

ROUND 1: BIG LANDLORD GOUGED TENANTS, COURT RULES

- Tuesday, December 7, 2004

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One of South Florida's biggest landlords has knowingly violated Florida law by exorbitantly penalizing renters for broken leases or failing to provide notices of nonrenewal, a state court ruled in West Palm Beach. In a class-action case involving more than 14,000 Florida renters, Palm Beach Circuit Judge Susan R. Lubitz ordered Equity Residential to remove more than \$15 million in charges from the credit reports of thousands of former Equity tenants.

Lubitz also enjoined the Chicago-based company from continuing to charge such fees and ordered it to set aside \$1.6 million to compensate tenants who paid the unlawful fees rather than allow it to be reported to credit bureaus. The ruling was handed down Friday. Palm Springs resident Peter Miller, for instance, terminated his one-year lease four days after moving into the apartment because of personal reasons." Miller, a named plaintiff in the class-action, had paid a \$450 application fee and two months' rent totaling \$1,486. Yet, despite the fact the apartment was re-rented two days after he departed, Equity Residential also demanded insufficient-notice and cancellation fees totaling \$2,229.

Equity Residential, the largest publicly traded apartment owner in the country, rents 33,000 apartments throughout Florida, including Miami-Dade and Broward counties. "We are disappointed with the court's ruling and will appeal it, if necessary, as we have the order certifying the class," Equity Residential's spokesman Marty McKenna said in a statement. *{They didn't}*.

Equity Residential was sued in Palm Beach Circuit Court in November 2002. The plaintiffs alleged the apartment rental operator charged tenants three months' rent for breaking a lease. In other cases, the lawsuit alleged, the company charged two months' rent when tenants failed to give 60 days' notice that they would not renew a year's lease. Frequently, as in Miller's case, the apartments were quickly rented to other tenants. The plaintiffs claimed the practice of charging the penalties while leasing the apartments to other renters violated the Florida Consumer Collection Practices Act and the Florida Deceptive and Unfair Trade Practices Act. Judge Lubitz agreed, concluding in a 20-page bench ruling that Equity charged unlawful fees. "When Equity takes possession and re-rents the property, Equity must credit the former tenant for rents received from the new tenant," she wrote.

The court found that as early as 1999 Equity's own lawyer, Donna Barfield, had advised the company that its fees for early termination weren't permitted. "Despite Barfield's legal advice, Equity continued to attempt to collect these fees until January 31, 2004," Lubitz wrote.

Attorney Rod Tennyson, who represents the plaintiffs, said Equity Residential is still not out of the woods at the trial court level. By the end of the week, Tennyson said he plans to file motions seeking punitive damages and statutory damages under the state consumer collection practices law, which he contends is between \$2 million and \$3 million. He may also seek to increase the \$1.6 million compensatory damages award.

"This practice must stop," said Tennyson, a solo practitioner in West Palm Beach. These fees are outrageous and unconscionable. Any landlord that continues to charge these fees does it at their own risk."

Ted Babbitt of Babbitt Johnson Osborne & Le Clair in West Palm Beach worked with Tennyson in the Equity Residential case.

Meanwhile, in a separate but nearly identical case, Palm Beach Circuit Judge Jonathan Gerber granted class certification to a group of tenants suing Boca Raton-based Gables Residential Trust.

Tennyson and Babbitt are also representing the plaintiffs in that case. [*Which they also won*]. Gables Residential Trust could not be reached for comment.

The company ranks among the largest apartment operators in the country with properties from San Diego to South Florida.

Equity Residential's shares closed up 28 cents at \$35.06 on the New York Stock Exchange. Gables Residential closed up 56 cents a share at \$36.72 on the NYSE.

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Round 2: Legislators to consider law on renter penalties

Sun-Sentinel -April 25, 2008|By Josh Hafenbrack Tallahassee Bureau

TALLAHASSEE — Florida renters could face new penalties equal to two months' rent for breaking leases under a proposal nearing final legislative approval, but supporters have added extra consumer protections in a bid to win Gov. Charlie Crist's support.

