

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
FOURTH DIVISION
CASE NO. 16-CI-04242



LEXINGTON RENTAL HOMES, LLC

PLAINTIFFS

v.

OPINION AND ORDER

PENNY SAFFERY and
FITZROY "GARY" SAFFERY

DEFENDANTS

This matter is before the Court on the Plaintiff, Lexington Rental Homes' ("LRH") Motion for Summary Judgment. LRH moves for summary judgment against the Defendants, Penny Saffery and Fitzroy "Gray" Saffery, (the "Safferys") based upon claims of breach of lease, failure to pay rent, and negligence regarding the residence located at 3113 Sandersville Road in Lexington, Kentucky. The Court has reviewed the Motion, the relevant case law, and the record. For the reasons set forth below, Lexington Rental Homes' Motion for Summary Judgment is hereby **SUSTAINED**.

FACTS

LRH and the Safferys entered into a written Lease dated August 12, 2011 (the "Lease"), whereby the Safferys agreed as tenants to lease residential space from LRH, located at 3113 Sandersville Road, Lexington, Kentucky. Monthly rent was \$1,295. The initial lease term was for a period of twelve (12) months, from September 1, 2011 to August 31, 2012. It was a year-to-year lease requiring 30-day written notice to terminate.

The Safferys habitually failed to pay rent in full when due. LRH was forced to initiate eviction proceedings, only to have the Safferys resolve said proceeding with a

partial payment. Pursuant to the lease agreement, the costs of the eviction proceeding, including attorneys' fees were then added into the Safferys' accruing balance owed in order to have the eviction proceeding dismissed at the hearing or to have the landlord disregard the eviction judgment if it had been entered. Between 2012 and 2016, the Safferys were subject to at least twenty-five (25) separate eviction proceedings.

The Safferys failure to pay rent as agreed under the Lease accumulated to \$7,840 in unpaid rent, late fees, and liquidated damages. The Safferys' vacated the residence on September 7, 2016. A new year-to-year lease term began on September 1, 2016. The Lease provides that, in the event the Safferys' prematurely cancel the Lease before the end of the Lease term, they are liable to LRH for two months' rent as liquidated damages. *See* Lease, paragraph 11. The liquidated damages total \$2,590. The Safferys were fully aware of their payment deficiencies, between their repeated partial payments of rent, accruing significant late fees, and the costs of eviction proceedings.

After the Safferys vacated the property, LRH discovered that they had failed to properly maintain the premises. LRH incurred extraordinary expenses in cleaning and repairing the property in order to re-let it. According to LRH, the total expense in cleaning and repairing the property was \$7, 673.12. Additionally, LRH seeks recovery of attorneys' fees and costs based upon KRS 383.660 and the Safferys' willful breach of the Lease. LRH contends that there is no genuine issue of material fact as to their liability for the sums due under the Lease.

LEGAL ANALYSIS

Summary judgment should be granted only in the absence of a genuine issue of material fact and where the moving party (LRH) is entitled to a judgment as a matter of

law. Ky. R. Civ. P. 56.03. See *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Moreover, “The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment.” *Lewis v. B & R Corp.*, 56 S.W.3d 432,436 (Ky. App. 2001). A party opposing a properly supported summary judgment motion cannot defeat the motion without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial. *Id.* Summary judgment is proper when it manifest that the opposing party could not strengthen their case at trial and the moving party would be entitled ultimately and inevitably to a directed verdict. *Old Mason's Home of Kentucky, Inc. v. Mitchell*, 892 S.W.2d 304 (Ky. App. 1995). Here, the Safferys did not produce evidence showing a genuine issue of material fact, and summary judgment is therefore appropriate.

