Commonwealth of Massachusetts

BRISTOL, SS:
PLYMOUTH, SS

HOUSING COURT DEPARTMENT
SOUTHEASTERN DIVISION
Docket No. 08-CV-00331

Barbara Cassidy
Plaintiff

vs.

Cranberry Highway Estates, Inc.
Defendant

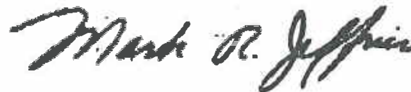
JUDGMENT

This action came on for trial/hearing before the Court, **Chaplin, J.** presiding, and the issues having been duly tried/heard and findings having been duly rendered, it is **ORDERED** and **ADJUDGED**:

Judgment for the Defendant as to each count of the Plaintiff's amended complaint.

Judgment for the Defendant as well, as to its counterclaim issue for unpaid rent in the sum of **$3,420.00.**

Dated at Fall River, Massachusetts this **20th** day of **May 2010**.



MARK R. JEFFRIES
CLERK MAGISTRATE

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

BRISTOL, SS
PLYMOUTH, SS

HOUSING COURT DEPARTMENT
SOUTHEASTERN DIVISION
Docket No. 08-CV-00331

****
Barbara Cassidy
PLAINTIFF

v.

Cranberry Highway Estates, Inc.
DEFENDANT
****

FINDINGS OF FACT, RULINGS OF LAW AND ORDER FOR JUDGMENT

This is a civil action in which the plaintiff, Barbara Cassidy, seeks to recover damages from the defendant, Cranberry Highway Estates, Inc., for violations of G.L. c. 93A and G.L. c. 186, §14, breach of the implied warranty of habitability, failure to provide utilities and/or other services, negligent or intentional failure to maintain the premises, and negligent or intentional infliction of emotional distress. The defendant, Cranberry Highway Estates, Inc., has denied the plaintiff's claims and seeks to recover damages from the plaintiff for unpaid rent[1].

Based upon all the credible testimony and evidence presented at trial, and the reasonable inferences drawn therefrom, the Court finds as follows:

The plaintiff, Barbara Cassidy, has resided in a manufactured home which she owns,

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[1]At the conclusion of the plaintiff's case, the defendant, through counsel, made an oral **Motion For Directed Finding** which the Court (Chaplin, F.J.) took under advisement. Following the conclusion of the trial, the defendant submitted a Memorandum in support of its Motion, and the plaintiff submitted a Memorandum in opposition to the Motion. The Court's decision on the issues raised in this Motion is contained in the body of this decision.

located at Lot 33, 3030 Cranberry Highway, East Wareham, MA ("the premises") since November 1982. The defendant, Cranberry Highway Estates, Inc. is the owner of the manufactured housing community known as Cranberry Village (or otherwise referred to herein as "the Park") in which the plaintiff resides.

The plaintiff rents the land on which her manufactured home is located from the defendant. She testified that the plaintiff has never given her a written lease. Dr. Kaup Shenoy testified that he is the president of Cranberry Highway Estates, Inc. He testified that the defendant has given all residents of the Park a package consisting of a Lease and the Park's General Rules and Regulations, but that only one (1) resident, who lives on Lot #1, has returned the package to the defendant. He testified that the plaintiff is a tenant at will. The Court credits the testimony of the parties on this issue, and finds that the plaintiff is a tenant at will.

The plaintiff contends that the defendant committed an unfair act or practice in violation of G.L. c. 93A when it refused to pay for the replacement of the oil tank at the premises.

Capt. Howard Anderson of the Onset Fire Department testified that, on January 11, 2008, he went to the premises at the plaintiff's request to look at the oil tank located at the rear of her residence. He testified that he observed that the oil tank was in poor condition, and that the majority of the tank was rusted and not covered appropriately with paint. He testified that there was no cement pad under the tank, and that there were cement blocks under each foot, but the tank was not level, and was leaning as if sinking into the ground on an unstable base. He testified that there was vegetation on one side of the tank, and evidence of a small oil leak on the ground. He testified that the tank posed an environmental concern. He testified that the applicable code requires that the tank be painted so that bare metal is not exposed to the weather, and that the owner of the tank is responsible for painting it. He testified that the owner of the

tank is notified if it needs to be repaired, and that the Onset Fire Department has never notified the defendant that it was responsible for painting any oil tank. He testified that, in late March 2008, he returned to the premises because the plaintiff's daughter had notified him that the plaintiff was putting diesel into the tank a few gallons at a time. He testified that, on March 27, 2008, he went to the premises, red-tagged the tank and informed the plaintiff that she could not put any more oil into the tank. He testified that, on October 24, 2008, the oil tank was replaced, and that, after a final inspection on October 27, 2008, a permit to use the new tank was issued. The Court credits this testimony.

