BEFORE THE
COMMISSION OF LANDLORD-TENANT AFFAIRS
FOR MONTGOMERY COUNTY, MARYLAND

In the Matter of Jonathan S. Hunn Complainant	
v.	Case No. 10569
Barry and Emily Wasser Rental Facility: 9469 Copenhaver Drive, Potomac, Maryland (Rental License No. 36705) Respondents	

DECISION AND ORDER

The above captioned case having come before the Commission on Landlord-Tenant Affairs for Montgomery County, Maryland (the "Commission"), pursuant to Sections 29-10, 29-14, 29-41, and 29-44 of the Montgomery County Code, 2001, as amended, and the Commission having considered the testimony and evidence of record, it is therefore, this 12th day of February, 2002, found, determined, and ordered, as follows:

BACKGROUND

On August 10, 2000, Jonathan S. Hunn, (the "Complainant"), former tenant at 9469 Copenhaver Drive, Potomac, Maryland (the "Property"), a licensed single-family rental facility in Montgomery County, Maryland, filed a formal complaint with the Office of Landlord-Tenant Affairs within the Department of Housing and Community Affairs, (the "Department"), in which he alleged that Barry and Emily Wasser (the "Respondents"), owners of the Property: (1) failed to deliver the Property to him at the commencement of

his tenancy in a clean, safe and sanitary condition, in violation of Section 29-26(n) of the Montgomery County Code, 1994, as amended ("County Code"), which caused him to prematurely terminate his tenancy; and (2) failed to make needed and necessary repairs to the Property, including elimination of rodent infestation and mold and mildew in the basement, in a timely manner after being put on notice by him and by the Department's Division of Housing Code Enforcement, which constituted a substantial breach of the lease and resulted in the premature termination of his tenancy on July 27, 2000, one week after taking possession.

Specifically, the Complainant asserts that: (1) he originally viewed the Property on June 25, 2000, while it was still furnished and occupied by the previous tenants; (2) on June 27, 2000, he signed a thirteen (13) month lease with Respondent, Barry Wasser, and pre-paid July 2000 rent in the amount of $2,650.00; (3) on July 20, 2000, he moved from Cincinnati, Ohio, to take possession of the Property; (4) at the time he arrived at the Property, it was not clean, and he observed numerous deficiencies that were not observable on June 25, 2000, including the presence of mold and mildew and an infestation of rodents; (5) he immediately notified Respondent, Emily Wasser, who informed him that "everybody has to do some cleaning when hey move in"; (6) based on the Respondents' failure to expeditiously make needed and necessary repairs to the Property, he contacted the Department's Division of Housing and Code Enforcement which resulted in an inspection and the issuance of a Notice of Violation containing 28 violations of Chapter 26, *Housing and Building Maintenance Standards*, of the County Code ("Housing Code"), including an infestation of rodents and a strong mildew/mold odor from a water leak in the basement; and (7) based on the Respondents' failure to make the repairs in a timely manner, due in part to the fact that Respondent Barry Wasser was out of the country at the time the Complainant took possession of the Property, he vacated the Property on July 27, 2000, and stopped payment on his security deposit check.

By correspondence dated April 19, 2001, the Complainant amended his complaint to claim, in addition to the refund of his entire July 2000 rental payment ($2,650.00) reimbursement of attorney's fees in the amount of $540.00.

The Respondents contend that: (1) at the time the Complainant took possession of the Property, July 20, 2000, it was in need of some minor repairs and they were working to correct all of the problems; (2) the previous tenant, Antonio Galicia, was responsible for cleaning the Property when he vacated, but they do not know if Mr. Galicia did so; (3) although Mr. Wasser was out of the country at the time the Complainant took possession of the Property, the Complainant never gave him the opportunity to correct the problems before moving out; (4) the Complainant breached the lease and abandoned the Property, which resulted in re-rental expenses and lost rental income; and (5) the Complainant is not entitled to a refund of pre-paid July 2000 rent.

