

IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT, IN AND FOR PALM
BEACH COUNTY, FLORIDA

CASE NO.: 502002CA014116XXOCAB

TAMMY YATES, PETER MILLER,
MARIA L. CRUZ and JOSE ORTEGA
as Class Representatives of those
similarly situated,
Plaintiffs,

vs.

EQUITY RESIDENTIAL PROPERTIES
TRUST, a real estate trust licensed to do
business in the State of Florida; EQUITY
RESIDENTIAL PROPERTIES MANAGE-
MENT CORP., a corporation licensed to
do business in the State of Florida; EQUITY
RESIDENTIAL PROPERTIES MANAGEMENT
LTD., a limited partnership licensed to do
business in the State of Florida; EQUITY
RESIDENTIAL PROPERTIES MANAGEMENT
LTD. II, a limited partnership licensed to do
business in the State of Florida; and ERP
OPERATING LIMITED PARTNERSHIP a
limited partnership licensed to do business
in the State of Florida,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came before the Court for non jury trial on August 23 - August 30, 2004. After considering the testimony, evidence, pleadings and argument of counsel, the court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Plaintiffs, Tammy Yates ["Yates"], Peter Miller ["Miller"], Maria Cruz ["Cruz"] and Jose Ortega ["Ortega"] were tenants and represent a class of tenants who signed leases with Defendants,

Equity Residential Properties Management Corp. ["ERPMC"]¹, Equity Residential Properties Management Ltd. ["Equity Mgmt. Ltd."], and Equity Residential Properties Management Ltd. II ["Equity Mgmt. Ltd. II"]. Yates was a resident of Mission Bay Apartments in Orlando, Florida; and Miller, Cruz and Ortega were residents of The Pines At Springdale in Palm Springs, Florida.

Except for Equity Residential Management Corp. II², the Defendants identified below either owned the apartment complexes or leased the apartments involved in this lawsuit and are landlords, according to the Florida Residential Landlord and Tenant Act, which defines a landlord as the owner or lessor of a dwelling unit. Section 83.43(3), Fla. Stat. Defendant ERP Operating Limited Partnership ["ERP-OP"] owned or currently owns the approximately 77 to 83 apartment complexes in Florida involved in this lawsuit, which include Mission Bay Apartments and The Pines At Springdale. ERPMC and its predecessor management companies, Equity Mgmt. Ltd. and Equity Mgmt. Ltd II, executed leases with the Plaintiffs and class members and managed the apartment complexes on behalf of ERP-OP. ERPMC is wholly owned by ERP-OP. The general partner of ERP-OP is Defendant Equity Residential Properties Trust.³ Hereinafter, the Defendants will be referred to collectively as "Equity".

Equity used a form lease entitled "Standard Apartment Lease - Florida ("Lease") until the summer of 2001. In September, 2001, Equity began to replace the Lease with a new form entitled

¹Although the Joint Pretrial Stipulation states that ERPMC signed the Standard Apartment Lease with Yates, Miller, Cruz and Ortega, the Lease was actually signed by Equity Mgmt. LTD, ERPMC's predecessor management company. The named Plaintiff on two final judgments against Cruz and Miller for fees arising out of the tenancy is Equity Mgmt LTD.

²Equity Residential Management Corp. II did not own or manage apartment complexes in Florida.

³A general partner of a limited partnership is jointly liable for the debts and obligations of the partnership. *Brinkley, McNerney, Morgan & Soloman v. Community Acres Associates LTD*, 602 So.2d 685 (Fla. 4th DCA 1992); Section 620.125, Fla. Stat.

Standard Apartment Lease - Terms and Conditions (Florida Form)(“National Lease”). Members of the class signed either the Lease or the National Lease.

