STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

Kristofer Babler and Christine Babler,
Plaintiffs,

vs

Jaime Penn,
Defendant

Findings of Fact, Conclusions of Law, and Order for Judgment

File No. 62-CV-13-~~1359~~ 1539

This case was tried on June 16, 2013. By the prior agreement of the parties, Daniel S. Kleinberger presided as Consensual Special Magistrate (the "Magistrate").[1] Plaintiffs Kristofer Babler and Christine Babler appeared *pro se* (in person, not represented by a lawyer). Defendant Jaime Penn appeared in person and was represented by attorney Chad McKenney. This document states the Magistrate's decision in this matter.

Based on the evidence presented at the trial, the Magistrate makes the following Findings of Fact, Conclusions of Law, and Order for Judgment.

Findings of Fact

Background

1. From November 15, 2010 through October 31, 2012, Plaintiffs rented from Defendant the condominium (the "Condominium") located at 697 Laurel Avenue, Unit 3W, St.

---

[1] The trial was recorded, and the recording is on an MP3 file: 62-CV-13-1539 06192013 (LS_70123).MP3. References to the recording are in this form: Trial Recording, [number]:[number]. The first number refers to hours, and the second number refers to minutes. Times are approximate.

Paul, Minnesota 55104 (the "Tenancy"), under a written lease "entered into" October 25, 2010 (the "Lease"). Pl. Ex. 8.[2]

2. This dispute concerns:

    a. the condition of the carpet in the Condominium (the "Carpet") at the end of the Tenancy (at "Move-Out")—in particular whether cat urine in the Carpet necessitated its replacement;[3]

    b. whether Defendant provided Plaintiffs proper, timely notice of Defendant's reason for withholding Plaintiffs' security deposit (the "Security Deposit"); and

    c. whether Plaintiffs are liable to Defendant for Defendant's attorney's fees and other expenses incurred in this matter.

3. The parties agree on most of the facts, including that:

    a. Throughout the Tenancy, the parties communicated with each other almost exclusively through email.

    b. The amount of the Security Deposit was $1325.00.

    c. Plaintiffs:

        i. fully paid all rent due during the Tenancy;

        ii. gave proper notice to end the Tenancy;

        iii. moved out of the Condominium on time; and

---

[2] Pl.'s. Ex. = Plaintiff's Exhibit. Def.'s. Ex. = Defendant's Exhibit. Defendant's realtor, Ms. Constance Portlas, provided the Lease form to Defendant, presumably from the forms used by Ms. Portlas' company. Trial Recording, time 1:08.

[3] This issue has two aspects: (i) Plaintiffs' claim for return of the Security Deposit; and (ii) Defendant's counterclaim for damages exceeding the amount of the Security Deposit.

iv. with the exception of the alleged problem with the Carpet, left the Condominium in appropriate condition.

4. Defendant acknowledges that, except for the alleged problem with the Carpet, Plaintiffs were fine tenants.[4]

5. After Move-Out, Defendant communicated with Plaintiffs concerning the Security Deposit and the condition of the Carpet through, *inter alia*:[5]

i. an email dated November 9, 2012, which stated:

> Connie stopped by the condo this week and unfortunately she found a significant smell of cat urine on the in the living room and also in the back. Unfortunately I will have to hold onto your deposit until we get this sorted out and figure out exactly what needs to be done. She has reserved a carpet cleaning company to come out next week.[6]

ii. an email dated December 9, 2012, which stated:

> I apologize for how long it has taken to get this [situation] sorted out. However, we have made efforts to determine the best course of action. First we had the carpet cleaned in hopes of getting the smell out. I had planned to have the carpet cleaned any way and Connie advised me on the best professional cleaners for the job. But it was unsuccessful . . . . Unfortunately this damage must be corrected and that is the reason for the security and pet deposit. Your deposit was for $1325. It will cost over $1500 to re-carpet the entire area except the bedroom with a comparable carpet.[7]

---

[4] Trial Recording, time: 0:11; 0:41.

[5] "Inter alia" means "[a]mong other things." Black's Law Dictionary (9th ed. 2009), inter alia. Thus, the listed items are some but not all of the communications. The items are noted because they are relevant to a legal determination. *See* Conclusions of Law Nos. 5-10.

[6] Pl.'s Ex. 5. "Connie" refers to Constance Portlas, who acted for Defendant. *See* Finding of Fact No. 12.

[7] Pl.'s Ex. 5.

iii. a certified letter dated December 14, 2012, recounting and somewhat expanding the information previously provided, and stating:

> [I] need to replace the carpet and the cost exceeds the deposit balance. Therefore I will not be returning any deposit funds to you. This matter has taken time to sort out, schedule and address[.] There was no delay beyond scheduling venders for estimates and services.[8]

The Condition of the Carpet at the Beginning of the Tenancy

6. During the trial and once before the trial, Plaintiffs[9] suggested that the Carpet had some urine smell when Plaintiffs moved in.[10]

7. However, on cross-examination, Mr. Babler effectively withdrew that suggestion.

> Mr. McKenney: At the time you moved in and to the time you moved out, did you ever smell cat urine in that property?
>
> Mr. Babler: No.[11]

Condition of the Carpet at Move-Out

8. As to the condition of the Carpet at "Move-Out," Plaintiffs presented the testimony of Mr. Babler and Mr. Michael Schmidt, each of whom testified that there was no smell of urine coming from the Carpet.[12]

---

[8] Pl.'s Ex. 9.

