \$60 for “removal of items left throughout the house” (as set forth in Defendants’ original counterclaim). Plaintiff offered testimony that the counter-top was burned at the time of move-in (Defendants did not rebut this); that some storm windows were broken at the time of move-in (Defendants did not rebut this); that the basement ceiling was not damaged; and that her refrigerator did not have a water connection. Defendants’ claims for these damages must also fail because they presented no proof as to the condition of these items at move-in or at any time after move-in and thus Defendants require the Court to speculate as to what their condition was at move-in.

#### IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests the Court to find in her favor on her self-help eviction claim against Defendants in the amount of \$7,923.74 plus reasonable attorney’s fees. Plaintiff will make a motion for attorney’s fees upon the Court’s finding in her favor. Plaintiff respectfully requests the Court to find against the Defendants on their claim for damages to the premises.

Respectfully submitted,

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Andrew J. Ruzicho II (0064024)  
611 East Weber Road Suite 102  
Columbus, Ohio 43211  
(614) 447-2365  
Attorney for Plaintiff

### **Certificate of Service**

The undersigned hereby certifies that a true and accurate copy of the foregoing has been served upon the party below by ordinary U.S. Mail, postage prepaid, to the below address, this 27th day of June, 2005.

**Sheila P. Vitale, Esq.  
Cooper & Elliott  
2175 Riverside Drive  
Columbus, Ohio 43221**

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Andrew J. Ruzicho II (0064024)