The Lease and the National Lease contain similar lease termination clauses. The Lease and National Lease require the tenant to notify the landlord in writing, at least 60 days prior to the expiration of the term, that the tenant intends to vacate the premises at the expiration date of the lease. In the event the tenant fails to notify the landlord, the Lease and National Lease automatically convert to a month to month tenancy. The tenant is then required to notify the landlord in writing of the tenant’s intent to vacate the apartment at least thirty days prior to terminating the month to month tenancy.⁴ If the tenant vacates the apartment at the end of the stated expiration date in the lease but fails to notify Equity of an intent to vacate, the tenant is charged a maximum of two months additional rent.

The Lease and the National Lease contain similar early termination clauses. According to the Lease, the tenant is permitted to terminate the Lease prior to the expiration date by entering into an early termination agreement. An early termination agreement requires the tenant, among other things, to pay an early termination fee, which is approximately one month’s rent, and to provide written notice of terminating the Lease at least 60 days prior to the early termination date. If a tenant vacates an apartment prior to the termination of the Lease without entering into an early termination agreement, the tenant must pay the early termination fee and rent until the apartment is re-rented or until the lease expires.⁵ The early terminating tenant is also charged an insufficient notice fee of a maximum of two months rent, presumably for failing to provide the 60 day written notice of early

⁴Lease, Paragraph 11; National Lease, Paragraphs 1, 37, 38 and Term Sheet

⁵Paragraph 14

termination. However, the Lease does not explicitly state that the early terminating tenant is liable for a maximum of two months rent. The National Lease does not offer an early termination option to all tenants. If the tenant is allowed to terminate the National Lease before the expiration date, the tenant is charged an early termination fee of two months rent and must give Equity at least sixty days written notice of vacating prior to the early termination date. However, if the tenant does not have an early termination option or violates the early termination provision and leaves the apartment before the expiration of the lease, the tenant must pay liquidated damages equal to three months rent and the rent during the tenant's occupancy.⁶

Although the individual property managers are responsible for billing tenants who move from the apartments, Equity employs a standard billing procedure. Approximately three days after a tenant moves out of an apartment, the property manager prints out and mails a Final Billing and Settlement Statement ("FBSS") to the tenant, which records all amounts owed by or to the tenant. These amounts include the fees charged for failure to give notice and early termination as well as actual costs for repairing and cleaning the apartment.

About 10 days after the FBSS is mailed to the tenant, the information on the FBSS is electronically transmitted to Equity's collection division, which is known as EQRCD. EQRCD mails letters to prior lease holders, roommates, and guarantors demanding payment of the outstanding bills on the FBSS. Sixty days after the tenant moves, EQRCD notifies the credit reporting bureaus if the balance is unpaid. One person from each unit is reported to the credit reporting bureaus. Prior to the establishment of EQRCD in January, 2000, Equity used private collection agencies and mailed paper statements to them. These collection agencies sent letters to

⁶Paragraph 39 and Term Sheet

former tenants demanding payment of the FBSS.

Since January of 2000, the information on the FBSS has been electronically transmitted to a data base (the "WIZ" system). The fees that Plaintiffs challenge for failure to give notice and early termination are captured in the following WIZ codes: CNCFB - Cancellation Charge - FBSS; INSUF - Insufficient Notice Charge; LSEFB - Lease Fulfillment Charge - FBSS; LIQDM - Liquidated Damages; CANCL - Cancellation Charge-A/R Resident; LSETM - Lease Fulfillment Charge-A/R Resident. These codes were deactivated in the WIZ computer system in December, 2003. On July 15, 2003, Equity replaced the six codes with four new codes that identify the challenged fees. The four new codes are XCEL, XCL1, PGNR and RVRFL.

On or about August 1, 2001, Yates and her roommate Megan Rhing signed the Lease for Apartment #226 in the Mission Bay Apartments in Orlando, Florida, for a term beginning on August 1, 2001 and ending on July 31, 2002. Yates paid her rent on time and delivered her keys to the property manager on July 31. When she delivered her keys, the manager advised her that she would be charged two months rent because she failed to give management a written notice of termination. On or about July 31, 2002, Mission Bay printed out and mailed an FBSS to Yates, which included, among other things, a charge for "Insufficient Notice - FBSS" in the amount of \$1,740.00 (two months rent). About a month later Yates received a collection notice from Equity. Collection letters were also addressed to Megan Rhing and the tenants' fathers, who were the guarantors on the Lease.