[9] With regard to the Tenancy and Security Deposit, sometimes Mr. Babler acted for Plaintiffs and sometimes Ms. Babler did so. For simplicity's sake, this decision refers to "Plaintiffs" except when the identity of the individual is significant.

[10] Trial Recording, time: 0:29 (testimony of Mr. Babler), 1:20 (testimony of Ms. Portlas, referring to a telephone conversation with Mr. Babler); Def.'s Ex. 3 (email dated November 20, 2012, from Ms. Portlas to Defendant, referring to the same telephone conversation).

[11] Trial Recording, time: 0:31.

9. Mr. Schmidt helped Plaintiffs move out of the Condominium.

10. Mr. Babler testified that Plaintiffs' cat had no history of spraying and was "litter box trained."[13]

11. Defendant's evidence of the condition of the Carpet at Move-Out came exclusively from Ms. Constance Portlas, Defendant's real estate agent.[14]

12. Living out of state, Defendant depended on Ms. Portlas to:

    a. inspect the Condominium after Move-Out and report its condition; and

    b. arrange:

        i. to have the Carpet cleaned; and

        ii. to have the Carpet replaced, when the cleaning was unsuccessful.

13. On direct examination, Ms. Portlas testified that:

    a. She inspected the Condominium on November 7, 2012. As to that inspection, she stated:

        i. "[I] walked in the door and immediately smelled cat urine—immediately."[15]

        ii. "That was in the front living room space."[16]

---

[12] *Id.*, time 0:32. ("*Id.*" is shorthand for the Latin word "idem," meaning "[t]he same" and "is used in a legal citation to refer to the authority cited immediately before." Black's Law Dictionary (9th ed. 2009), id. Thus, "*id.*" means that the authority or source for the information is the same as the authority or source indicated in the immediately previous citation.)

[13] *Id.*, time 0: 29.

[14] *Id.*, time 0:49, 0:58 (testimony of Defendant, stating that her information in this matter comes from Ms. Portlas and that she (Defendant) she has not seen the Condominium since Move-Out).

[15] *Id.*, time: 1:10.

[16] *Id.*

iii. "I actually got down on my hands and knees to smell the carpet to try to determine how large of an area it was . . . ."[17]

iv. The smell in front living room began "in front of the large window; it kinda curved around toward the fireplace."[18]

v. There was also "very strong cat order in the back carpet," located "[i]n the back hallway closest."[19]

b. She advised Defendant of the problem with the Carpet, and suggested and arranged remediation—first cleaning and then replacement.

c. Cleaning did not remedy the problem.[20] To the contrary, the smell became worse.[21]

d. She obtained bids from two companies to do the replacement work. She knew of these companies because the company she works with often uses them.[22]

e. She arranged for the work to be done after Defendant selected the lower bid.

f. The replacement of the Carpet resolved the problem.

14. On cross-examination, Ms. Portlas testified that:

a. After the Move-Out, after the Carpet was cleaned, and before the Carpet was replaced:

---

[17] *Id.*

[18] *Id.*, time 1:13.

[19] *Id.*, time 1:15.

[20] The cleaning cost $200.00, but Defendant is not claiming anything for the cost of cleaning. In an email dated October 16, 2012, she undertook to have the carpets cleaned. Pl.'s Ex. 3.

[21] *Id.*, time 1:11; 1:19.

[22] *Id.*, time 1:12–13.

i. She showed the Condominium to approximately five potential tenants.

ii. She received one application, but the application "did not move forward."[23]

iii. None of the potential tenants made any comment about the urine smell, but "they did not become tenants."[24]

iv. She told at least some of the prospective tenants that the new carpet was to be installed but did not explain why.[25]

b. Other than the urine problem, the Carpet was in good shape—not new but showing no signs of wear and no signs of any other problem.[26]

15. In response to questions from the Magistrate, Ms. Portlas testified that she:

a. is as an experienced realtor, knowledgeable about "staging" premises for sale or rental; and

b. would not have recommended replacing the Carpet but for the urine problem.[27]

16. The Carpet had urine problems in two locations, which could be remedied only by replacing the Carpet and the underlying pad.

---

[23] *Id.*, time 1:23. Ms. Portlas initially testified that she received no applications but, on further cross-examination, acknowledged having previously indicated that she had received one application. *Id.*

[24] *Id.*, time 1:24.

[25] *Id.*, time 1:28.

[26] Ms. Portlas reiterated this information and provided further detail in response to questions from the Magistrate. *Id.*, time 1:32–35.

[27] *Id.*, time 1:32.

a. There is no reason to doubt the good faith of any of the three witnesses who testified as to the urine issue.

b. However:

   i. Mr. Schmidt:

      - had a very limited basis for his testimony;
      - did not examine the Condominium to determine whether a cat urine smell was present; and
      - when shown photographs of two urine stains on the Carpet, taken shortly after Move-Out, acknowledged that he had not noticed the stains.[28]

   ii. Ms. Portlas' testimony was detailed, clear, and convincing.

