SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

Landlord and Tenant Branch

DISTRICT OF COLUMBIA, Plaintiff,	
v.	L&T No. 91801-80
SHARMON L. MONTGOMERY, Defendant.	

MEMORANDUM OPINION AND ORDER

I

In the District of Columbia, the people who live in public housing are among the poorest inhabitants of the city. Many of them are uneducated and some are wholly or functionally illiterate. A large number are unemployed and on public assistance. Most are heavily in debt, with no relief in sight. Many of the more prosperous citizens who live in more spacious and elegant quarters regard residents of public housing as unproductive leeches who contribute nothing and live from the charity of others.

In the city of Chicago, residents of one neighborhood brought an action to prevent the approval of public housing in their area upon the grounds that the residents of such housing, as a group, are so indolent, shiftless, unclean and prone to criminality that their presence pollutes the environment. The plaintiffs argued that the construction of such housing may not be approved unless an environmental impact statement has been filed and

"pollution by people" precluded. See Nucleus of Chicago Homeowners v. Lynn, 372 F.Supp. 147 (N.D.Ill. 1973), aff'd 524 F.2d 225 (7th Cir. 1975), cert. denied 424 U.S. 967 (1976). The suit was providently dismissed, but the attitudes reflected in it continue to flourish. Indeed, the Court is aware from prior experience that the negative views of public housing tenants held by some members of the community at large are shared by an appreciable number of the tenants themselves. A sense of degradation and impotence and a lack of self-worth contribute to and compound the intrinsic obstacles which inhibit escape from the physical and psychological chains imposed by poverty.

But even those members of the community who are viewed by some of their fellow citizens as unproductive recipients of taxpayers' largesse are entitled to the protections of our legal system. They have the right not to be exploited on the basis of their lack of education and sophistication. For the most part, they are already sufficiently obligated to creditors for the necessities of life (and for an occasional luxury) without being subjected, as in this case, to the multiplication of their rent by more than four because they were late in completing administrative forms which they probably did not understand. In short, public housing tenants are entitled to expect that their basic legal rights will be respected, especially by the officials of their municipal government.

From that perspective, this case troubles the conscience of the Court. It is true that the defendant, Ms. Sharmon Montgomery, has not been the most conscientious tenant

from the perspective of paying her rent and meeting the requirements of a protective order. The District of Columbia brought this action, however, on the theory that Ms. Montgomery was more than $1,200.00 behind in her rent, and now seeks possession unless she pays that amount. This calculation is, in the Court's view, so inflated by the inclusion of impermissible charges that it distorts beyond recognition the true posture of the case. The Court does not suggest that anyone deliberately tried to swindle Ms. Montgomery, and attributes the events about to be described more to bureaucratic intractability, inertia, and force of habit than to any other cause. Nevertheless, the Court concludes that what the City did was just not fair.

Unfortunately, the record in this very short trial is a limited one. It is possible that the practices here found to be unconscionable are isolated aberrations from a more benign and responsible norm. It is also possible, however, that these abuses, as the Court views them, are merely the tip of the iceberg. In any event, the Court hopes that the appropriate officials of the District of Columbia will examine the issues discussed in this Opinion and, if they agree with the Court, take whatever steps are appropriate to ensure that others are not treated as Ms. Montgomery has been.

II

The District of Columbia filed this action on November 14, 1980. The Complaint is based on

> defendant's default in the payment of rent, there being now due rent in the sum of $1,063.74 for the period from April 1979 to November 1980. Monthly rental rate $56.00.

A protective order was issued on December 9, 1980 in the amount of $56.00, and that amount was duly deposited on January 2, 1981. */ Trial was initially scheduled for January 23, 1981, but was continued to February 25, and the matter was heard by the Court, sitting without a jury, on the afternoon of that date. Ms. Montgomery was without counsel and appeared pro se.