On or about August 9, 1999, Cruz and Ortega signed the Lease for Apartment #1317 in The Pines At Springdale, Palm Springs, Florida, for a term beginning on August 20, 1999 and ending on August 20, 2000. Because the unit had water intrusion, Cruz moved to Apartment #G110 in the same complex. She signed a new Lease for a term beginning December 24, 1999 and ending on December

18, 2000. Ortega moved from Apartment #1317 and did not sign the Lease for Apartment #G110. Cruz signed A Notice of Intent to Vacate Apartment on February 23, 2000 and vacated Apartment #G110 on March 1, 2000, nine months before the second Lease terminated. On or about March 3, 2000, The Pines At Springdale printed out and mailed an FBSS to Cruz and Ortega, which included, among other things, a charge for "Insufficient Notice - FBSS" in the amount of \$1,251.30, a "Lease Fulfillment Fee" in the amount of \$736.00 and a concession payback charge of \$300.00. Three months later, a private collection agency, Pierce Hamilton & Stern, Inc., ("Pierce") mailed a collection letter to Cruz and Ortega for the amount charged in the FBSS. Cruz sent a \$10.00 check to Pierce with a letter objecting to some of the charges. In June and July, 2000, Pierce sent at least three more collection letters to Cruz and Ortega, threatening to report the account to three national credit reporting bureaus. A final judgment for the insufficient notice and lease fulfillment fees, in addition to other charges, was issued against Cruz. Ortega testified that his joint bank account with Cruz was garnished because of the Cruz judgment. In addition, he paid a higher interest rate on a loan because Cruz, the co-signer on the loan, had an outstanding judgment.

On or about February 4, 2000, Miller signed the Lease for Apartment #G111 in The Pines At Springdale, Palm Springs, Florida, for a term beginning February 4, 2000 and ending on February 4, 2001. In addition to the application fee of \$450.00, he paid Equity first and last month's rent of \$1,486.00. Approximately four days after he moved into the apartment, Miller notified management that he was leaving for personal reasons. Miller and his co-resident occupied the apartment for about one week. The apartment was re-rented approximately two days after they left. In March, The Pines At Springdale printed and mailed an FBSS to Miller, which included a charge for "Insufficient Notice - FBSS" in the amount of \$1,486.00 and an "FBSS Cancellation Fee in the amount of

\$743.00, which amounted to three months rent. He received no credit for the rent that Equity received from the new tenant and no refund for last month's rent. Equity filed an action against him for the outstanding bill, which he did not defend, resulting in an outstanding judgment against him.

CONCLUSIONS OF LAW

Plaintiffs claim that the provisions in the Lease and National Lease which provide the contractual basis for the assessment of the disputed fees violate The Florida Residential Landlord and Tenant Act and the common law of contract and liquidated damages. These assessments, Plaintiffs argue, are unfair and unlawful business practices which violate the Florida Consumer Collection Practices Acts and the Florida Deceptive and Unfair Trade Practices Act.

I THE FLORIDA RESIDENTIAL LANDLORD AND TENANT ACT, CHAPTER 83, PART II, FLA. STAT.

A. NOTICE OF TERMINATION.

Equity's practice of charging rent and additional fees is regulated by The Florida Residential Landlord and Tenant Act, Chapter 83, Part II, Fla. Stat. Equity's rental agreements cannot alter the measure of damages available to a landlord for breach of lease. Section 83.47, Fla. Stat. According to Section 83.595(1), when a tenant surrenders possession or abandons a dwelling unit prior to the expiration of the lease term, 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 reletting; or (c) Stand by and do nothing, holding the lessee liable

for the rent as it becomes due".⁸ Accordingly, when Equity takes possession and rerents the property, Equity must credit the former tenant for rents received from the new tenant. Section 83.595(1)(b); *Quintero-Chadid Corp. v. Gersten*, 582 So.2d 685 (Fla. 3rd DCA 1991).