      - She had nothing to gain by noting and reporting the problem with the Carpet.
      - To the contrary, the problem resulted in her doing substantial uncompensated work.

   iii. Mr. Babler's testimony can be reconciled with the Ms. Portlas' testimony; it is not unknown for a cat trained to use the litter box to have lapses.

   iv. The testimony concerning the showing of the Condominium before the Carpet was replaced was inconclusive.

---

[28] *Id.*, time 0:34.

Extent, Timing, and Cost of the Replacement

17. Given the "shotgun" floor plan of the Condominium,[29] it was not possible to replace only the portions of the Carpet affected by the urine.[30] For aesthetic reasons, it was necessary to have the same carpet laid from the front to the back of the Condominium.

18. Approximately 10 weeks passed between Move-Out and Defendant accepting a firm bid to have the Carpet replaced.

    a. Defendant lives out of state and had to rely on Ms. Portlas to handle the matter.

    b. Given Ms. Portlas' other work commitments and her schedule, her attention to this matter was necessarily intermittent. For example:

        i. Ms. Portlas first inspected the Condominium on November 7, 2012, a full week after Move-Out.[31]

        ii. Almost two weeks passed between Ms. Portlas' first inspection and her return to the Condominium to determine whether the cleaning of the Carpet had solved the urine problem.

19. Defendant paid $1764.00 to replace the Carpet.[32]

20. Defendant's replacement of the Carpet was reasonable, because:

---

[29] That is, the rooms are in a straight row.

[30] *Id.*, time 1:01–02.

[31] *See* Pl.'s Ex. 4 (showing date of Move-Out); Finding of Fact No. 13-a; s*ee also* Pl. Ex.'s 9, second page, text of "Connie Portlas Nov 7 to me [Defendant]" (stating "[s]orry for the delay" in inspecting the Condominium).

[32] Def.'s Ex. 6.

a. Defendant first tried a less expensive method to resolve the problem (i.e., professional cleaning).[33]

b. When cleaning failed to resolve the problem, Defendant (through Ms. Portlas) considered bids from two reliable contractors and then selected the contractor that had submitted the lower bid.[34]

c. Replacing all of the Carpet was reasonable. Replacing only the affected areas would have been inappropriate, due to:

   i. the layout of the Condominium;[35]

   ii. the two separate areas of the Carpet affected by the cat urine;[36] and

   iii. the predictably deleterious effect a crazy-quilt pattern of carpeting would have on the marketability of the Condominium (whether for rental or sale).[37]

21. Defendant:

a. took a long time to remedy the problem with the Carpet; and

b. could have done a better job at keeping Plaintiffs advised.[38]

---

[33] *See* Pl. Ex.'s 9, second page, text of "Connie Portlas Nov 7 to me [Defendant]" ("I'm going to cancel Zerorez and have a property management company our firm uses bid and clean the carpet with a neutralizer to start.").

[34] Trial Recording, time: 1:01 (Defendant on re-direct examination).

[35] *See* Finding of Fact No. 17.

[36] *See* Finding of Fact No. 16.

[37] Defendant did not provide testimony that the replacement carpet was of the same general quality as the Carpet. Given the overall testimony of Defendant and Ms. Portlas, and Plaintiffs' failure to raise this issue, the Magistrate infers that the replacement was of the same general quality.

[38] There may have been a month gap in communications. Trial Recording, time 0:58 (testimony of Defendant).

Age of the Carpet and the Question of Depreciation

22. The testimony did not establish the exact age of the Carpet. Defendant's testimony suggests that:

    a. at Move-Out the Carpet may have been seven years old; and

    b. the Condominium may have been unoccupied for two of those seven years.[39]

23. Plaintiffs' Exhibit 10, an IRS publication dealing with the depreciation of property used in rental units, lists carpeting in the five-year category.[40]

24. On that basis, Mr. Babler testified: "In the eyes of the federal government, 5-year old carpet is worthless."[41]

25. Defendant's only evidence concerning the useful life of the Carpet came from Ms. Portlas, who testified that, in her opinion, the Carpet might have lasted 15 years or more but for the urine problem.

Defendant's Claim for Attorney's Fees

26. The Lease, paragraph C provides: "Lessee shall be liable for and pay Lessor all legal costs, including reasonable attorney's fees, all filing and service fees, including collection agency fees, incurred by Lessor in any court proceedings or any collection proceedings as a result of Lessee's tenancy."

27. Defendant has incurred attorney's fees in this matter.

---

[39] Trial Recording, time: 0:54–57; 1:00. Defendant testified that she had lived in the Condominium for "two to three years," had left the Condominium in November 2008. *Id.* Plaintiffs moved into the Condominium in November 2010.

[40] Pl.'s Ex. 10, page 9, second item down.

[41] Trial Recording, time: 1:31.

28. In his closing argument, Defendant's counsel stated the fees incurred before the trial, and those fees were indubitably reasonable.

