

**Before the
Commission on Landlord-Tenant Affairs
for Montgomery County, Maryland**

In the Matter of Dennis H. McCune Complainant	
v.	Case No. 4747
David Swanner Rental Facility: 4108 Warner Street, Kensington, MD. (License # 015254) Respondent	

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DECISION AND ORDER

The above captioned case having come before the Commission on Landlord-Tenant Affairs for Montgomery County, Maryland, pursuant to Sections 29-14A, 29-38, and 29-40 of the Montgomery County Code 1994, as amended ("County Code"), and the Commission having considered the testimony and evidence of record, it is, therefore, this 22nd day of June, 1999, found, determined and ordered, as follows:

BACKGROUND

On August 6, 1997, Dennis H. McCune (the "Complainant"), filed a complaint with the Office of Landlord-Tenant Affairs, within the Department of Housing and Community Affairs (the "Department"), in which he alleged that David Swanner (the "Respondent"), owner of 4108 Warner Street, Kensington, MD (the "Property"), a single-family rental property in Montgomery County, MD: 1) failed to deliver the Property to him at the commencement of the lease term, October 20, 1996, in a clean, safe and sanitary condition; and, 2) refused to refund his security deposit after he notified the Respondent in writing of his intention not to take possession of the Property.

Specifically, the Complainant asserts: 1) on or about October 15, 1996, he entered into an eight and one-half (8½) month lease agreement with the Respondent for the rental of the Property which commenced October 20, 1996, and was due to expire on June 30, 1997, and paid a

security deposit of \$975.00; 2) on moving into the Property on October 21, 1996, he noticed several problems, including a moldy odor in the rear addition to the Property along with a problem with the gas oven, which he immediately reported to the Respondent; 3) on October 22, 1996, the Respondent sent him a fax which stated, "I strongly urge you to cease using the stove and summon emergency service from the Washington Gas Light Company", which he did; 4) on October 23, 1996, a contractor from the Washington Gas Company inspected the stove and found, "Signature range saturated in grease and presents a possible fire hazard-should not be used until corrections are made"; and 5) On October 23, 1996, he vacated the Property, turned in his keys and notified the Respondent that he could no longer stay under those conditions.

In response to the Complainant's allegations, the Respondent asserts that: 1) the Complainant had been through the Property on at least three (3) occasions prior to signing the lease and did not object to the problems that existed at that time; 2) he never tried to trick the Complainant, and advised him to call someone about the stove immediately; 3) the Complainant is a building inspector and was therefore aware that the conditions at the Property may have been substandard when he signed the lease; 4) he believes the Complainant wanted to move to a less expensive Property, which prompted his complaint; 5) he lost rent for the month of November 1996 because of the Complainant's abrupt departure and had to pay a second realtor's fee to re-rent the Property; and, 6) due to the Complainant's breach of lease, and costs he incurred as a result, the Complainant is not entitled to the return of any monies.

The Complainant is seeking a refund of his entire security deposit (\$975.00), plus interest accrued from the termination of his tenancy, October 23, 1996, to the date of the hearing. He is also requesting the refund of pro-rata October 1996 rent in the amount of \$450.00.

After determining that the complaint was not susceptible to conciliation., the Department duly referred this case to the Commission for its review, and on October 6, 1998, the Commission accepted jurisdiction of the case and scheduled a public hearing which commenced on February 11, 1999, and ended on that date.

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 the County Code.

The record reflects that the parties were given proper notice of the hearing date and time. Present at the hearing and presenting testimony and evidence were the Complainant, Dennis McCune, and the Respondent, David Swanner. Two witnesses, John and Mary Liipfert, who were summoned at the Respondent's request, were not present at the hearing. Both witnesses notified the Commission in writing of their inability to be present for the hearing.

The Commission entered into evidence, as Commission's Exhibit No. 1, the contents of the case file compiled by the Department. There was no objection by the Complainant but the Respondent questioned whether the correspondence from the absent witnesses would be considered. The Respondent requested that the letter written by John and Mary Liipfert, page 18 of Commission's Exhibit No. 1, not be considered since the Liipferts were not present and he could not cross examine them regarding the letter's contents. The Commission granted this request, and page 18 of Commission's Exhibit No. 1 was stricken from the record.

The key issue in this case is whether or not the Respondent breached his lease with the Complainant in violation of Section 29-30 (a)(3) of the County Code and Paragraph 9 of the lease, entitled, "Maintenance."

The Complainant submitted into evidence at the hearing 14 photographs (Complainant's Exhibit # 1A - 1G) which he asserted depicted the condition of the Property at the commencement of his tenancy, and a short video tape (Complainant's Exhibit #2), depicting these same conditions. The Complainant testified that he had inspected the Property on October 15, 1996, and expressed an interest in renting it from the Respondent. Based on that inspection, he submitted a rental application, but he did comment to the Respondent at this inspection, there was a "musty odor" in the house. He was informed by the Respondent that this odor was probably due to the fact the house had been closed up for awhile. The Complainant was subsequently approved and took possession of the Property on October 20, 1996, at which time he moved in most of his possessions. On October 23, 1996, he attempted to use the gas stove and detecting an odor of gas, notified the Respondent. The Respondent informed the Complainant, through facsimile, to stop using the stove immediately and call the gas company, which he did. The technician from the gas company wrote on the Complainant's service ticket, " Signature range saturated in grease and presents a possible fire hazard- should not be used until corrections are made" (Complainant's Exhibit #3). The smell from the porch remained and the Complainant discovered it was emanating from the carpet on the porch in the addition to the house, which was constantly wet. The faulty stove and the smell from the wet rug in the addition, taken as a collective caused the Complainant to conclude the Property was not habitable and on October 23, 1996, he informed the Respondent, via telephone message, of his intention to vacate the Property immediately due to its uninhabitable condition.