Equity argues that it is not obligated to credit the former tenant with rent received from the new tenant because it retakes the premises under Section 83.595(1)(a), which allows the landlord to terminate the lease and to retake possession for the landlord's own account. Clearly, the language of Section (1)(a) applies only if the landlord resumes possession and utilizes the premises for purposes other than the recovery of rent. *4-Way, Inc. v. Bryan*, 581 So.2d 208 (Fla. 4th DCA 1991). Since Equity chooses to rent the vacant apartments to new tenants, it is required to credit the former tenant with the rent received from reletting the apartment.

Both the Lease and National Lease automatically convert to a month to month tenancy at the end of the lease term if the tenant fails to provide written notice of an intent to vacate, even if the tenant vacates the apartment. The tenant then becomes obligated as a month to month tenant to provide 30 days written notice of termination. As a month to month tenant, the tenant is obligated to pay at least one month's rent. If the tenant delivers the keys to Equity at the end of the lease without notifying Equity in writing of the tenants intent to vacate, the tenant is charged two months rent. Equity admits that it attempts to rent vacant apartments as soon as possible. The average number of days an apartment remains vacant is 25.5, while the median days an apartment remains vacant is 21. If Equity rents the vacant apartment to a new tenant, Equity receives double rent and the tenant receives no credit for the rent paid by the new tenant. Paragraphs 11 of the Lease and 37, 38 and the Term Sheet of the National Lease provide the contractual justification for the collection

⁸Subsection (c) is not applicable.

of double rent in violation of Section 83.595(1)(b).

Paragraph 11 of the Lease identifies the additional rent charged for failure to provide a written notice of termination as liquidated damages. Although the National Lease doesn't identify the fee for insufficient notice of lease termination as liquidated damages, the clauses in the two leases are similar. If the fees are liquidated damages, Equity was not statutorily authorized to charge its tenants liquidated damages in its rental agreement prior to 2003. At the time Yates and the class members signed the Lease and National Lease, the landlord's measure of damages was limited by Section 83.595. Paragraph 11 of the Lease and Paragraphs 37, 38 and the Term Sheet of the National Lease are unenforceable, since they seek to enlarge Equity's remedies contrary to statutory authority. It was not until 2003 that the legislature enacted Section 83.575, adding the remedy of liquidated damages for failure to notify a landlord of an intent to vacate at the end of the lease.⁹

B. EARLY TERMINATION.

Section 83.595(1)(b) applies to early terminating tenants as well as end of term tenants. As discussed previously, Equity's recovery of damages for breach of lease is limited to the recovery of rent from the breaching tenant to the end of the lease or until the apartment is re-rented. However, Equity charges its early terminating tenants more than it is permitted to recover under Section 83.595(1)(b). An early terminating tenant under the Lease who fails to give at least 60 days written notice of early termination is charged an insufficient notice fee of up to two months rent, an early termination fee of approximately one months rent and rent until the apartment is rented or until the

⁹Section 83.575 became effective May 23, 2003 and was amended, effective June 24, 2004.

lease expires whichever occurs first.¹⁰ Paragraph 1 of the Lease identifies the early termination fee and insufficient notice fee as additional rent. As additional rent, such charges clearly exceed the amount recoverable under Section 83.595(1)(b).

A tenant who signs the National Lease and vacates the apartment prematurely is charged a fee of three months rent.¹¹ Paragraph 2 of the National Lease identifies the fee as additional rent. The tenant is liable for the additional rent even if Equity rents the apartment one month after the apartment is vacant. Thus, Equity receives rent in excess of the rent it is permitted to charge under Section 83.595(1)(b).

C. CREDIT FOR RELETTING

Plaintiffs and Equity agree that beginning February 1, 2004, Equity began to credit its former tenants with rent it received from reletting the apartments. The billing records include an entry of "credit" to the tenants who moved. Equity claims that it began to credit former tenants on July 15, 2003, when it converted its WIZ computer system from six codes to four codes. However, the billing records between July 15, 2003 and January 31, 2004 do not contain credits to former tenants. During this time it appears that Equity had no uniform policy for crediting the former tenants for rent that Equity received from new tenants.

