IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

KARINA WASHINGTON, Plaintiff	: NO. 21-00457
vs.	: CIVIL ACTION - LAW
WCH PROPERTIES, LLC, Defendant	: *Preliminary Objections to* : *Third Amended Complaint*

OPINION AND ORDER

AND NOW, following argument held February 28, 2022 on Defendant's Preliminary Objections to Plaintiff's Third Amended Complaint, the Court hereby issues the following OPINION and ORDER.

BACKGROUND

Plaintiff commenced this matter by filing a Complaint on May 21, 2021. Plaintiff filed an Amended Complaint on June 14, 2021, and a Second Amended Complaint on July 15, 2021. Defendant filed Preliminary Objections to Plaintiff's Second Amended Complaint, and on December 30, 2021 the Court issued an Order ruling on those Preliminary Objections. Specifically, the Court sustained each of Defendant's five preliminary objections, and directed Plaintiff to file an Amended Complaint.

THIRD AMENDED COMPLAINT AND PRELIMINARY OBJECTIONS

Plaintiff timely filed a Third Amended Complaint on January 19, 2022. Like the Second Amended Complaint, the Third Amended Complaint alleges that Plaintiff entered into a written lease agreement (the "Lease") for a residence at 1 Maple Avenue, Williamsport (the "Residence") on June 16, 2020, and that on April 23, 2021 an electrical fire caused extensive damage to the Residence, requiring Plaintiff and

her family to vacate the Residence and rendering it uninhabitable. Plaintiff alleges that "Defendant was aware of electrical issues at the Residence due to a prior fire at the same apartment building in recent history." She claims her personal items were destroyed or damaged in the fire, she was forced to expend significant sums of money to obtain alternate housing, and following the fire Defendant demanded Plaintiff pay utility bills that had either already been paid or were not Plaintiff's responsibility. On May 18, 2021, Plaintiff made written demand on Defendant to provide alternative housing; Defendant has not done so.

The first twenty-five paragraphs of the Third Amended Complaint, containing the factual averments underlying Plaintiff's claims, are identical to those in the Second Amended Complaint, save for an additional sentence regarding Plaintiff's good faith in seeking assistance from a social services program. Plaintiff did, however, expand the first four of the Complaint's five counts and reworked the fifth in response to this Court's December 30, 2021 Order.

On February 2, 2022, Defendant filed Preliminary Objections to Plaintiff's Third Amended Complaint, consisting of a demurrer to each of the first four counts.[1] Reiterating many of the arguments made in its Preliminary Objections to Plaintiff's Second Amended Complaint, Defendant essentially contends that even after the Court provided Plaintiff the opportunity to plead additional facts, her claims in Counts I through IV remain insufficient as a matter of law.

[1] Pa. R.C.P. 1028(a)(4) permits preliminary objections premised on "legal insufficiency of a pleading (demurrer)...."

A. Count I

Count I is for breach of contract. Plaintiff contends Defendant breached Paragraph 18 of the Lease, which reads: "18. Quiet Enjoyment. As long as Tenant is not in default under the terms of this lease, Tenant will have the right to occupy the premises peacefully and without interference." She also contends that "[a] tenant's right to the covenant of quiet enjoyment is also an implied duty in all leases," and that "Defendant deprived Plaintiff of the use of the leased premises by failing to properly maintain the premises, by failing to provide temporary housing for Plaintiff, and by failing to timely repair the apartment from fire and consequential smoke and water damage."

In its preliminary objection to Count I, Defendant points out that "Paragraph 18 of the lease does not provide for damages in the event of a fire," and that damages are discussed in Paragraph 16 of the Lease:

> "16. Damages to Premises
>
> A. If the premises are damaged through fire or other cause not the fault of Tenant, Tenant will owe no rent for any period during which Tenant is substantially deprived of the use of the premises.
>
> B. If Tenant is substantially deprived of the use of the premises for more than 90 days because of such damage, Tenant may terminate[] this lease by delivering written notice of termination to Landlord."

Defendant argues that "Plaintiff has not identified any provision of the lease agreement which would require defendant to provide plaintiff with temporary housing or pay her expenses, as such an obligation does not exist under the terms of the lease agreement, or under Pennsylvania law."