The Complainant is seeking an order from the Commission for the Respondents to refund his July 2000 rent payment, $2,650.00, plus the cost he incurred to hire an attorney, $540.00, for a total award of $3,190.00.

After determining that the complaint was not susceptible to conciliation, the Department duly referred this case to the Commission for its review, and on June 26, 2001, the Commission voted to hold a public hearing. Notice of the hearing date and time was sent to the parties on June 27, 2001. The public hearing in the matter of Jonathan S. Hunn v. Barry and Emily Wasser, relative to Case No. 10569, commenced on August 7, 2001, and concluded on that date.

The record reflects that the Complainant and the Respondents were given proper notice of the hearing date and time. Present at the hearing and presenting testimony and evidence were the Complainant Jonathan S. Hunn, the Respondents Barry Wasser and Emily Wasser, as well as three witnesses called by the Commission, the Department's Inspector Sheila Williams (Retired), Program Manager, Linda Bird and Landlord-Tenant Investigator Rosie McCray-Moody.

Without objection from the Complainant or the Respondents, the Commission entered into the record of the hearing the case file compiled by the Department, identified as Commission's Exhibit No. 1, which included 41 photographs of the Property submitted by the Complainant as part of his original complaint. The Commission also accepted into evidence at the hearing three (3) exhibits offered by the Complainant: (1) a copy of an advertisement from the Washington Post newspaper, dated June 25, 2000, relating to the Property, identified as Complainant's Exhibit No. 1; (2) a series of 30 articles and industry publications regarding mold and mildew, identified as Complainant's Exhibit No 2a – 2dd; and (3) a 2-page photocopy of a bill for legal services rendered from Moses & Aiken, LLC, in the amount of $540.00. The Commission also accepted into evidence two (2) exhibits offered by the Respondents: (1) a proposalfor repairs to the Property, dated July 14, 2000, from David Crayle, General Manager, J.R. Roofing & Siding Co., Inc., in the amount of $3,450.00, identified as Respondents' Exhibit No. 1; and (2) a statement from Ana Perez, regarding proposed cleaning services to the Property dated August 3, 2000, identified as Respondents' Exhibit No. 2.

Furthermore, the Commission extended the time period within which it would decide this matter pursuant to Section 7.1 of Appendix L, "Regulations on Commission on Landlord-Tenant Affairs" of Chapter 29 of the County Code.

FINDINGS OF FACT

Based on the testimony and evidence of record, the Commission makes the following findings of fact:

1. **On June 25, 2000, after first viewing the Property which was still occupied by the previous tenant, the Complainant and Respondent, Barry Wasser, entered into a thirteen (13) month lease agreement for the rental of the Property (the "Lease"), which commenced on July 1, 2000, and was due to expire on July 31, 2001. The amount of the monthly rent for the Lease was $2,650.00.**

2. The Lease does not comply with Section 29-26(d) of the County Code because it does not contain a provision acknowledging the landlord's responsibility for maintenance of the rental facility, and the Lease does not incorporate by reference Chapter 8, title "Buildings", Chapter 22, title "Fire Safety Code, Chapter 26, title "Housing Standards," and Chapter 29, title "Zoning," of the County Code, as an express warranty of habitability and covenant to repair.

3. The Lease does not comply with Section 29-26(n) of the County Code because it does not contain a covenant that the landlord will deliver the Property in a clean, safe and sanitary condition and in complete compliance with all applicable laws.

4. On or about June 25, 2000, the Complainant pre-paid the Respondents $2,650.00 for rent for the entire month of July 2000, even though it was never his intention to move into the Property prior to July 20, 2000.

5. On or about June 25, 2000, the Complainant paid the Respondents a security deposit in the amount of $3,000.00, which is receipted in the Lease.

6. On July 20, 2000, the Complainant moved from Ohio to take possession of the Property, at which time he noted numerous deficiencies, including suspected rodent infestation, non-locking sliding glass door, defective door locks, leaky faucets, mold and mildew in the basement, and general lack of cleanliness. The Commission credits the testimony of the Complainant that he immediately reported these problems to the Respondent, Emily Wasser.