Conclusions of Law

Burden of Proof

1. Minnesota law has several different rules governing the burden of proof on claims pertaining to a security deposit for a residential tenancy.[42]
    1. "In any action concerning the [security] deposit, the burden of proving, by a fair preponderance of the evidence, the reason for withholding all or any portion of the deposit shall be on the landlord." Minn. Stat. § 504B.178, subdiv. 3(c) (2012).
    2. In contrast, Minnesota Statutes section 504B.178, subdivision 4, which provides damages for failure to timely provide a written explanation of reasons for withholding any part of a tenant's security deposit, states no rule as to burden of proof, nor does chapter 504B state a burden of proof applicable to Defendant's counterclaim for expenses incurred in excess of the amount of the Security Deposit.
2. "In an ordinary civil action the plaintiff has the burden of proving every essential element of his case, including damages by a fair preponderance of the evidence." *Wick v. Widdell*, 149 N.W.2d 20, 22 (Minn. 1967). For a counterclaim, the burden of proof is on the defendant. *Kastner v. Wermerskirschen*, 205 N.W.2d 336, 338 (Minn. 1973); *Lahr v. Kraemer*, 97 N.W. 418, 419–20 (Minn. 1903).

---

[42] The term "burden of proof" pertains to: (i) which party has the burden of persuading the finder of fact (in this case, the Magistrate); and (ii) how persuasive that party must be.

3. As a result, the burden of proof is on:

    a. Defendant as to:

        i. whether she is liable for withholding the Security Deposit improperly; and

        ii. her counterclaim for damages; and

    b. Plaintiffs regarding whether Defendant is liable for failing to give proper notice of her reasons for withholding the Security Deposit.

4. When a party has the burden of proof, the party "must prove every element of a claim, including the existence of damages, by a preponderance of the evidence. . . . Speculative damages, or those based on an 'off-the-cuff estimate,' may not be recovered. Although damages need not be proved with certainty, the amount of the damages must be established to a reasonable probability." *Lawrence v. Forthun*, No. A09-543, 2009 WL 4796754, at *3 (Minn. Ct. App. Dec. 15, 2009) (citing *Hill v. Tischer*, 385 N.W.2d 329, 332 (Minn. Ct. App. 1986) and *Hydra-Mac, Inc. v. Onan Corp.*, 450 N.W.2d 913, 920 (Minn. 1990)).[43]

Sufficiency of Defendant's Notice to Plaintiffs as to Reasons for Withholding the Security Deposit

The Notice Requirement

5. Minnesota Statutes section 504B.178, subdivision 3(a)(1) (2012) states in pertinent part:

> Every landlord shall within three weeks after termination of the tenancy . . . and after receipt of the tenant's mailing address or delivery instructions,

---

[43] Although *Lawrence* is an unreported decision and therefore without precedential value, the quoted passage expresses the law felicitously and rests securely on the authority of a decision from the Minnesota Supreme Court and a reported decision from the court of appeals.

return the deposit to the tenant, with interest thereon as provided in subdivision 2, or furnish to the tenant a *written* statement showing the specific reason for the withholding of the deposit or any portion thereof.

(Emphasis added.)

6. The email sent by Defendant to Plaintiffs on November 9, 2012 complies with the time limit set by Minnesota Statutes section 504B.178, subdivision 3(a)(1). The certified letter sent by Defendant to Plaintiffs on December 14, 2012 does not.

7. Plaintiffs' claim, therefore, depends on whether an email satisfies the requirement of Minnesota Statutes section 504B.178, subdivision 3(a)(1) for "written notice."

8. Minnesota has adopted the Uniform Electronic Transactions Act ("UETA"). Minn. Stat. ch. 325L.

    a. Section 325L.08(a) states:

        If parties have agreed to conduct transactions by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt.

    b. By its terms, section 325L.08(a) applies to the Minnesota Statutes section 504B.178, subdivision 2(a).[44]

---

[44] Texas has also enacted the Uniform Entity Transactions Act. Texas Business & Commerce Code section 322.007 parallels Minnesota Statutes section 325L.08, and comment 2(b) to the Texas provision states:

> Where a state statute specifies or requires written communications, that requirement can be satisfied by e-mail, but only where the parties have agreed to communicate electronically. For example, Section 93.005 of the Property Code requires the landlord to refund the security deposit to a commercial tenant who "provides notice" of the tenant's forwarding address, and Section 93.009(a) requires that this notice be in the form of a "written statement of the tenant's forwarding address." Subsection 43.008(a) should permit landlord and tenant to agree that tenant may furnish this information by e-mail and should validate the tenant's e-mailing the new address to the landlord so long as the e-mail is capable of retention by the landlord as required by that subsection.

c. Section 325L.08(a) does not require an express agreement; a pattern of conduct can establish an implied agreement. *See* UETA § 2, cmt. 1 ("Whether the parties have reached an agreement is determined by their express language and all surrounding circumstances . . . . Where [the applicable substantive] law takes account of usage and conduct in informing the terms of the parties' agreement, the usage or conduct would be relevant as 'other circumstances' included in the definition [of "agreement"] under this Act."). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 19(1) ("The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act."); *Roberge v. Cambridge Co-op. Creamery Co.*, 79 N.W.2d 142, 145 (Minn. 1956) ("Mutual assent may be manifested wholly or partly in written or oral words or partly in written or oral words and partly by the conduct of the parties. It may be partly expressed in words and partly implied in fact from acts and circumstances." (footnotes omitted) (citing RESTATEMENT OF CONTRACTS § 19, the predecessor provision to RESTATEMENT (SECOND) OF CONTRACTS § 19)).