Vetoed by the governor last year, the rental penalties set for approval by the Florida House as early as today would change the state's 35-year-old landlord-tenant law to allow "early termination fees" that would average more than \$2,000 in South Florida.

Landlords who have pushed for the penalties for three years made concessions to Crist and consumer groups, cutting the penalty back from three months' rent to two.

Another new wrinkle: Renters would have the option to accept or reject the two-month penalty clause by checking "yes" or "no" when they sign their leases.

Under current law, landlords are limited to "actual damages." That means when renters break their leases, landlords can sue to collect regular rent payments until they find a new tenant.

Sen. Dave Aronberg, D-Greenacres, said the bill is consumer-friendly because it gives renters a guaranteed maximum penalty.

"Especially in this market, a renter's market - the rents are lower, the housing market is down - this allows them to walk away by paying two months' rather than being liable for the entire year," he said.

As the House prepares to vote on the rental bill, which is sailing through both chambers unopposed, Crist signaled Thursday he might reconsider his veto of the penalties. The "new language that offers more protection to the renter or the consumer is encouraging," Crist spokesman Sterling Ivey said.

Ron Book, a lobbyist for the Florida Apartment Association, said allowing the renter to choose whether to accept the early-termination fee should allay the fears of the governor and consumer groups.

"Do I think it's much more tenant-friendly? Yes. Did the [governor's] veto drive us to do it? Yes," Book said.

"The tenant gets the choice. One of the complaints had been landlords can put [early termination fees] in the lease, and they have to take it or leave it. Meeting with the governor's folks, they wanted more options for the tenant."

West Palm Beach attorney Rod Tennyson, who won class-action lawsuits against landlords that were illegally charging early termination fees, said that by giving the renter the final say, it's "getting closer to being a fair bill."

Renters might be better off with the two-month penalty, if they're renting from a complex with low occupancy rates - cases in which the landlord could keep charging rent while it takes months and months to find a new tenant, Tennyson said.

"Before you sign the lease, do a little research and check the box that helps you the most," he said

ROUND 3: F.S.(Florida Statutes) 83.595

ACT 3: LexisNexis (R) Florida Annotated Statutes

TITLE 6. CIVIL PRACTICE AND PROCEDURE (Chs. 45-88)
CHAPTER 83. LANDLORD AND TENANT
PART II. RESIDENTIAL TENANCIES
Fla. Stat. § 83.595 (2010)

§ 83.595. **Choice of remedies upon breach or early termination by tenant**

If the tenant breaches the rental agreement for the dwelling unit . . . the landlord may:

(1) Treat the rental agreement as terminated and retake possession for his or her own account, thereby terminating any further liability of the tenant;

(2) Retake possession of the dwelling unit for the account of the tenant, holding the tenant liable for the difference between the rent stipulated to be paid under the rental agreement and what the landlord is able to recover from a reletting. If the landlord retakes possession, the landlord has a duty to exercise good faith in attempting to relet the premises, and any rent received by the landlord as a result of the reletting must be deducted from the balance of rent due from the tenant. For purposes of this subsection, the term "good faith in attempting to relet the premises" means that the landlord uses at least the same efforts to relet the premises as were used in the initial rental or at least the same efforts as the landlord uses in attempting to rent other similar rental units but does not require the landlord to give a preference in renting the premises over other vacant dwelling units that the landlord owns or has the responsibility to rent;

(3) Stand by and do nothing, holding the lessee liable for the rent as it comes due; or

(4) Charge liquidated damages, as provided in the rental agreement, or an early termination fee to the tenant if the landlord and tenant have agreed to liquidated damages or an early termination fee, if the amount does not exceed 2 months' rent, and if, in the case of an early termination fee, the tenant is required to give no more than 60 days' notice, as provided in the rental agreement, prior to the proposed date of early termination. This remedy is available only if the tenant and the landlord, at the time the rental agreement was made, indicated acceptance of liquidated damages or an early termination fee. The tenant must indicate acceptance of liquidated damages or an early termination fee by signing a separate addendum to the rental agreement containing a provision in substantially the following form:

I agree, as provided in the rental agreement, to pay \$ _____ (an amount that does not exceed 2 months' rent) as liquidated damages or an early termination fee if I elect to terminate the rental agreement, and the landlord waives the right to seek additional rent beyond the month in which the landlord retakes possession.