Whether express or implied, a covenant of quiet enjoyment inures to the benefit of every lessee of real property in Pennsylvania.[2] The covenant of quiet enjoyment "is breached when the lessee's possession is impaired either by acts of the lessor or those acting under the lessor... Any 'wrongful act' of the lessor that interferes with the lessee's possession, in whole or in part, is a breach of the covenant of quiet enjoyment."[3]

Plaintiff's Complaint pleads that the fire at the residence was "an electrical fire," and that she "has reason to believe Defendant was aware of electrical issues with [the Residence] due to a prior fire at the same apartment building in recent history." She more specifically alleges that Defendant "fail[ed] to properly maintain the premises" to prevent electrical issues and an ensuing fire. Inasmuch as Plaintiff has pled that Defendant knew of electrical issues but failed to take affirmative steps to remedy them through the proper maintenance of the Residence, thus causing a fire, Plaintiff has alleged a "wrongful act" by Defendant that has interfered with her possession of the Residence. Thus, Plaintiff has adequately pled a breach of the covenant of quiet enjoyment.

Defendant demurs not just to the cause of action, however, but to the damages that Plaintiff seeks. In fact, Counts I, III, IV and V do not include a prayer for damages; rather, these Counts describe in varying detail the damages Plaintiff alleges. The "wherefore" clause of the Complaint does request "that the Court enter monetary judgment in favor of Plaintiff for such compensatory, statutory, and actual damages, and any other relief that may be appropriate." The Court construes the

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[2] *See, e.g., Lichtenfels v. Bridgeview Coal Co.*, 531 A.2d 22, 25 (Pa. Super. 1987).
[3] *Id.*

Complaint as asking for damages of whatever kind the Court is willing to award, and Defendant's first preliminary objection as demurring to all but a sliver of them in the context of Count I.

Count I avers that the breach "caused Plaintiff to incur additional expenses for housing, food, clothing, transportation, and other necessities; substantially in excess of her usual expenses." Defendant responds that there is no legal basis upon which to grant remedies beyond those in Paragraph 16 of the Lease.

A lessee who is dispossessed of a property due to a breach of a covenant of quiet enjoyment is entitled to "the cost of moving… to a suitable location," and a commercial lessee may recover lost profits if it can reasonably establish them rather than merely speculate as to their amount.[4] Here, under Count I, Plaintiff may clearly recover for the cost of relocating to another apartment if she prevails on this claim, as well as any other damages stemming directly from her need to find new housing. Damages for personal injury and destruction of personal property, on the other hand, are not traditional contract remedies, and are thus not recoverable under Count I.[5] Plaintiff's damages will be offset by the relief from rent provided by Paragraph 16 of the Lease as well as the payments mentioned in Paragraphs 18 and 25 of the Third Amended Complaint.[6] Inasmuch as Plaintiff suggests Defendant "fail[ed] to provide temporary housing for Plaintiff [and] fail[ed] to timely repair the apartment from fire…" she cannot simultaneously recover for a failure to provide new housing and a failure

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[4] *Pollock v. Morelli*, 369 A.2d 458, 463 (Pa. Super. 1976).
[5] Such damages may appropriately be brought under a negligence claim. Count IV of the Third Amended Complaint, which sounds in negligence, and Defendant's preliminary objection to Count IV are discussed *infra*.
[6] "On May 24, 2021, under Court Order, Plaintiff received $500 from Defendant to off-set the cost of temporary housing."

to repair her old housing. Additionally, Plaintiff has a duty to mitigate damages, and will need to demonstrate that her excess expenses were reasonable. Finally, although Plaintiff has not limited the temporal scope of her request for damages, the Lease was set to expire on July 1, 2021.[7] Plaintiff has not pled that any party extended the Lease or that Defendant would have been otherwise unable to insist that Plaintiff vacate the Residence on this date. Therefore, Plaintiff's damages for a breach of the covenant of quiet enjoyment are necessarily circumscribed by the dates during which Defendant was obligated to provide quiet enjoyment.