The plaintiff testified that she moved into the premises in November 1982, when she married Donald Cassidy, and that the oil tank was there when she moved in. She testified that her husband had bought the premises in approximately 1970. She testified that her husband, who died in 1996, maintained the lot: he took care of the roses and the bushes, he mowed the lawn, and he painted the oil tank every year. She testified that the oil tank did not have a cement pad under it, that the legs were six inches long, and that the tank had a line into the ground . She testified that the oil tank serves only her residence, that she paid for oil for the tank, and never thought about whether she owned the tank. She testified that, after her husband's death, she did not paint the tank, and "never gave a thought" about painting the tank. She testified that she never asked the defendant to paint the tank or to maintain it, and that she had no notification from anyone that it was her responsibility to maintain the oil tank. The plaintiff testified that, on January 8, 2008, Standish Oil left a note on her back door that it would not deliver any more oil to her and that she should not use the tank. She testified that, in response to that note, she called Paul Calandria, the defendant's employee, and he told her to talk to Dr. Shenoy. She testified that she did so, and that Dr. Shenoy told her that "anything above ground" is her responsibility. She testified that she had read **The Attorney General's Guide to Manufactured Housing**

Community Law (July 2007), and that she relied on this **Guide** when she told Dr. Shenoy that it is the defendant's responsibility to replace the oil tank. The Court credits this testimony.

Dr. Shenoy testified that, in January 2008, the plaintiff came to see him while he was at the Park. He testified that she was very upset, and told him that she could not get oil delivered because the tank was unstable, and that it was the defendant's responsibility to replace the oil tank. He testified that he informed the plaintiff that the replacement of the oil tank was her responsibility because the tank was above ground. He testified that he showed her the diagram in the Park's General Rules and Regulations setting forth the resident's responsibility for making above-ground repairs. He testified that, a couple of weeks later, he looked at the plaintiff's oil tank to see if "the problem belonged to me." He testified that he observed that the condition of the tank was "very bad." He testified that there was peeling white paint, and that there was no cement pad under the tank, just a wooden block. He testified that the tank was "somewhat tilted," and that he could not see any legs. He testified that the tank appeared to be unstable. He testified that he never received notice from the Onset Fire Department to replace the plaintiff's oil tank. He testified that the oil tanks of some other residents of the Park have been replaced, and that those residents paid for the replacement of their oil tanks. He testified that, on or about October 24, 2008, he received a G.L. c. 93A demand letter from the plaintiff's counsel, and that, on November 12, 2008, his attorney sent the plaintiff's counsel a response to that letter. The Court credits this testimony.

Robert Ethier, Inspector, Wareham Board of Health ("Board of Health"), testified that the Park has filed two (2) sets of Rules and Regulations with the Board of Health, the first on March 13, 2000 and the second on April 20, 2008. He testified that the 2000 Rules and Regulations of the Park do not have a "sketch" describing the above ground and below ground distinction with respect to the obligation to make repairs, but that the 2008 Rules and Regulations do. The Court

credits this testimony.

Neil McIsaac testified that he has been a resident of the Park since 1992. He testified that, when he bought his manufactured home, it had an above-ground oil tank, and that he believes he owns the tank. He testified that he replaced his tank three (3) years ago, and that he assumed it was his responsibility to replace the tank. He testified that he had previously owned another manufactured home in the Park, and that he sold it with an above-ground oil tank. He testified that he believed he had the right to sell that oil tank. He testified that he did not list the oil tank on the Purchase and Sales Agreement when he sold the prior unit. The Court credits this testimony.

John Corbett testified that he has been a resident of the Park since 1988. He testified that, when he bought his manufactured home, he believed he was buying the above-ground oil tank, even though it was not listed in the Purchase and Sales Agreement. He testified that he replaced his oil tank two (2) years ago when the legs started sinking into the ground. He testified that there was no cement pad under the tank. The Court credits this testimony.

David G. Piper, Jr. testified that he is the president of two (2) manufactured housing parks in Carver, MA. He testified that he is also the president of the Massachusetts Manufactured Housing Association, and has bought and sold over a thousand mobile homes. He testified that, at his parks, above-ground oil tanks are owned by the residents, and that he does not know of any park that does it differently. He testified that the oil tanks are unique to each home, and are a component of the heating system for that particular home. He testified that the Oil Heat Council has never promulgated a definitive standard with respect to the useful life of an above-ground oil tank, but has estimated its useful life to be approximately ten to fifteen years. The Court credits this testimony.

The Manufactured Housing Community Regulations promulgated by the Attorney

General pursuant to G.L. c. 93A, §2, found at 940 CMR 10.03 *et seq.*, and G.L. c. 140, §32S provide that it shall be an unfair or deceptive act or practice in violation of G.L. c. 93A for a manufactured home park operator "to require any resident to pay for the removal or replacement of oil storage tanks on a home site to meet environmental concerns or risks not caused by the negligence of the resident, provided that the operator may recover such costs as capital improvements in accordance with 940 CMR 10.03(2)(l)." **940 CMR 10.03(2)(n).**

The Court finds that **The Attorney General's Guide to Manufactured Housing Community Law (July 2007)** provides, at pages 23-25: "**8. Utilities...h. Oil storage tanks.** In recent years, community owner/operators have become concerned about their potential legal liability stemming from the environmental risks posed by leaking underground oil storage tanks. The Regulations require that the cost of removing or replacing an oil storage tank should be initially incurred by the community owner/operator, who is usually better able to pay for or finance these costs upfront. Thus, you may not be charged directly for the removal or replacement of oil storage tanks, but your community owner/operator may eventually recover the costs as capital improvements, in the manner allowed by law. 940 C.M.R. 10.03(2)(n). This general rule applies whether the tank is above[38] or below-ground. There is one exception to the general rule: where your negligence has caused the environmental concern or risk posed by the oil tank, you may be held directly responsible for removing or replacing it. 940 C.M.R. 10.03(2)(n)."