I do not agree to liquidated damages or an early termination fee, and I acknowledge that the landlord may seek damages as provided by law.

Round 4: Olin v. Moss, 984 So. 2d 558 (2008)



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**OLEN PROPERTIES CORPORATION, a Florida corporation, and
OLEN RESIDENTIAL REALTY CORPORATION, a foreign
corporation, all licensed to do business in Florida, Appellants, v.
SAMANTHA S. MOSS, as Class Representative of those similarly
situated, Appellee.**

No. 4D07-2592

COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

984 So. 2d 558; 2008 Fla. App. LEXIS 6871; 33 Fla. L. Weekly D 1297

May 14, 2008, Decided

SUBSEQUENT HISTORY: Released for Publication July 9, 2008.
Rehearing denied by Olen Props. v. Moss, 2008 Fla. App. LEXIS 10995 (Fla. Dist. Ct.
App. 4th Dist., July 9, 2008)
Review denied by, Motion granted by Olen Props. Corp. v. Moss, 2008 Fla. LEXIS 2281
(Fla., Nov. 18, 2008)

COUNSEL: Sheridan Weissenborn of Papy Weissenborn Vraspir Patreno & Puga, P.A.,
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P.A., West Palm Beach, for appellee.

Donna S. Barfield of Donna Barfield, P.A., West Palm Beach, for Amicus Curiae Florida
Apartment Association.

JUDGES: GROSS, J. POLEN and MAY, JJ., concur.

OPINION BY: GROSS

OPINION

[*559] GROSS, J.

Olen Properties appeals a ruling granting a partial summary judgment and enjoining enforcement of certain provisions in a residential lease. We affirm the order as it applies to the "Default by Resident" provision, paragraph (16) in the lease, and reverse that portion of the order directed at the "Cancellation Fee" provision, paragraph (6) in the lease.

The circuit court's order appears to enjoin the enforcement of provisions contained in paragraphs (6) and (16) of a form residential lease. Paragraph (6) allows a tenant to cancel a lease after seven months of occupancy, if the tenant meets certain conditions, including the payment of a fee equal to one month's rent as "liquidated damages." Paragraph (16) concerns default by a tenant, and generally reserves to the landlord "all rights provided under state law . . . including the right to terminate the Lease, retake possession of the premises, and recover damages." For tenants who vacate the premises before the end of a lease term, "either voluntarily or involuntarily," paragraph (16) states that the tenant "shall be obligated to" the landlord "for an amount equivalent to 3 months rent which amount shall operate as liquidated damages."

The validity of these lease provisions turns on the application of Part II, Chapter 83, Florida Statutes (2007), the Florida Residential Landlord and Tenant Act. §§ 83.40-83.682, Fla. Stat. (2007). The Act is a part of a broader movement over the last 75 years to codify the common law. *See* Mark D. Rosen, *What Has Happened to the Common Law?--Recent American Codifications and their Impact on Judicial Practice and the Law's Subsequent Development*, 1994 Wis. L. Rev. 1119, 1123-24 (1994). "The statute swept away legal principles which had existed for hundreds of years either through the common law or by statute. Landlord-tenant law which had been weighted heavily in favor of the landlord became more balanced." James C. Hauser, *Florida Residential Landlord Tenant Manual* (2007) 1-1.

Section 83.595, Florida Statutes (2007) sets out the landlord's "choice of remedies upon [a] breach [by the] tenant:"

(1) If the tenant breaches the lease for the dwelling unit and the landlord has obtained a writ of possession, or the tenant has surrendered possession of the dwelling [**4] unit to the landlord, or the tenant has abandoned the dwelling unit, the landlord may:

(a) Treat the lease as terminated and retake possession for his or her own account, thereby terminating any further liability of the tenant; or

(b) Retake possession of the dwelling unit for the account of the tenant, holding the tenant liable for the difference between rental stipulated to be paid under the lease agreement and what, in good faith, the landlord is able to recover from a reletting; or

(c) Stand by and do nothing, holding the lessee liable for the rent as it comes due.