With regard to the liquated damages, the Safferys’ claim that the last eviction notice was served on them more than 30 days before the end of the lease, therefore it was a proper termination of the Lease. Also stating that they are not responsible for the damages because the Lease did not “automatically renew” due to the forcible detainer, so the Lease naturally ended. This is false. The Lease required written notice by the tenant at least 30 days before the first day of their last month. The forcible detainer cannot be construed as a notice by the landlord, within the meaning of paragraph 1 of the Lease, to “terminate” the lease because that would permit the Safferys to benefit from their own dereliction and breach of the Lease terms. LRH’s eviction filing on its face is a “notice to vacate” and not a notice to terminate the lease. The lease was extended through August 31, the last eviction proceeding was filed July 21, 2016 and the Forcible Detainer

Judgment was entered August 5, 2016, yet the Safferys did not vacate until September 7, 2016. They had not sent a written thirty (30) day notice of termination and still occupied the property. The Lease obligates the Safferys to pay two months of liquated damages.

The Safferys state that the damages to the property resulted from normal wear and tear. This inference is not adequately supported. Under KRS 383.580(3), at the termination of occupancy, the landlord shall inspect the premises and compile a comprehensive listing of damages. The tenant shall then have the right to inspect “the premises to ascertain the accuracy of such listing.” The Safferys have not provided any evidence that they timely requested an inspection of the property pursuant to KRS 383.580 or that they documented prior to their departure the conditions of the premises or that they challenged any of the repair items timely. As a result, the Safferys have waived any right to challenge the damages sought by LRH.

The affidavit of the “expert” attempted to argue that the damages were a result of normal wear and tear. Her statements were general, she had not personally viewed the property, and therefore her opinion does not aid the trier of fact. *See, e.g., Stringer v. Com.*, 956 S.W.2d 883, 889 (Ky. 1997) (“The real question should not be whether the expert has rendered an opinion as to the ultimate issue, but whether the opinion ‘will assist the trier of fact to understand the evidence or to determine a fact in issue.’ KRE 702. Generally, expert opinion testimony is admitted when the subject matter is outside the common knowledge of jurors. *O’Connor & Raque Co. v. Bill*, Ky., 474 S.W.2d 344 (1971)”).

Finally, LRH is entitled to its entire attorneys’ fees based on the willful breach of the written Lease under KRS 383.660(3). The Safferys’ attempt to rely on the *O’Rourke* case, arguing that they paid rent 58 of the 60 months of their tenancy. However, the

Safferys simply ignore that they only paid rent – typically partial rent – after at least 25 forcible detainers were filed against the. They were perpetually late with the rent and required legal action on a regular basis to pay. Therefore, the facts of this case go beyond the “mere” failure to pay rent which distinguished the *O’Rourke* Opinion. *O’Rourke v, Lexington Real Estate Co. LLC*, 365 S.W.3d 584, 586 (Ky. Ct. App. 2011).

Therefore, because there is no genuine material facts in dispute, Lexington Rental Homes is entitled to judgment as a matter of law. The Motion for Summary Judgment is **GRANTED**. There being no just cause for delay, this is a final and appealable order.

SO ORDERED this 2nd day of June, 2017.


JUDGE, FAYETTE CIRCUIT COURT
FOURTH DIVISION

A TRUE COPY
ATTEST: VINCENT RIGGS, CLERK
FAYETTE CIRCUIT COURT

BY  DEPUTY

CLERK'S CERTIFICATE OF SERVICE

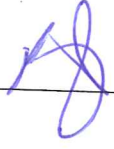
This is to certify that a true and accurate copy of the foregoing Opinion and Order was mailed to the following, on this the 5th day of June, 2017.

CARROLL M. REDFORD, III
MILLER, GRIFFIN & MARKS, PSC
271 West Short Street, Suite 600
Lexington, Kentucky 40507-1292

DUSTIN C. BEARD
MATTHEW S. GOEING
GOEING, GOEING & MCQUINN
300 East Main Street, Suite 150
Lexington, Kentucky 40507

CAYWOOD PREWITT
KRIZ, JENKINS, PREWITT & JONES, PSC
200 West Vine Street 710
Lexington, Kentucky 40507

VINCENT RIGGS, CLERK
FAYETTE CIRCUIT COURT

BY  D.C.