9. The pattern of conduct noted in Finding of Fact No. 3-a implies an agreement between Plaintiffs and Defendant "to conduct transactions by electronic means."

10. Thus, in this matter an email does satisfy the requirement of Minnesota Statutes section 504B.178, subdivision 3(a)(1) for "written notice," and, therefore, Defendant complied with the statute's notice requirement.

Plaintiffs Liability to Defendant for the Carpet

11. Findings of Facts Nos. 13 and 16 compel the conclusion that Plaintiffs are liable to Defendant on account of the Carpet.

12. Determining the amount of the liability, however, is complicated.

    a. Plaintiffs' assertion that the Carpet had depreciated to worthlessness is unpersuasive.[45] Depreciation for tax purposes is quite different than actual decrease in value.[46]

    b. Nonetheless, awarding Defendant the full replacement cost would over-compensate her.[47] The Carpet had been in use for approximately five years.[48] The replacement carpet was new when installed.

    c. The damage to the Carpet is a breach of contract (i.e., the lease).[49]

---

[45] *See* Finding of Fact No. 24. Mr. Babler also asserted this point in Plaintiffs' closing argument.

[46] *See, e.g.*, *Glass v. Oeder*, 716 N.E.2d 413, 417 (Ind. 1999) ("[D]epreciation, although properly calculated for tax purposes, may be overstated for purposes of determining income to measure child support. In general, we would assume that allowable depreciation under methods designed to encourage investment may be overstated for child support purposes."); *State ex rel. Empire Dist. Elec. Co. v. Pub. Serv. Comm'n*, 714 S.W.2d 623, 630 (Mo. Ct. App. 1986) (discussing in the context of public utility rate setting the complicated interrelationship of tax depreciation, accounting method, and rate calculation).

[47] *See Lane v. Spurgeon*, 223 P.2d 889, 892 (Cal. Ct. App. 1950) ("[The landlords] say that [they] were entitled to have the whole of the leased property turned back to them in condition for its continued and immediate use in a going business; that time did not serve for going about in an attempt to obtain used articles comparable to those under discussion. This may be true, but while respondents were entitled to have these articles returned in the condition agreed upon they were not entitled to have new articles in their place. That would be to more than make them whole and cannot be allowed.").

[48] *See* Finding of Fact No. 22.

[49] *See* Pl.'s Ex. 8, Lease ¶ G ("All . . . damage whatsoever . . . by the misuse of the Lessee . . . shall be repaired by the Management at the sole expense of the Resident."); Lease Addendum ¶D-17 ("ALL DAMAGES to the building caused by MISUSE . . . shall be paid by the Resident."). The Lease does not define "misuse," but cat urine on a carpet surely qualifies. In any event, even "[i]ndependently of express covenant a lessee is under an obligation imposed by law to return

d. "[T]he general measure of damages for breach of contract is the amount that will place the nonbreaching party in the same situation as if the contract had been fully performed."[50]

e. In particular, "[w]hen personal property has been damaged [through breach of contract], the general rule is that the damage is to be measured by the difference in the reasonable market value immediately before and immediately after the injury to such property."[51]

f. Moreover, the determination of market value must take into account the age, condition, and extent of depreciation of the property at the moment immediately before the damage occurred.[52]

---

leased property in good condition, normal wear and tear excepted." *Lane v. Spurgeon*, 223 P.2d 889, 891–92 (Cal. Ct. App. 1950) (citing 51 C.J.S., *Landlord and Tenant* § 408 (2013)).

[50] 4 MICHAEL K. STEENSON & PETER B. KNAPP, MINNESOTA PRACTICE: CIVIL JURY INSTRUCTION GUIDES § 20.60 (5th ed. 2012) (citing *Peters v. Mutual Benefit Life Ins. Co.*, 420 N.W.2d 908, 915 (Minn. Ct. App. 1988) and *Sprangers v. Interactive Technologies, Inc.*, 394 N.W.2d 498, 503–04 (Minn. Ct. App. 1986)).

[51] *Cent. Freight Lines, Inc. v. Naztec, Inc.*, 790 S.W.2d 733, 734 (Tex. App. 1990) (breach of contract claim against a shipper); *see also Sadler v. Bromberg*, 106 N.E.2d 306, 307 (Ohio Ct. App. 1950) (acknowledging that" "with respect to personal property" damaged through breach of contract, "the measure of damages is the difference in market value of the property immediately before and after the injury"). A different rule applies "[w]here the injury to the property has not resulted in its total loss and the repair of the damaged property is economically feasible." *Cent. Freight Lines*, 790 S.W.2d at 734. In that situation, "the plaintiff may elect to recover the reasonable cost of repairs." *Id.* However, in this case, "the injury to the property . . . resulted in its total loss."