Mr. Jasper Burnett, a property manager for the National Capital Housing Authority, testified that as of the date of trial, Ms. Montgomery owed rent in the amount of $1,051.74, or $12.00 less than the amount initially prayed for. He explained that there has been an upward adjustment for the three months (December, January and February) since the complaint was filed (3 X $56.00 = $168.00) and a downward adjustment of $180.00 for reasons which the Court did not fully understand. He further testified that he had signed a notice to quit which was duly served on Ms. Montgomery. He said that he had visited Ms. Montgomery a few months ago to discuss her delinquency, and that she had been "perturbed" about the lack of repairs to her apartment. He produced work orders showing that work had been done on Ms. Montgomery's apartment on about eight occasions since 1977, and said that this was "mostly" done in timely fashion. He acknowledged that some repairs remained to be made.

In response to questioning by the Court, Mr. Burnett explained that it often took a substantial amount of time to process rental delinquiencies but that it was unusual for a tenant to be a year and a half behind, as

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*/ Defendant failed to make her protective order payment for the month of February. In the exercise of its discretion, the Court declines to impose sanctions for this failure. Compare Hovey v. Elliot, 167 U.S. 409 (1897) with Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909).

Ms. Montgomery was alleged to be, before suit was brought. He acknowledged that Ms. Montgomery had been lacking a faucet for "I don't know how long -- probably six months or more" but explained that "you can't get faucets." He stated that the apartment had needed painting for a long time, but that he "took care of the holes today," meaning on the day of trial. */

Ms. Montgomery testified that she had been living at the apartment in question with three young sons since 1975. She is on public assistance and stays at home to look after her children. She claimed that she was all paid up except for five months' rent. She initially said that she did not have any reason for not having paid this portion of her rent or for having missed her second protective order payment, except that she did not have the money. Further inquiry by the Court led Ms. Montgomery to relate that conditions in her apartment were, to put it mildly, not satisfactory. Specifically, she complained that

1. her commode had been leaking for most of the time that she had lived in the apartment, and that she often had to block the leaks with newspapers;

2. some of her windows did not fit properly and fell out;

3. her refrigerator did not work and, after some time, Mr. Burnett had installed her neighbor's refrigerator;

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*/ Counsel for the District of Columbia candidly acknowledged that it was not entirely a coincidence that this repair had been accomplished on the very day that the case came to court.

4. there were problems with the oven; */

5. there had been a hole in a wall for several months, and the NCHA representatives said that they could not plaster it; **/

6. there were severe problems with rats, in the kitchen and elsewhere.

Mr. Burnett testified on redirect examination that the project at which Ms. Montgomery lives contains 627 units, that there are 27 persons on the maintenance staff, and that only nine of them are skilled. On rebuttal, he related that "we baited [for rodents] last week." The last time this had been done, he said, was nine months earlier.

During the course of the trial, the Court asked counsel for the District of Columbia and Mr. Burnett, as well as Ms. Dolores Cooper, an NCHA management aide who served the notice to quit, to provide a breakdown of the amount alleged to be owed by Ms. Montgomery. Plaintiff offered the following:

A. Rent

12 months at $41.00 per month	=	$492.00
8 months at $56.00 per month	=	$448.00
2 months at $236.00 per month	=	$472.00 ***/
Total		$1412.00

The parties appeared to be in agreement that defendant had paid a total of $615.00 over the period in question leaving an unpaid balance of $797.00.

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*/ The Court did not fully understand this testimony.

**/ This was apparently the hole that was repaired on the day of trial.

***/ In its post-trial memorandu, plaintiff changed its position and maintained that $236.00 was the correct rent for only one month, rather than two.

B. Maintenance

Costs of maintenance due to tenant caused damage: $323.49

C. Costs of Prior Litigation: $225.00 */

These three items do not add up precisely to the amount claimed by the District of Columbia to be owing, and there are troublesome discrepancies, some perhaps attributable to a failure by the Court to understand the details of plaintiff's evidence. For reasons described below, however, the Court does not believe it to be necessary to reconcile all of these figures in order to adjudicate fairly the case before it.