The Court finds that **The Guide's** endnote 38 at page 57 provides: "**38.** Some community owner/operators try to avoid these costs by claiming that the residents have purchased their above-ground oil tanks. This argument often fails because purchasing the tank may have been an impermissible condition of entry into the community rather than arms-length transaction."

The defendant contends that the plaintiff owned the oil tank and that the environmental risks posed by the oil tank at the premises were caused by the plaintiff's negligence. In order to demonstrate negligence, the defendant must show that the plaintiff had a duty of care, that she breached that duty, and that her breach of duty was the proximate cause of any damages. **Nelson v. Massachusetts Port Authority**, 55 Mass.App.Ct. 433, 435 (2002).

The Court finds that, prior to his death in 1996, the plaintiff's husband exercised dominion and control over the above-ground oil tank at the premises by painting it every year, and finds that there was no evidence at trial that either the plaintiff or her husband ever asked any agent or employee of the defendant to perform any maintenance of the oil tank at the premises. The Court finds that, after the death of her husband, the obligation to maintain the above-ground oil tank at the premises became the plaintiff's, and the Court finds that the plaintiff has a duty of care with respect to the tank.

The Court finds that, since the death of her husband in 1996, the plaintiff has not painted the oil tank at the premises, and finds that there was no evidence at trial that she took any actions of any kind to maintain it. The Court finds that the plaintiff did not act as a reasonably prudent person would do in such an instance, and did not exercise due care in the maintenance of the above-ground oil tank at the premises. **Back v. Wickes Corp**, 375 Mass. 633 (1978). The Court finds that the plaintiff's breach of her duty of care was the proximate cause of the risks posed by the tank. Accordingly, the Court finds that the plaintiff is responsible for the cost of replacing the above-ground oil tank which serves the premises.

The Court finds that the plaintiff has failed to establish that the defendant violated G.L. c. 93A by failing to replace the above-ground oil tank at the premises.

In light of the Court's ruling on this count of the Amended complaint, the Court finds that the plaintiff has failed to establish that the defendant violated G.L. c. 186, §14, breached the

implied warranty of habitability, failed to provide utilities and/or other services, negligently or intentionally failed to maintain the premises, or negligently or intentionally inflicted emotional distress on the plaintiff, since each of these counts of the Amended complaint also sounds in the defendant's failure to replace the above-ground oil tank at the premises.

In its written answer and counterclaims, the defendant seeks to recover damages from the defendant for unpaid rent.

The plaintiff testified that, in 2008, her monthly rent was **$380.00**. She testified that she withheld her rent by putting it in escrow "at some point" after the dispute over the responsibility for replacing the oil tank arose. She testified that she started paying rent again "four months before trial," i.e., December 2009. She testified that her monthly rent is **$410.00** effective February 2010. Dr. Shenoy testified that the monthly rent is **$410.00** effective January 2010. The Court credits the plaintiff's testimony on the issue of the monthly rent in 2008 and credits the testimony of Dr. Shenoy on the issue of the 2010 rent increase. The Court finds that the plaintiff's monthly rent was **$380.00** in 2008, and finds that the plaintiff's monthly rent increased to **$410.00** effective January 2010.

The Court finds that, on June 5, 2008, the plaintiff, through counsel, notified the defendant in writing that she was withholding her rent and had done so for four (4) months as of the date of that letter, i.e., March 2008 through June 2008. Based on the representations of counsel in the June 5, 2008 letter, which the Court credits, the Court finds that the plaintiff's monthly rent is due no later than the fifth day of each month. The Court finds that the plaintiff has failed to pay the defendant any rent for the months of March 2008 through November 2008, and currently owes the defendant a total of **$3,420.00** in unpaid rent.

ORDER FOR JUDGMENT

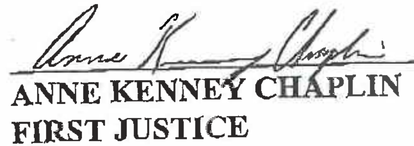
Based upon all the credible testimony and evidence presented at trial in light of the

governing law, it is **ORDERED** that:

1. Judgment enter for the defendant on each count of the plaintiff's amended complaint.

2. Judgment enter for the defendant on its counterclaim for damages for unpaid rent in the amount of **$3,420.00**.

3. Execution issue thirty (30) days after the date that judgment enters.



ANNE KENNEY CHAPLIN
FIRST JUSTICE

Date: May 20 , 2010

cc: Susan Nagl, Esq.
Robert Kraus, Esq.