[52] *Williams v. Faria*, 297 P. 78, 80 (Cal. Ct. App. 1931) (reversing a judgment in favor of a landlord for a damages tenant caused to a barn and silo because "the barn was erected 15 years preceding its destruction, and also that the silo had been standing for about 11 years, and there is not a single scintilla of testimony in the record relative to the depreciation of the silo and barn during that period of time"); *Torres v. Cosmopolitan Associates, LLC*, 910 N.Y.S.2d 409 (N.Y. App. Div. 2010) (stating that, "if plaintiff was alleging the destruction of her appliances [through a power surge, allegedly a breach of contract by the landlord], it was incumbent upon her to show that the appliances were beyond repair and to show the actual value of such property taking into account the original cost and relative newness and the extent, if any, to which it has deteriorated or depreciated through use, age, decay or otherwise" (internal quotation and citation omitted)); *Slepoy v. Kliger*, 906 N.Y.S.2d 783 (N.Y. App. Div. 2009) ("Notwithstanding that a small claims court is not bound by the rules of evidence, there must be some testimony regarding the 'quality and condition' of a possession as a basis of a claim of value, such as its original cost, age and condition at the time of the [harm]." (citations omitted)); *Kodak v. Am. Airlines*, 805 N.Y.S.2d

13. "[*M*]*arket* value . . . is the amount that 'a willing buyer . . . would pay to a willing seller.'"[53] But there is no market for used residential carpet, and thus in this context a "market value" measure of damages is impracticable.[54]

14. As a result, calculation of damages must begin with reasonable costs of replacement, adjusted to avoid over-compensating the Defendant.

    a. "Where diminution in market value is unavailable or unsatisfactory as a measure of damages, courts have routinely turned to replacement or restoration costs as the appropriate measure of damages."[55]

    b. However:

> [e]ven if the facts justify consideration of evidence other than diminution in fair market value, care must be taken, if possible, not to permit the injured party to recover more than is fair to restore him to his position prior to his loss. He should not recover a windfall. We are well aware of the danger that evidence of repair or replacement costs may lead to an excessive award unless [they are] . . . *adequately* discounted for obsolescence and inadequacy as well as for physical depreciation. Thus, evidence of repair or replacement cost must be adjusted, if possible, to take into account the condition of the injured property at the time of the injury or loss. For example, if the property has deteriorated by the time of the injury, the plaintiff should not be

---

223, 226 (N.Y. App. Div. 2005) ("The measure of plaintiffs' damages for the loss of their personal property [as a result of the airline's breach of contract] is the actual value of such property taking into account the original cost and relative newness and the extent, if any, to which it has deteriorated or depreciated through use, damage, age, decay or otherwise.").

[53] *Tuscaloosa Cnty. v. Jim Thomas Forestry Consultants, Inc.*, 613 So. 2d 322, 324 (Ala. 1992) (emphasis in original) (quoting *United States v. Certain Property in the Borough of Manhattan*, 403 F.2d 800, 802 (2d Cir. 1968)).

[54] *Massachusetts Port Auth. v. Sciaba Const. Corp.*, 766 N.E.2d 118, 124 (Mass. App. Ct. 2002) (stating that, although "[g]enerally . . . the appropriate measure of damages in actions for negligent injury to property is the difference between the fair market value of the property prior to the loss and its fair market value after the loss caused by the tortfeasor," a "predicate for the application of this principle is the existence of a relevant market in which the property can be freely exchanged or sold").

[55] *Id.* at 125.

awarded an amount that would put the property into a condition substantially better than it was at the time of the injury.[56]

15. Under the approach stated in Conclusion of Law No. 14, the Magistrate must take into account that:

    a. the likely useful life of the Carpet was 20 years;[57] and

    b. of those 20 years, at Move-Out the Carpet had been in use for five years[58]—25% of the useful life.

16. Defendant is therefore entitled to 75% of the replacement cost ($1764.00)[59] (i.e., $1325.00).[60]

Interest Due on the Security Deposit

17. Minnesota Statutes section 504B.178, subdivision 2 (2012) provides that interest on the security deposit accrues at a rate of "one percent per annum . . . , computed from the first day of the next month following the full payment of the deposit to the last day of the month in which the landlord, in good faith, complies with the requirements of subdivision 3 . . . ."

18. Plaintiffs are due interest for 25 months, for a total of $ 27.60.

---

[56] *Id.* at 126 (internal quotations and citations omitted; brackets and emphasis in the original).

[57] *See* Findings of Fact Nos. 14-b (testimony of Ms. Portlas stating that at Move-Out the Carpet was in good condition except for the urine problem); 25 (testimony of Ms. Portlas stating that, but for the urine problem, the Carpet could have lasted for another 15 years); and 22 (determining that, at the beginning of the Tenancy, the Carpet was likely seven years old but had been in use only for five of those seven years).

[58] *See* Finding of Fact No. 22.

[59] Finding of Fact No. 19.