For the foregoing reasons, the Court overrules in part and sustains in part Defendant's preliminary objection to Count I of the Third Amended Complaint. Plaintiff has adequately pled a breach of the covenant of quiet enjoyment. Plaintiff's damages for this breach are limited to the costs of moving to new housing and the *excess* costs of new housing – to the extent they are reasonable – from April 23, 2021 to July 1, 2021 at the latest.

B. Count II

Count II is for a breach of the implied warranty of habitability. Plaintiff contends that Defendant breached the implied warranty of habitability for the same reasons as proffered regarding the covenant of quiet enjoyment. In response to this Court's December 30, 2021 Order, Plaintiff's Third Amended Complaint explicitly states the damages she is pursuing under Count II: "additional expenses which were substantially in excess of her usual expenses, including temporary housing, food

[7] The Lease purported to expire on "June 31, 2021," but June only has 30 days. The Court will construe this patent ambiguity in the Lease in Plaintiff's favor as the non-drafting party, providing her an additional day of potential damages by treating the Lease as though it was set to expire on July 1, 2021 rather than June 30, 2021.

capable of being stored and cooked in a hotel room, replacement clothing, additional transportation, and other necessities," as well as "damages to restore Plaintiff to the same position she would have been in if the contract had been performed."

Defendant responds that a request to be relieved from rent payments – as is explicitly provided in Paragraph 16 of the Lease – is an appropriate "traditional contract remedy" available for a breach of the implied warranty of habitability. Defendant contends that all other expenses sought by Plaintiff under this Count, however, are not "traditional contract remedies" and thus are unavailable.

As the Court noted in its December 30, 2021 Order:

> "[D]amages for a breach of the implied warranty of habitability are confined to 'traditional contract remedies'... designed to either put a party in the same position it would be in had the contract been performed, restore the party to the position it would have been in had the contract not been made, or transfer from the breaching party to the non-breaching party the benefit the breaching party had received due to its breach.... Here, Defendant has clearly not received a benefit from the alleged breach... [furthermore], the Lease does not impose a duty on Defendant to provide identical housing...."

Pennsylvania Courts have acknowledged that remedies for a breach of the implied warranty of habitability are limited. As discussed above, damages for personal injury and destruction of property are not "traditional contract remedies." Appropriate remedies for a breach of the implied warranty of habitability include full rent abatement for a total breach; partial rent abatement for a partial breach; the cost of "reasonably-priced" repairs undertaken by the tenant as long as their cost does not exceed the amount of rent paid over the term of the lease; and recovery of the increase in utility costs attributable to the inhabitability.[8] Ultimately, "the implied

[8] *Pugh v. Holmes*, 405 A.2d 897 (Pa. 1979); *Fair v. Negley*, 390 A.2d 240 (Pa. Super. 1978).

warranty of habitability in a typical residential lease... and the tenant's obligation to pay rent are mutually dependent, so that 'a material breach of one of these obligations will relieve the obligation of the other so long as the breach continues.'"[9]

Here, Plaintiff has alleged that she incurred additional expenses due to the fire; these expenses, however, are not attributable to any repairs undertaken or additional utilities expended while living in an uninhabitable residence. Indeed, Plaintiff agrees that in accordance with Paragraph 16 of the Lease her obligation to pay rent was completely relieved. Pennsylvania case law makes clear that the implied warranty of habitability goes hand-in-hand with the requirement to pay rent, and that the cost of "[r]epairs... cannot exceed the amount of the rent available to apply against the cost, i.e. the amount of rent owed for the term of the lease"; this means that if the cost of repairs to make a residence habitable is greater that the total amount of rent to be paid, the tenant will be fully relieved from paying rent but may not recover the amount in excess of the total rent to be paid during the lease.[10]

As Plaintiff has already been completely relieved of the duty to pay rent for the period during which the Residence was uninhabitable, and has not alleged that she expended any monies to make the Residence habitable, there is no additional recovery to be had on this count. Therefore, the Court sustains Defendant's preliminary objection to Count II of the Third Amended Complaint.

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[9] *Staley v. Bouril*, 718 A.2d 283, 285 (Pa. 1998) (quoting *Pugh*, 405 A.2d at 903).
[10] *Pugh*, 405 A.2d at 908. For example, if a tenant has paid $1,000 in rent for 12 months for a total of $12,000 and expends $15,000 to make the residence habitable, that tenant is entitled to complete relief from rent, but may not recover the additional $3,000.