III

The reader of the calculation of rent due reproduced above may well wonder how it could be that Ms. Montgomery's rent for two (or even one) of the months in question could have been $236.00 per month. Thereby hangs a tale. **/

On July 25, 1977, Ms. Montgomery and a representative of the National Capital Housing Administration (the Administration) signed a long five-page lease. Like most such instruments, this one is full of phrases like "hereinafter jointly and severally called the Tenant, witnesseth," and "promulgated revision in the regulations of NCHA which alters the applicable rent schedule" and "failure of the Tenant to comply with any covenant of the lease shall not create a waiver by the Authority of the covenant or the breach." Paragraph 8(a) of the lease provides that

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*/ Counsel for plaintiff made an oral allusion to this amount, but in its post-trial memorandum plaintiff appears to have dropped this claim.

**/ William Shakespeare, As You Like It, Act II, scene 7.

> the Tenant agrees to fully cooperate with the Administration's annual rent redetermination program. At least once a year at a time designated by the Administration or more often if requested, the Tenant will submit on forms provided by the Administration signed statements setting forth the current facts as to family income, employment and size with such verification as may be required.

Plaintiff's witnesses explained that Ms. Montgomery's rent for two months was raised to $236.00 per month because she did not submit her form in time, so that the Administration did not know whether she continued to be eligible for lower rent.

The basis for this startling action by the plaintiff was an unsigned and undated */ form letter from the Acting Chief for Management of the District's Department of Housing and Community Development directing Ms. Montgomery, within three days, to "comply with your Lease and have the forms in your management office." **/ The letter warned Ms. Montgomery that if she failed to comply

> it will be necessary to terminate your leave by a thirty (30) day notice to vacate the premises. Additionally, your rent will be increased to THE MAXIMUM OF THE FAIR MARKET VALUE BY BEDROOM SIZE. [Block capitals in original.] ***/

Ms. Montgomery was concededly late in completing and delivering the form. The precise date on which she did so is unclear, but in public assistance cases the information

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*/ The letter contains the following inscrutable notation on the bottom left hand corner:

DATE 5/23/80 and 5/27/80
TIME 1 p.m. to 9 p.m.

**/ It appears from the form letter that a prior request is supposed to have been made earlier, but plaintiff produced no evidence that this in fact occurred.

***/ The letter identifies the maximum monthly market rent for a two-bedroom apartment as $244.00. The Cout is unsure where the $236.00 claimed by plaintiff comes from.

about the tenant's income must apparently be verified by the tenant's caseworker, Ms. Montgomery's caseworker, Barbara A. Day, signed the necessary form on June 27, 1980. The Court thus infers that the form was submitted about a month late, and that coincides with Ms. Montgomery's recollection.

Plaintiff's contention in the form letter and at trial that lateness in submitting the form warrants the charging of maximum market rent is based on an entirely unilateral construction of the lease. Paragraph 13(a)(iii) of that instrument does purport to provide that the Administration may terminate the lease for a "serious or repeated" violation by the tenant of certain paragraphs thereof, specifically including paragraph 8(a). There is nothing in the lease authorizing the Administration to increase the rent in response to such a violation, nor is there any provision that would permit the party claiming to be aggrieved by the breach to select its own remedy and impose it on the tenant as a fait accompli. On the contrary, the Court agrees with Hon. Frederick H. Weisberg that

> it is axiomatic that when a contract exists between two parties -- whether it be a lease contract or any other -- one party to the agreement is not free unilaterally to change its terms, particularly where the change operates to the detriment of the other party.

Delwin Realty Co. v. Boyd, L&T No. 101761-78 (Super.Ct. D.C. decided March 30, 1979), at p. 6.

The Court need not reach the question whether Ms. Montgomery's breach was a "serious or repeated one," because the Administration did not attempt to secure the remedy provided by the lease for "serious or repeated" violations, namely, termination or refusal to renew the lease. */ Rather, plaintiff sought to invoke a remedy not specified

*/ The present action, which was brought more than half a year after the alleged breach, is predicated exclusively on nonpayment of rent and does not mention Ms. Montgomery's failure to complete her forms.

in the lease, and can only prevail if the Court is prepared to read such a remedy into the lease by implication, despite the specific inclusion of another remedy but silence as to the one here claimed to apply. The Court is of the opinion that it would be altogether inappropriate to imply such a remedy in favor of the plaintiff.