¹⁰Paragraph 14

¹¹Paragraph 39 and Term Sheet

II LIQUIDATED DAMAGES

A. NOTICE OF TERMINATION

Liquidated damages is an amount the parties agree will be paid in the event of a breach. The stipulated sum must bear some relation to the actual damage which the parties can reasonably anticipate at the time they enter into the contract. *Lefemine v. Baron*, 573 So.2d 326 (Fla. 1991); *Woodhaven Apartments v. Washington*, 942 P.2d 918 (Utah 1997). The Lease identifies the additional charge for an insufficient notice of termination as liquidated damages. Although the National Lease does not identify the fees charged as liquidated damages, the same analysis applies, as it computes the fees in the same manner as the Lease. The court stated in *Hyman v. Cohen*, 73 So.2d 393, 398-399 (Fla. 1954):

“Regardless, then, of the language used by the parties in stipulating for the forfeiture . . . , the courts will apply certain well settled rules to determine whether the parties actually intended to liquidate their damages or whether their real intention was only to induce performance. If it is clear that they could have intended only the latter, then the provision for forfeiture will be held to be a provision for a penalty.

Thus, in the case of a stipulation for payment of a fixed sum or forfeiture ... upon the breach of a covenant, if the damages for such breach are readily ascertainable and, when so ascertained, are out of all proportion to the amount stipulated to be paid or forfeited, the parties could only have intended to induce performance of the covenant and not to liquidate in advance their damages for such breach.”

Equity's end of termination tenant is charged an amount that is unrelated to the damage caused to Equity by the failure to provide written notice. The tenant is charged according to the date the tenant notifies Equity in writing of the tenant's intent to vacate. If the tenant fails to provide written notice to Equity and the apartment is rerented immediately after the tenant vacates, then the

tenant is charged two months rent, but Equity suffers no damage. On the other hand, if the tenant notifies Equity of the tenant's intent to vacate 59 days before the end of the lease and the apartment remains vacant for 1 month, the tenant is liable for only one days rent; but Equity has lost the rent for an entire month. If enforcement of the forfeiture provision bears no reasonable relationship to the actual damages suffered, then the forfeiture is a penalty and is unenforceable. *Hyman v. Cohen*, Ibid.

B. EARLY TERMINATION

A lease which gives the landlord the choice to either choose liquidated damages or sue for actual damages indicates an intent to penalize the tenant and negates an intent to liquidate damages in the event of a breach. Such a provision places the tenant at risk for paying a sum greater than the liquidated sum. On the other hand, if the actual damages are less than the liquidated sum, then the tenant is obligated to pay the liquidated damages. *Lefemine v. Baron*, 573 So.2d 326 (Fla. 1991).

An early terminating tenant who signs the Lease is subject to the risks identified by the *Lefemine* court. According to the Lease, Equity has the option to collect actual damages, that is, to recover any rent concession¹², to accelerate the rent due for the remaining term of the Lease¹³, or to collect rent until the apartment is re-rented or until the lease expiration date.¹⁴ In the same Lease, Equity can collect liquidated damages for insufficient notice and early termination.¹⁵

¹²Section 1 to accelerate rent.

¹³Section 12

¹⁴Section 14

¹⁵Section 14

Miller's tenancy is illustrative of the inequities inherent in the Lease. Miller signed the Lease and moved from the apartment a week later. The apartment was then rented to a new tenant within days after Miller left. Equity charged Miller \$2,229.00 for an insufficient notice and cancellation fee. Had the apartment remained vacant during Miller's lease term, Equity could have elected to sue Miller for \$8,916.00 (12 months at a monthly rent of \$743.00), instead of collecting the lesser sum of \$2,229.00. "Because neither party intends the stipulated sum to be the agreed-upon measure of damages, the provision cannot be a valid liquidated damages clause." *Lefemine v. Baron*, *Ibid.*, 330.