[60] That this amount exactly equals the amount of the Security Deposit is coincidental. The Magistrate did not realize the concordance until his third re-reading of the penultimate version of this decision.

a. "[T]he first day of the next month following the full payment of the deposit" was most likely November 1, 2010.[61]

b. "[T]he last day of the month in which the landlord, in good faith, complie[d] with the requirements of subdivision 3" was November 30, 2012.[62]

c. The Magistrate used

i. this formula to calculates the interest: Amount x Rate x Years; and

ii. 2.083 as the number of years in 25 months.

Defendant's Claim for Attorney's Fees

19. The Lease is a "contract of adhesion"—a form agreement,[63] offered on a take-it or leave-it basis, concerning a necessity.

a. As explained by the Minnesota Court of Appeals:

> Boilerplate language alone does not create an adhesion contract. Instead, the adhesiveness of a contract depends upon factors such as the relative bargaining power of the parties, the opportunity for negotiation, the availability of the service for which the parties contracted, whether the service was a public necessity, and the business sophistication of the parties.

Interfund Corp. v. O'Byrne, 462 N.W.2d 86, 88–89 (Minn. Ct. App. 1990) (citing *Hauenstein & Bermeister, Inc. v. Met-Fab Indus., Inc.*,

---

[61] There was no direct testimony as to the date Plaintiffs paid the Security Deposit, and the Lease does not resolve the question. The Lease was "entered into" on October 25, 2010, but the Tenancy did not begin until November 15, 2010. Pl.'s Ex. 8, introductory para. and para. A. Given how the parties approached their relationship, it seems most likely that the Plaintiffs paid the Security Deposit when they signed the Lease. In any event, given the interest rate, the question has *de minimus* effect.

[62] *See* Finding of Fact No. 5; Conclusion of Law No. 10.

[63] Finding of Fact No. 1.

320 N.W.2d 886, 891 (Minn.1982) and *Personalized Mktg. Serv., Inc. v. Stotler & Co.*, 447 N.W.2d 447, 452 (Minn. Ct. App. 1989), *pet. for rev. denied* (Minn. 1990)).

b. The Magistrate has found no Minnesota case directly holding that residential rental housing is a public necessity, although the much-traveled case of *McCaughtry v. City of Red Wing* seems almost to assume so. *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 333–34 (Minn. 2011); *McCaughtry v. City of Red Wing*, 816 N.W.2d 636, 639–40 (Minn. Ct. App. 2012), *rev. granted* (No. A10-332) Aug. 21, 2012; *see also Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 924 (Minn. 1982) (stating that an adhesion contract "is a contract generally not bargained for, but which is imposed on the public for *necessary* service on a 'take it or leave it' basis" (emphasis in original)).

c. There can be no doubt that for much of the population in the Twin Cities rental housing is a necessity. Moreover, although obviously there are multiple sources of rental housing, the Legislature has evidently determined that the market for residential housing warrants detailed regulation.[64] Minnesota Statutes chapter 504B is replete with such regulation.

---

[64] The Magistrate sees this regulation as an alternative to the factor that "the services could not be obtained elsewhere." *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 925 (Minn. 1982). *See Yang v. Voyagaire Houseboats, Inc.*, 701 N.W.2d 783, 789 (Minn. 2005) ("In examining whether the service being offered is a public or essential service, we 'consider whether it is the type generally thought suitable for public regulation.'" (quoting *Schlobohm*, 326 N.W.2d at 925)).

2. Minnesota courts recognize the concept of unconscionability in leases. *Pickerign v. Pasco Mktg., Inc.*, 228 N.W.2d 562, 563 (Minn. 1975) ("In considering the validity of termination clauses in service station lease agreements and dealer agreements, the court should consider all of the circumstances in determining if the clauses may be unconscionable and unenforceable." (syllabus by the court)); *Gunhus, Grinnell v. Engelstad*, 413 N.W.2d 148, 152–53 (Minn. Ct. App. 1987) (affirming on the merits the trial court's holding *against* a claim of unconscionability, but not doubting that the unconscionability doctrine applies to leases); *Minneapolis Cmty. Dev. Agency v. Powell*, 352 N.W.2d 532, 535 (Minn. Ct. App. 1984) (reversing the trial court's rule that a provision of a residential lease was unconscionable, but not doubting that the unconscionability doctrine applies to leases).
3. Paragraph C of the Lease obligates Plaintiffs to pay Defendant's attorney's fees without regard to the success of legal merit of Defendant's assertions.[65]
4. The Magistrate has not found a Minnesota case on point, but two New York state decisions have held such provisions unconscionable.
    a. In *Weidman v. Tomaselli*, 365 N.Y.S.2d 681, 689 (N.Y. Co. Ct. 1975), the court stated:

> According to the terms of clause 32, there could be a judicial determination that there had been no default, and the attorney's fees would be nonetheless due. This is unconscionable. The effect of such clause is to permit the petitioner to exact tribute from the respondents for the petitioner's legal proceedings, successful or not. This is unconscionable.