7. The Commission finds credible the testimony of Respondent, Emily Wasser, that upon hearing from the Complainant about deficiencies in the Property on July 20, 2000, she immediately inspected the Property and spoke with the Complainant in order to determine what repairs were necessary. The Commission further finds that on July 23, 2000, Respondent, Emily Wasser, returned to the Property to further inspect, that she began taking actions to address deficiencies in the condition of the Property, that she made arrangements to have the windows cleaned on July 26, 2000, and that she told the Complainant to make a list of all problems that needed correcting.

8. Based on a complaint filed by the Complainant on July 26, 2000, seven days after he took possession of the Property, Inspector Sheila Williams, from the Department's Division of Housing and Code Enforcement, inspected the Property and subsequently issued the Respondents a Notice of Violation citing them with 28 violations of the County's Housing Code, including inoperative front entrance door locks, inoperative stove burners, deteriorated floor covering, and a loose handrail.

9. The Commission finds that at the time the Complainant took possession of the Property, July 20, 2000, there were numerous deficiencies present, as evidenced by the 40 photographs submitted by the Complainant (See pages 10-23 of Commission's Exhibit No.1), which fairly and accurately represent the condition of the Property on that date.

10. The Commission finds that based on the deficiencies, the Respondents did not deliver the Property to the Complainant at the commencement of his tenancy, July 20, 2000, in a clean and sanitary condition, and in complete compliance with all applicable laws.

11. On July 27, 2000, the Complainant vacated the Property, returned the keys to the Respondents, and stopped payment on his security deposit check.

12. In the opinion of the Commission, the Complainant was within his right to terminate the Lease at the end of July 2000 based on the Respondents' failure to deliver the Property to him in a clean and sanitary condition and in compliance with all applicable laws.

13. The Commission finds that there is not sufficient credible evidence or testimony from the parties or the witnesses to determine the existence of an infestation of mice in the Property on or after July 20, 2000.

14. The Commission does not find credible the testimony or evidence of the Complainant that the condition of the Property on or after July 20, 2000, was hazardous or posed an immediate threat to his health, safety or well being. Although the Property had deficiencies at the time it was delivered to the Complainant, the Property was not uninhabitable, and the deficiencies did not rise to the level of posing an immediate threat to the health, safety and well being of the Complainant.

15. Although the Complainant was within his right to terminate the Lease, the Commission finds that by vacating the Property on July 27, 2000, the Complainant failed to provide the Respondents with sufficient time or opportunity to remedy, repair, or correct the deficiencies in the Property and therefore, the Respondents were not delinquent in failing to remedy, repair or correct the deficiencies in the Property by July 27, 2000.

16. The Commission finds that by vacating the Property the day after the Department issued a Notice of Violation to the Respondents citing them for 28 violations of the County's Housing Code, the Complainant did not provide the Respondents sufficient or reasonable time to correct the Housing Code violations contained in that Notice of Violation.

CONCLUSIONS OF LAW

Accordingly, based upon a fair consideration of the testimony and evidence contained in the record, the Commission of Landlord-Tenant Affairs concludes:

1. The Commission notes that Chapter 29, *Landlord-Tenant Relations,* of the County Code has been amended, and that the amendments became effective as of April 1, 2001. However, the termination of the Complainant's tenancy and the Respondents' alleged violations of Chapter 29 of the County Code took place prior to April 1, 2001, and therefore, although the public hearing in this matter took place after April 1, 2001, with the exception of newly enacted Section 29-19(e), the Commission must apply Chapter 29 as it was prior to the newly enactedamendments.

2. The fact that the Lease does not contain a provision acknowledging the Respondents' responsibility for maintenance of the rental facility, and the Lease does not incorporate by reference Chapter 8, title "Buildings", Chapter 22, title "Fire Safety Code, Chapter 26, title "Housing Standards," and Chapter 29, title "Zoning," of the County Code, as an express warranty of habitability and covenant to repair, constitutes a violation of Section 29-26(d) of the County Code, and has caused a defective tenancy.