Paragraphs 36, 39 and 51 of the National Lease run afoul of *Lefemine*. Paragraphs 36 and 39 give Equity the right to terminate the lease for any non performance or default prior to the expiration of the lease. Paragraph 36 permits Equity to accelerate the rent while Paragraph 39 allows Equity to collect liquidated damages. Paragraph 51 provides: "Lessors rights and remedies under this Lease are cumulative and the use of one or more remedy shall not exclude or waive Lessor's right to other remedies".

III FLORIDA CONSUMER COLLECTION PRACTICES ACT, SECTIONS 559.55 - 559.785.

The court has found that Equity's attempt to collect fees based on contractual provisions of the Lease and National Lease violated The Florida Residential Landlord Tenant Act and common law. Equity began to collect these fees from end of term and early termination tenants in December, 1998. The collection efforts included the FBSS's and collection letters that were mailed to former tenants, co-tenants and guarantors.

Section 559.72(9), Fla. Stat., states that a debt collector shall not "[c]laim, attempt or threaten

to enforce a debt when such person knows that the debt is not legitimate or assert the existence of some other legal right when such person knows that the right does not exist.” A debt collector violates Section 559.72(9), only if the debt collector knows that the claim is not legitimate. It is not enough to prove that the debt collector should have known. *Williams v. Streeps Music Company, Inc.*, 333 So.2d 65 (Fla. 4th DCA 1976); *Kaplan v. Assetcare, Inc.*, 88 F. Supp.2d 1355 (S.D. Fla. 2000).

On or about August 4, 1999, Equity’s Florida counsel, Donna Barfield, advised Equity in writing that Section 83.595(1) limited Equity’s recovery of rent from early terminating tenants to the amount in the lease reduced by the amount the landlord received from reletting the apartment. Barfield also advised Equity that it could not recover both liquidated damages and actual damages from an early terminating tenant. She wrote:

“I refer you to Fla. Stat. Section 83.595 and caution you in regard to a provision in paragraph 11 providing for accelerated rent and in paragraph 37 where the term accelerated rent is also used. The option provided by statute is in conflict with the concept of accelerated rent in that the landlord is limited to recover only that rent which is lost as a result of the tenant’s breach until such time as the landlord is able to relet the premises. Paragraph 37 also appears to commingle a liquidated damage provision with a compensatory damage provision in that it refers to accelerating the rent due for the remaining lease term in accordance with the early termination provision provided in the Lease Form. The early termination provision provided in paragraph 40 in conjunction with the Term Sheet on page 2 is effectively a liquidated damage clause. Liquidated damages can not be recovered in conjunction with compensatory damages, but one or the other remedy must be elected. Fla. Stat. Section 83.595 limits the landlord’s compensatory damages to the recovery of rent stipulated under the lease minus what the landlord is able to recover from reletting. A landlord is not entitled to recover damages in accordance with Fla. Stat. 83.595 and also charge the tenant for failure to perform the early termination terms and conditions. Acceleration is not permitted in any event.”

In commenting on a draft of the proposed National Lease, Barfield wrote Equity another letter dated November 7, 2000, reminding Equity that the collection of rent from an early terminating tenant was limited to the period that the apartment remained vacant under F.S. 83.595 and that Equity could not collect liquidated damages and actual damages from an early terminating tenant. It is clear that on or about August 4, 1999, Equity knew that the fees in the Lease and National Lease affecting early terminating tenants were impermissible. Despite Barfield's legal advice, Equity continued to attempt to collect these fees until January 31, 2004.

Plaintiffs argue that Equity knew as early as 1985 that the disputed fees were uncollectible. Plaintiffs introduced testimony of Kenneth Lowenhaupt, an attorney retained by Equity, that three county court judges had refused to award the disputed fees. Lowenhaupt testified that the judges did not issue written rulings and that other county judges had awarded the disputed fees. The evidence was insufficient to prove that Equity knew that the fees were unlawful prior to August, 1999. There was no evidence that Equity knew that the notice of termination charges billed to end of term tenants violated Florida law.