C. Count III

Count III of the Third Amended Complaint is for a violation of the Unfair Trade Practices and Consumer Protection Law ("UTPCPL"). Plaintiff alleges that "Defendant has engaged in an unlawful course of conduct which breached the contract with Plaintiff, by failing to properly maintain the property as set forth herein, thereby depriving Plaintiff of her residence which Defendant contracted to rent to her." Plaintiff claims damages stemming from Defendant's "failure to comply with [the] warranty given to Plaintiff to provide her a habitable residence." Plaintiff further alleges that Defendant claimed "until at least May 18, 2021 that the residence would be repaired quickly," which is the reason Plaintiff "sought only temporary replacement housing at her own expense while waiting to return to living at 1 Maple Ave." Finally, Plaintiff alleges that Defendant "repeatedly demanded payment of amounts that were not owed by Plaintiff," demanding that Plaintiff pay water and gas bills she was not responsible for.

Defendant responds, essentially, that the Court held in its December 30, 2021 Order that Plaintiff had not stated a claim under the UTPCPL, but "plaintiff has renewed those allegations in count III of the third amended complaint, without material change."

The UTPCPL defines twenty-one separate acts as "unfair or deceptive acts or practices." Plaintiff suggests that Defendant's acts violate either provision fifteen, "[k]nowingly misrepresenting that services, replacements or repairs are needed if they are not needed,"[11] or provision twenty-one, the catch-all provision, "[e]ngaging in

[11] 73 P.S. § 201-2(4)(xv).

any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding."[12]

The Court agrees with Defendant that Plaintiff has not stated a claim under the UTPCPL. Regarding the "fail[ure] to comply with a warranty given to Plaintiff to provide her a habitable residence," the only potential provision of the UTPCPL that applies is the catch-all. This is true as well of Plaintiff's claim regarding the representations made "that the residence would be repaired quickly...."[13] However, the catch-all provision of the UTPCPL requires the defendant's conduct to be "fraudulent or deceptive." With regard to these first two claims, Plaintiff has not pled any facts that suggest Defendant's alleged breach of the warranty of habitability or statements made regarding repairs to the Residence were fraudulent or deceptive. Rather, Plaintiff alleges merely that the breach was wrongful, and the statements concerning repairs were factually wrong. This is insufficient to state a claim under the UTPCPL.

With regard to the third claim, Plaintiff similarly fails to plead that the "repeated demands for water and gas bills" were fraudulent or deceptive, though she does plead that they were "knowing[]"; knowledge would suffice to demonstrate acts prohibited by § 201-2(4)(xv), and a liberal reading of the allegations would allow an inference of "deception" arising out of repeated demands for payment despite "knowing" Plaintiff was not liable. In order to bring a private action under the UTPCPL, however, a person must "suffer... ascertainable loss of money or property,

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[12] 73 P.S. § 201-2(4)(xxi).

[13] As Plaintiff pleads that the fire in fact rendered the Residence completely uninhabitable, the Court does not understand Plaintiff to be maintaining that "repairs... [were] not needed" as would be required to plead acts under § 201-2(4)(xv).

real or personal, as a result of the use or employment by any person of a method, act or practice" prohibited by the UTPCPL. Plaintiff has not pled any "ascertainable loss of money or property" as a result of repeated demands for payment of bills; she has not averred that she was in fact made to pay the bills, or that she expended any sums of money or lost any other property due to Defendant's demands.

For the foregoing reasons, Defendant's third preliminary objection is SUSTAINED. Count III, as well as the reference to the UTPCPL in the "wherefore" clause, shall be stricken from the Third Amended Complaint.

D. Count IV

Count IV is for Negligence. Plaintiff alleges "a torts claim of negligence... for failure to conform to [Defendant's] duty to provide a safe premise[s] for Plaintiff." Plaintiff alleges that Defendant "knew or should have known of electrical" issues at the Residence,[14] and that Defendant "fail[ed] to make repairs after Defendant was informed of electrical problems."