3. The fact that the Lease does not contain a covenant that the landlord will deliver the Property in a clean, safe and sanitary condition and in complete compliance with all applicable laws, constitutes a violation of Section 29-26(n) of the County Code, and has caused a defective tenancy.

4. The Respondents' failure to deliver the Property to the Complainant at the commencement of his tenancy in a clean and sanitary condition, and in complete compliance with all applicable laws, constitutes a violation of Section 29-26(n) and 29-30(a), and has caused a defective tenancy.

5. Because of the foregoing, there was a defective tenancy, and the Complainant was within his right to terminate the Lease, and he is entitled to relief from any obligations under the terms of the Lease after the end of July 2000.

6. Based on consideration of the level and nature of deficiencies and Housing Code violations at the Property, and based on consideration of whether the Respondents had notice of the violations and reasonable opportunity to cure them, the Commission finds that the Complainant is not entitled to the return of all rent paid for the Property for July 2000, and therefore his request for an award of $2,650.00 for July rent is DENIED.

7. Regarding the Complainant's request for reimbursement of attorney's fees related to his claim, pursuant to Section 29-43(b)(4) of the County Code, the Commission is authorized to make an award of reasonable attorney's fees, not to exceed $1,000.00, if it makes an affirmative finding of retaliatory action on the part of the Landlord, and that the fees were incurred by the affected tenant in defense of the retaliatory action. No such claim of retaliation has been made in this case by the Complainant, and therefore, his request for an award of $540.00 in attorney's fees is DENIED.

ORDER

In view of the foregoing, the Commission on Landlord-Tenant Affairs hereby Orders that the Complainant's request for a refund of July 2000 rent and reimbursement for attorney's fees is DENIED; and his complaint is hereby DISMISSED.

Commissioners John Peterson and Martin Schnider, Jr., Chair, concurred in the foregoing decision. However, Commissioner Travis Nelson dissented, and a copy of his Dissenting Opinion is attached hereto.

Any party aggrieved by this action of the Commission may file an administrative appeal to the Circuit Court for Montgomery County, Maryland within thirty (30) days from the date of this Decision and Order, pursuant to the Maryland Rules governing administrative appeals.

_____

Martin Schnider, Jr., Panel Chairperson
Commission on Landlord-Tenant Affairs

FOLLOWING IS A DISSENTING OPINION

BEFORE THE
COMMISSION OF LANDLORD-TENANT AFFAIRS
FOR MONTGOMERY COUNTY, MARYLAND

In the Matter of Jonathan S. Hunn Complainant	

v.	Case No. 10569
Barry and Emily Wasser Rental Facility: 9469 Copenhaver Drive, Potomac, Maryland (Rental License No. 36705) Respondents	

DISSENTING OPINION

I must respectfully dissent from the opinion of my colleagues. Under my colleagues' interpretation, this case involves a breach of warranty, and under such, the tenant is required to notify the landlord of any defects and allow a reasonable amount of time for the landlord to cure such defects. In order for there to be a warranty from the landlord to the tenant to breach, there must first exist a landlord-tenant relationship manifested by a valid contract. If there was no contract from the beginning, then there can be no warranties flowing from that contract.

A fundamental principle of contract construction is to ascertain and effectuate the intentions of the contracting parties, unless that intention is at odds with established principles of law. *B & P Enterprises v. Overland Equipment Co*., 758 A.2d 1026 (Md. App. 2000). The primary source for determining the intention of the parties is the language of the contract itself. *Id.* Clear and unambiguous language of a written agreement controls, and "a contract is not ambiguous merely because the parties disagree as to its interpretation." *Id., citing Fultz v. Shaffer*, 681 A.2d 568 (Md. App. 1996).

A standard residential lease agreement is essentially a bilateral contract - a contract where each party promises to do something in exchange for the other party's promise to do something else. In this case, the Respondents promised to furnish a residential dwelling that was clean, safe and habitable in condition. In return for Respondents' promise to furnish such a dwelling, the Complainant promised to pay the agreed upon amount of $2,650.00. Under the lease agreement, the Complainant was to pre-pay the rent due for July 2000 and Complainant's property interest in the dwelling would vest on July 1, 2000, even though he would not take actual possession of the dwelling until July 20, 2000.