The Respondent testified that at the time he rented the Property to the Complainant, it was in clean, safe and sanitary condition, and in compliance with all applicable laws. The Respondent also testified that when he was informed of the problem with the stove, he immediately told the Complainant to stop using it and call the gas company for service. The Respondent further testified that before he had the opportunity to affect repairs, the Complainant vacated the Property. At that point, the Respondent notified Weichert Realtors and listed the Property for sale or rent. He also put ads in the Washington Post and had the Realtors place ads as well. The Respondent testified that he replaced the carpet and the underlayment in the addition on November 2, 1996 and replaced the stove on December 5, 1996. He signed a lease with a new tenant on December 2, 1996 (see Commission's Exhibit #1, p.19). He also repaired a roof leak that apparently was causing the carpet on the porch to be constantly wet.

Upon consideration of the testimony and documentary evidence submitted herein, including the photographs submitted by the parties, the Commission makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Prior to execution of the lease, Complainant inspected the premises with the Respondent, at which time he did not observe any defects or deficiencies but did comment on a musty odor which was presumed by the Respondent to be due to the fact the house had been vacant and closed for a time.
2. The Complainant signed a lease with the Respondent on October 15, 1996, which commenced on October 20, 1996 and was due to expire on June 30, 1997.

3. The Complainant paid the Respondent a security deposit of \$975.00, and the first month's pro-rated rent in the amount of \$450.00.
4. The Complainant took possession of the Property on October 20, 1996.
5. On October 21, 1996, the Complainant called the Respondent and reported the smell of gas emanating from the gas stove. The Respondent instructed the Complainant to stop using the stove immediately and call the gas company. The gas company representative informed the Respondent the build up of grease under the stove top was dangerous and instructed him not to use the stove until it was cleaned thoroughly.
6. The Complainant vacated the Property on October 23, 1996, leaving the Respondent a telephone message on October 24, 1996 (see Respondent's Exhibit #1), informing him of his departure.
7. The conditions reflected in the photographs submitted by the Complainant (see Complainant's Exhibits 1A - 1G) and by the Respondent (Respondent's Exhibit's 2A - 2K), fairly and accurately represent the condition of the Property on October 24, 1996.
8. After receiving notice from the Complainant on October 24, 1996, that he had vacated the Property, the Respondent immediately began correcting the deficiencies reported by the Complainant.
9. The Respondent expeditiously attempted to re-let the Property and signed a lease with a new tenant which commenced on December 2, 1996.
10. The Respondent corrected all of the deficiencies in the Property by December 5, 1996.

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CONCLUSIONS OF LAW

1. Section 29-30 (a) "Landlord-Tenant Relations," of the County Code requires that a landlord must reasonably provide for the health, maintenance, safety and welfare of all tenants and all individuals properly on the premises of a rental facility. Furthermore, Section 29-30 (a)(3) requires that a landlord make all repairs and arrangements necessary to put and keep the dwelling unit and the appurtenances thereto in as good a condition as they were, or ought by law or agreement to have been, at the commencement of tenancy. In determining if the conditions of a Property warrant refusal to take possession and termination of the lease, certain factors need to be considered. Factors to be considered include whether the deficiencies, which may be minor in nature, rise to the level of housing code violations, the nature, the number, and the severity of code violations, how long any code violations have existed, whether the landlord has notice of the violations and has been given a reasonable opportunity to cure them.
2. As a matter of law, even taking into account the deficiencies noted above, the Complainant failed to provide sufficient probative testimony or evidence to demonstrate that the Property was delivered to him in an unclean, unsafe or unsanitary condition, or that the Property was uninhabitable at the commencement of the lease term, October 20, 1996. In addition, there was not ample time in which to cure the deficiencies.
3. Because of the foregoing, the Complainant was not within his rights to terminate the lease, and by doing so, breached the lease.
4. The Respondent fulfilled his duty to mitigate damages based on the Complainant's breach of the lease by expeditiously advertising and re-renting the Property as of December 2, 1996.

5. The Respondent did not breach the lease agreement with the Complainant and therefore, did not cause a defective tenancy.

ORDER

In view of the foregoing, the Commission on Landlord-Tenant Affairs hereby finds that no violation of applicable law or lease has occurred on the part of the Respondent or their agents, and that the Respondent has not caused a defective tenancy. It is, therefore, Ordered that Case No. 4747, McCune v. Swanner is DISMISSED.

The foregoing decision was concurred in unanimously by Commissioner Martin Schnider, Commissioner Jonathan Smith and Commissioner Greg Smith, Panel Chair.

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

Greg Smith, Panel Chairperson
Commission on Landlord-Tenant Affairs