IV FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT, CHAPTER 501, PART II, FLA. STAT.

Section 501.204(1) states: "Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." The Act embraces unfair or deceptive practices involving leases, landlords and tenants. *PNR, Inc. v. Beacon Property*, 842 So.2d 773 (Fla. 2003). An unfair practice is "one that 'offends established public policy' and one that is 'immoral, unethical, oppressive, unscrupulous or

substantially injurious to consumers’”. *Samuels v. King Motor Co. of Fort Lauderdale*, 782 So.2d 489, 499 (quoting *Spiegel, Inc. v. Fed. Trade Comm’n*, 540 F.2d 287, 293 (7th Cir. 1976)). Deception occurs if there is a “representation, omission, or practice that is likely mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment.” *Millennium Communications & Fulfillment, Inc. v. Office of the Attorney Gen.*, 761 So.2d 1256, 1263 (Fla. 3rd DCA 2000) (quoting *Southwest Sunsites, Inc. v. Fed. Trade Comm’n*, 785 F.2d 1431, 1435 (9th Cir. 1986)).

Equity’s practice of charging an end of term tenant the equivalent of 60 days rent, or a portion thereof, under the Lease and National Lease is an unfair and deceptive practice. Although both leases require the tenant to notify management in writing of an intent to vacate, neither lease notifies the tenant of the monetary consequence for failing to comply. Rather, the leases camouflage the charges by converting the tenancy to a month to month with a thirty day notice provision, requiring the tenant, who has already moved, to give written notice of the tenant’s intent to vacate. Similarly, Equity’s practice of charging an insufficient notice fee to tenants who vacate prior to the termination of the Lease is an unfair and deceptive practice. The Lease specifies that the tenant becomes liable for the early termination fee and for rent until the apartment is re-rented or the Lease expires. The Lease does not notify the tenant that the tenant is also liable for an insufficient notice fee for failing to provide 60 days written notice of early termination.

V CLASS MONETARY DAMAGES

Since there is no evidence that Equity knew that the notice of termination fees were unlawful, the end of term class members are not entitled to recover damages under Section 559.77(2), Fla. Stat. Conversely, beginning in August, 1999, Equity knew that the lease provisions authorizing Equity

to charge the disputed fees to early terminating tenants conflicted with Florida statutory and common law. Accordingly, the early terminating class members are entitled to recover damages under Section 559.77(2).

Prior to July 1, 2001, early terminating tenants injured by Equity's attempts to collect the illegal fees became entitled to an award of actual damages or \$500.00, whichever was greater.¹⁶ Beginning July 1, 2001, these tenants became entitled to an award of actual damages and additional statutory damages of up to \$1,000.00. Equity's practice of billing and attempting to collect the disputed fees from lease holders, roommates and guarantors for approximately 4 ½ years after Equity was on notice that the fees were prohibited by law constitutes conduct entitling the early terminating tenants to an award of statutory damages. In this class action the statutory damages are limited to \$500,000.00.¹⁷

Plaintiffs' witness, William Elrich, and Equity's witness, Mark Hosfield, offered their opinions on the size of the class and the damages recoverable by the tenants. However, neither witness provided the court with an accurate number of members in the class of early terminating tenants or the damages which should be awarded before and after July 1, 2001. Elrich did not count

¹⁶Prior to July 1, 2001, Section 559.77(1) provided: "A debtor may bring a civil action against a person violating the provisions of s.559.72 in a court of competent jurisdiction of the county in which the alleged violator resides or has his or her principal place of business or in the county wherein the alleged violation occurred." Section 559.77(2) provided: "Upon adverse adjudication, the defendant shall be liable for actual damages or \$500, whichever is greater, together with court costs and reasonable attorney's fees incurred by the plaintiff."