Defendant contends that the "gist of the action" doctrine, which "bars a plaintiff from re-casting ordinary breach of contract claims into tort claims," precludes these claims. Inasmuch as "[t]he relationship between the parties in this case is contractual," Defendant argues, "Plaintiff's negligence claims are barred...."

As the Court noted in its December 30, 2021 Opinion, the Superior Court of Pennsylvania has recognized the duty of a residential landlord "to protect tenants

[14] Paragraph 55 of the Complaint ends with the partial sentence "Defendant knew or should have known of electrical", without concluding. Paragraph 12 states that "Plaintiff has reason to believe Defendant was aware of electrical issues with [the Residence] due to a prior fire at the same apartment building in recent history"; the Court infers that the subjects of Paragraphs 12 and 55 are identical.

from injury or loss arising out of a negligent failure to maintain a rental property in a safe condition," specifically in the context for "failure to install smoke detectors... [and] negligently fail[ing] to maintain electrical wiring at the property."[15] The fact that the relationship between two parties is contractual does not by itself preclude those parties from bringing tort claims such as negligence.[16] Rather, the gist of the action doctrine will bar purported tort claims when they arise out of "the breach of duties imposed by mutual consensus" – that is, the contract – rather than "the breach of duties imposed as a matter of social policy...."[17]

The Superior Court of Pennsylvania has held that "[a] tenant seeking to recover damages stemming from the condition of a rental property may pursue claims sounding in ordinary negligence or a breach of the implied warranty of habitability."[18] Here, Plaintiff has pled these in the alternative. In this case, certain duties owed by Defendant and damages sustained by Plaintiff are specific to the contractual relationship between them, and others are not. For instance, Defendant's duty to provide Plaintiff quiet enjoyment, and damages sustained by Plaintiff seeking new housing, arise out of the specific contractual provisions outlined in the Lease. Contrastingly, Defendant's duty to maintain the Residence in a manner that will not injure people or destroy property, and Plaintiff's damages for property so destroyed, arise not out of the contract but out of "social policy."

For this reason, as recognized in *Echeverria*, a landlord's failure to maintain a residence in a safe condition by negligently failing to maintain wiring may support a

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[15] *Echeverria v. Holley*, 142 A.3d 29, 32-35.
[16] *See, e.g., Reed v. Dupuis*, 920 A.2d 861 (Pa. Super. 2007).
[17] *eToll, Inc. v. Elias/Savion Advertising, Inc.*, 811 S.2d 10, 14 (Pa. Super. 2002).
[18] *Echeverria*, 132 A.3d at 34.

valid claim for negligence, and because such a failure breaches a larger societal duty the gist of the action doctrine does not apply. For this reason, Defendant's preliminary objection to Count IV of Plaintiff's Complaint is overruled.

ORDER

AND NOW, for the foregoing reasons, the Court hereby ORDERS as follows:

- Defendant's first preliminary objection is OVERRULED IN PART and SUSTAINED IN PART. Plaintiff's damages under Count I shall be limited to the costs of moving to new housing and reasonable excess costs of housing for a period beginning April 23, 2021 and spanning no later than July 1, 2021.

- Defendant's second preliminary objection is SUSTAINED. Count II is hereby STRICKEN from the Third Amended Complaint.

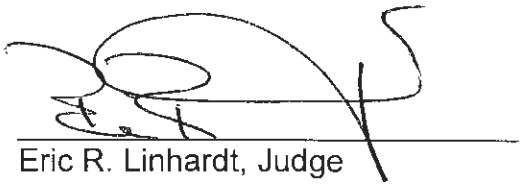
- Defendant's third preliminary objection is SUSTAINED. Count III, and the reference to the UTPCPL in the "wherefore" clause, are hereby STRICKEN from the Third Amended Complaint.

- Defendant's fourth preliminary objection is OVERRULED.

- Defendant shall file an Answer to the Third Amended Complaint within twenty (20) days of the date of this Order.

IT IS SO ORDERED this 13th day of June 2022.

By the Court,



Eric R. Linhardt, Judge

ERL/jcr
cc: Stephanie E. Wolak-Fleming, Esq.
Gary L. Weber, Esq.