Section 83.47(1)(a) provides that a "provision in a rental agreement is void and unenforceable to the extent that it . . . [p]urports to waive or preclude the rights, remedies, or requirements set forth" in the Act. Section 83.54 states that "[a]ny right or duty declared" in the Act "is enforceable by civil action." An action seeking injunctive relief is one type of "civil action." *See* Fla. R. Civ. P. 1.040 (stating that [HN3] "[t]here shall be one form of action to be known as 'civil action'").

We discern no problem, statutory or otherwise, with paragraph (6), the "cancellation" provision of the lease. Nothing in the statute precludes a landlord and tenant from agreeing in advance about the circumstances when a tenant may get out of the lease before the end of the lease term. Section 83.595(1) does not apply because the "cancellation" agreement is not a surrender, abandonment, or writ of possession situation. We disagree with the circuit court's conclusion that this provision is "in violation of" *Lefemine v. Baron*, 573 So. 2d 326 (Fla. 1991). This paragraph did not permit the landlord the option of choosing liquidated damages or bringing suit for actual damages; if the tenant opted for the conditions of the cancellation, then the landlord was limited to one month's rent as "liquidated damages," and nothing more. It is inartful to call a cancellation fee "damages"; if a tenant exercises his right to terminate early under paragraph (6), no default has occurred, so no "damages" are owed. Only if paragraph (6) was inapplicable to an early termination was a tenant thrown into the general default provision of paragraph (16).

We agree with the circuit court's conclusion that paragraph (16) violated *Lefemine*, rendering the liquidated damage provision of three months rent a nullity. We also find that the attempt to create [**6] a liquidated damage remedy violated section 83.595(1), which sets out the total universe of choices available to a landlord when a tenant has not completed the term of a lease. This statute places limitations on the freewheeling ability to contract; the legislature recognized that in a residential setting, landlords and tenants do not bargain from equal positions of power and knowledge. The statute expressly describes the landlord's three options following a tenant's breach and vacation of the leased premises. An inference must be drawn that the legislature intended to omit or exclude damage remedies not included by special reference. *See generally Prewitt Mgmt. Corp. v. Nikolits*, 795 So. 2d 1001 (Fla. 4th DCA 2001); *Towerhouse Condo., Inc. v. Millman*, 475 So. 2d 674 (Fla. 1985). Section 83.595 takes a balanced approach to allocating responsibilities after breach of a lease. In situations where a landlord immediately relets the property, the statute will favor the tenant. However, in a slow market, where a tenant abandons an apartment early in a lease, and the landlord cannot relet, the ability to recover actual damages benefits the landlord. The statute does not allow for the creation of a liquidated damages remedy to bypass the statutory provisions.

In an excellent brief, amicus curiae counsel argues that section 83.595 should be construed in a way that its remedies are "available in addition to the common law remedies, which include an award of liquidated damages pursuant to" a signed lease agreement. We reject this invitation to expand section 83.595 by judicial interpretation. The act does not contain the type of provision that "allows the [trial] judge access to an arsenal of alternative doctrines that are available, unless specific code provisions indicate these alternatives' inapplicability." *Rosen*, 1994 Wis. L. Rev. at 1181. For example, section 1.103 of the Uniform Residential Landlord and Tenant Act states:

Unless displaced by the provisions of this Act, the principles of law and equity, including the law relating to capacity to contract, mutuality of obligations, principal and agent, . . . fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause supplement its provisions.

Quoted at *Rosen*, 1994 Wis. L. Rev. at 1256 n.231. While Florida adopted some provisions of the Uniform Act, the legislature did not adopt section 1.103. It is for the legislature, and not the courts, to expand section 83.595 remedies.

We find no abuse of discretion in the court's entry of an injunction under section 501.211(1), Florida Statutes (2007). We note that an injunction would also have been proper under section 83.54.

The order of the circuit court is affirmed insofar as it applies to paragraph (16) of the lease and reversed insofar as it applies to paragraph (6) of the lease.

POLEN and MAY, JJ., concur.