The narrow issue in this case is whether the parties received what they bargained for as of the date that reciprocal performance was due, that date being July 1, 2000. This panel is in unanimous agreement that as of the day of the conveyance of the leasehold, July 1, 2000, the property in question was not clean, safe or sanitary, and that such conditions caused a defective tenancy. We must then ask ourselves whether failure to deliver the property in a clean, safe and sanitary condition constitutes a breach of contract thereby excusing the other party's performance (in this case Complainant's duty to pay rent).

In order for the Complainant to recover damages for breach of contract he must prove that the Respondents breached the contract and that the Complainant did not himself commit a material breach of contract. A breach is "material" if it affects the purpose of a contract in an important or vital way. A material breach by one party to a contract relieves the other party of its obligation to perform under that contract. *K & K Management, Inc. v. Lee*, 557 A.2d 965 (Md. 1989). The overriding purpose of this lease contract was to convey a clean and habitable residential property for an agreed upon lease term and monetary consideration. The unit was not conveyed in a clean and habitable

condition, therefore I find that the purpose of the contract was thwarted in an important or vital way and the Respondents have committed a material breach.

The majority opinion would appear to confirm this notion that the landlord's breach stemmed from the very inception of the lease. In its conclusions of law, at paragraph three, the majority confirms that because of the fact that the Lease failed to contain a covenant that the dwelling would be delivered in a clean, safe and sanitary condition and in compliance with all applicable laws, a defective tenancy exists. Further, at paragraph four, because of the "failure to deliver the Property to the Complainant at the commencement of his tenancy in a clean and sanitary condition, and in compliance with laws...[Respondents have] caused a defective tenancy." The majority neglects to recognize the significance of its own conclusions — that by "fail[ing] to deliver" the unit "at the commencement of the tenancy" in the bargained for condition, the landlord's breach existed from the very beginning.

The law in this state is clear: "Where...there has been a material breach of a contract by one party, the other party has a right to rescind it." *Washington Homes, Inc. v. Interstate Land Development Co., Inc*., 382 A.2d 555 (Md. 1978); *Plitt v. McMillan*, 223 A.2d 772, 774 (Md. 1966); *Foster-Porter Enterprises v. De Mare*, 81 A.2d 325 (Md. 1951); *Vincent v. Palmer*, 19 A.2d 183 (Md. 1941); Ady v. Jenkins, 104 A. 178 (Md. 1918). The rescission of a contract involves voiding it *ab initio* and returning the parties to the *status quo ante*, in this case returning to the Complainant his pre-paid rent.

I believe that the Complainant's request for reimbursement of July rent should be granted, and that all Complainant's and Respondents' other requests should be denied.

The majority this day treads on potentially dangerous precedent for landlord-tenant relations in this County. According to the majority, a landlord is free to convey a leasehold in residential property even though that property is in violation of our health and safety laws, and it is only if the tenant complains loud enough that the landlord will be forced to bring the property into compliance with the Code. This situation is exactly the sort of "unequal bargaining power between landlords and tenants" that the County Council was attempting to remedy when it drafted Chapter 29 and established the Commission on Landlord-Tenant Affairs. The County Council found it "necessary and appropriate" that the Commission is established in order "to facilitate fair and equitable arrangements, foster the development of housing that will meet the minimum standards of the present day and promote the health, safety and welfare of the people." Montgomery County Code, Section 29-2. In this case the majority is allowing a landlord to collect full rent on a property that is in violation of the County safety and sanitary laws, which is ironic as such is one of the very reasons that the County asserts for seeking revocation of a leasing license.

Believing that the majority's opinion is bad law and bad for Montgomery County, I must respectfully dissent.

Travis P. Nelson,

Commission on Landlord-

Commissioner

Tenant Affairs