¹⁷An amendment to Section 559.77(2), effective July 1, 2001 provided: "Upon adverse adjudication, the defendant shall be liable for actual damages and for additional statutory damages of up to \$1,000, together with court costs and reasonable attorney's fees incurred by the plaintiff. In determining the defendant's liability for any additional statutory damages, the court shall consider the nature of the defendant's noncompliance with s.559.72, the frequency and persistence of such noncompliance, and the extent to which such noncompliance was intentional. In any class action lawsuit brought under this section, the court may award additional statutory damages of up to \$1,000 for each named plaintiff and an aggregate award of additional statutory damages not to exceed the lesser of \$500,000 or 1 percent of the defendant's net worth for all remaining class members, but in no event may this aggregate award provide an individual class member with additional statutory damages in excess of \$1,000."

the members of each distinct subclass, which the court identified in the Order Authorizing Class Certification and Notice To Class Members as End Of Term Tenants And Early Termination Tenants, nor did Hosfield identify the damages which the early termination tenants could receive according to pre and post July 1, 2001 categories.

Although Hosfield underestimated the class of early termination tenants by excluding, for example, roommates and guarantors and the WIZ charges entered into the system after July 15, 2003, his identification of the early termination tenants, nevertheless, makes it possible to estimate the damages for the early termination tenants. The class members entitled to recover damages are those early terminating tenants whose FBSS's were generated beginning August 9, 1999,¹⁸ until January 31, 2004. Based on a class size of approximately 4,473 members, actual damages are approximately \$781,008.00, with prejudgment interest of \$348,372.37 and statutory damages of \$500,000.00,¹⁹ for a total class fund of \$1,629,380.37.

VI INDIVIDUAL MONETARY DAMAGES

Tammy Yates, the end of term tenant, is not entitled to recover monetary damages, as Plaintiffs failed to prove that Equity knew that the fees were illegal. The counterclaim against Yates is dismissed with prejudice, as the damage of \$303.36 caused by the pet was offset by the \$650.00 pet deposit.

Maria Cruz is awarded \$500.00 in statutory damages, as her actual damages amount to

¹⁸The court has determined that Equity had notice 5 days after the date on Barfield's letter. Fla.R.Civ.P. 1.090(e).

¹⁹Prejudgment interest is not assessed on statutory damages. *Vining v. Martyn*, 660 So.2d 1081 (Fla. 4th DCA 1995)

\$10.00; and she is entitled, by statute, to recover the greater amount. The award shall be a partial satisfaction of Equity's judgment against Cruz pursuant to the stipulation of the parties.

Peter Miller is awarded \$743.00, plus prejudgment interest of \$307.97, as Equity failed to refund last month's rent and Miller is entitled to receive his actual damages, if they exceed the statutory damages. This award shall be a partial satisfaction of Equity's judgment against Miller pursuant to the stipulation of the parties.

VII INJUNCTIVE RELIEF

Section 501.211(1), Fla. Stat., provides that "anyone aggrieved by a violation of this part may bring an action to obtain a declaratory judgment that an act or practice violates this part and to enjoin a person who has violated, is violating, or is otherwise likely to violate this part." The court, in *Davis v. Powertel, Inc.*, 776 So.2d 971, 975 (Fla. 2nd DCA, 2001) observed: "The Act is designed to protect not only the rights of litigants, but also the rights of the consuming public at large. . . . It follows that an aggrieved party may pursue a claim for declaratory or injunctive relief under the Act, even if the effect of these remedies would be limited to the protection of consumers who have not yet been harmed by the unlawful trade practice." Equity charged unlawful fees to end of term tenants and early termination tenants from December 1, 1998, to January 31, 2004, and reported these unpaid charges to credit reporting agencies. Equity is enjoined from enforcing the unlawful lease provisions and is required to eliminate the challenged fees from all invoices which have been or will be sent to Equity's former tenants. Equity shall deduct the challenged fees from the class member accounts and notify the credit reporting agencies to remove these charges from the class members' credit reports.

ATTORNEY FEES AND COSTS

The court reserves jurisdiction to consider an award of reasonable attorney's fees and costs.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida, on this 1st

day December, 2004.


SUSAN LUBITZ
CIRCUIT COURT JUDGE

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