---

[65] *See* Finding of Fact No. 26.

b. In *McClelland-Metz Mgt., Inc. v. Faulk*, 384 N.Y.S.2d 919, 921 (N.Y. Dist. Ct. 1976), the court stated:

> Paragraph 39th of the lease in question states, inter alia, that summary proceedings shall be deemed commenced under paragraph 18th upon the service of any notice (such as 3 day notice or oral notice).
>
> In other words, if the landlord gives oral notice to vacate, this would commence the proceedings and the landlord would be entitled to legal fees without doing anything further. The landlord would be entitled to legal fees every time he gave notice. Furthermore, under paragraph 39th of the lease in question, the landlord would be entitled to attorneys [sic] fees whether he was successful or not in the proceeding.
>
> This the Court finds unconscionable and in the nature of a penalty.

20. Moreover, Paragraph C is at odds with Minnesota Statutes section 504B.172 (2012), which states:

> If a residential lease specifies an action, circumstances, or an extent to which a landlord, directly, or through additional rent, may recover attorney fees in an action between the landlord and tenant, the tenant is entitled to attorney fees if the tenant prevails in the same type of action, under the same circumstances, and to the same extent as specified in the lease for the landlord.

a. The phrase "if the tenant prevails" seems to presuppose a lease provision entitling the landlord to attorney's fees only if the landlord prevails.

b. Otherwise, the statute could produce absurd results. For example:

   i. The tenant prevails and, per the statute, is entitled to attorney's fees. However, per the lease, the landlord is also entitled to attorney's fees—despite the tenant having prevailed.

   ii. The statute applies to lease provisions that presuppose the landlord prevailing but does not address the far more aggressive provisions

that entitle a landlord to recover attorney's fees even when the tenant prevails.

21. The Magistrate holds that the attorney's fees provision of the Lease is unconscionable and therefore unenforceable.

    a. In this case, Defendant did prevail on the merits,[66] but courts do not determine unconscionability "as applied." The determination is made as of the time the contract is made. RESTATEMENT (SECOND) OF CONTRACTS § 208, Ills. 1, 2, 3, and 5 and cmt. g. *See also* Minn. Stat. § 336.2-302 (2012) (providing a remedy "[i]f the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made").[67]

    b. *614 Co. v. D. H. Overmyer Co., Inc.*, 211 N.W.2d 891, 894 (Minn. 1973) is not to the contrary. In that case, the landlord's legal action was clearly justified, and the Supreme Court so recognized. "The court emphasized that '[t]he deliberate violation of the lease agreement by [the lessee] warrants giving full effect to [the] remedial provisions of the lease.'" *Cheyenne Land Co. v. Wilde*, 463 N.W.2d 539, 540 (Minn. Ct. App. 1990) (brackets in original) (quoting *614 Co. v. D. H. Overmyer Co., Inc.*, 211 N.W.2d at 894).

---

[66] Conclusions of Law Nos. 24–25.

[67] The cited section pertains to contracts for the sale of goods, but this part of Uniform Commercial Code "has many times been used either by analogy or because it was felt to embody a generally accepted social attitude of fairness going beyond its statutory application to sales of goods." RESTATEMENT (SECOND) OF CONTRACTS § 208, Reporter's Note to cmt. a.

c. Also, this is not a situation such as in *Cohen v. Conrad*, 124 N.W. 992, 993 (Minn. 1910), where the lessee sought to defend against a claim for rent on the grounds that other provisions of the lease—*not* sought to be enforced by the landlord—were unconscionable. Here, the landlord has invoked and relied on the provisions held unconscionable.

Amounts Due

22. On their Complaint, Plaintiffs are entitled to $ 27.60.

23. On her Counterclaim, Defendant is entitled to no recovery.

Prevailing Party as to Costs and Disbursements

24. For the purposes of Minnesota Statutes sections 491A.02, subdivision 7 and 549.04 (2012), Defendant is the prevailing party.

25. "[I]dentifying the prevailing party" requires a "pragmatic analysis." *Posey v. Fossen*, 707 N.W.2d 712, 715 (Minn. Ct. App. 2006)

a. Although Plaintiffs will have judgment in their favor, the amount of the judgment is minimal compared to the recovery they sought.

b. The two main issues in this case were whether Defendant: (i) gave proper notice of her reasons for withholding the Security Deposit; and (ii) was justified in withholding the Security Deposit. Defendant prevailed on both these issues.

c. Although Defendant did not prevail on her Counterclaim, the amount sought in the Counterclaim was far less than the amount for which Defendant was at risk on account of Plaintiffs' Complaint.

d. Although the Magistrate has declined to enforce the Lease provision on attorney's fees, that issue was collateral to the subject of this dispute.

IT IS THEREFORE ORDERED THAT:

I. On Plaintiffs' claims against Defendant, Plaintiffs are entitled to judgment against Defendant in the amount of Twenty-Seven Dollars and Sixty Cents ($ 27.60).

II. On Defendant's claims against Plaintiffs, Plaintiffs are entitled to judgment against Defendant and Defendant's Counterclaim is dismissed with prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY

Daniel S. Kleinberger
Daniel S. Kleinberger
Consensual Special Magistrate

Date: August 5, 2013

Approved for filing in the District Court

Judge of District Court

8-6-13
Date