If the lease did provide the remedy here claimed by plaintiff, it would probably be void for unconscionability. As Chief Judge Wright explained for the Court in Javins v. First National Realty Corp., 138 U.S.App.D.C. 369, 377, 428 F.2d 1071, 1079 (1970), cert. denied 400 U.S. 925 (1970)

> The inequality in bargaining power between landlord and tenant has been well documented. Tenants have very little leverage to enforce demands for better housing. Various impediments to competition in the rental housing market, such as racial and class discrimination and standardized form leases, mean that landlords place tenants in a take it or leave it situation. The increasingly severe shortage of adequate housing further increases the landlord's bargaining power and escalates the need for maintaining and improving the existing stock.

A public housing tenant, the poorest of the poor, has even less bargaining power than the individual seeking an apartment in the private housing market, and the technical language in which this lease is couched makes the conception of a negotiated agreement even more illusory.

Inequality of bargaining power bears heavily on the issue of unconscionability. The leading case in this jurisdiction addressing that concept is Williams v. Walker-Thomas Furniture Co., 121 U.S.App.D.C. 315, 319-20, 350 F.2d 445, 449-50 (1965). The Court's opinion in that case, also written by Judge Wright, includes the following discussion:

> Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was even given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.

Closely related to the concept of unconscionability is the doctrine that the law will countenance a liquidated damages clause but will not enforce a penalty. See AHEPA v. Travel Consultants, Inc., 367 A.2d 119, 126 (D.C.App. 1976), cert. dismissed 434 U.S. 802 (1976); Davy v. Crawford, 79 U.S.App.D.C. 375, 376, 147 F.2d 574, 575 (1945). In the words of the Court in Davy, repeated by our Court of Appeals in AHEPA,

> damages stipulated in advance should not be more than those which at the time of the execution of the contract can be reasonably expected from its future breach, and agreements to pay fixed sums plainly without reasonable relation to any probable damages which may follow a breach will not be enforced.

AHEPA, supra, 367 A.2d at 126.

In the present case, counsel for plaintiff acknowledged that there was no evidence to show that the District of Columbia was in fact damaged in the amount of $180.00 per month (the difference between $236.00 and $56.00), or for that matter, in any other monetary amount, by Ms. Montgomery's alleged lateness in returning her form. The theory on which this attempted forfeiture */ was evidently based was that, since Ms. Montgomery did not establish her financial eligibility to pay the lower rent, she must be presumed to be able to pay the higher rent. The Court finds this presumption to be sufficiently remote from reality to preclude its serving as a predicate for more than quadrupling the monthly rent. The Court also observes that if plaintiff really claimed that so high a measure of monetary damage resulted from defendant's breach, it was obligated to mitigate damages, and no attempt to do so was shown. **/

For these reasons, the Court is of the opinion that any provision in a public housing resident's lease which purported to raise his monthly rent from $56.00 to $236.00 for lateness in providing information for annual redetermination of eligibility would be unconscionable and void. ***/ In the present case, the lease contains no such provision,

*/ The Court is satisfied that this is an accurate characterization, in substance if not in form.

**/ Plaintiff might, for example, have contacted Ms. Montgomery's social worker directly to obtain the information. It may be that a requirement that plaintiff's employees make such contact with other government personnel would constitute an unreasonable burden on them, but no evidence was submitted by plaintiff to substantiate such a contention.

***/ In Wigand v. State Dept. of Public Health & Welfare, 459 S.W.2d 522 (Mo.App. 1970), the Court upheld the disqualification of an applicant for old age benefits from collecting such benefits for one year as a penalty for misrepresenting or failing to disclose her assets. The penalty was based on a state statute and was imposed as a result of obviously reprehensible conduct. The present record presents no comparable issue.

and the bargaining power of the parties is manifesly unequal. The reasons for voiding such an agreement if it had been made therefore apply a fortiori to preclude the Court from reading the right to raise the rent to the market level into the contract as an implied but unspecified remedy.

IV

Paragraph 1 of Ms. Montgomery's lease provides in pertinent part that the Administration

> does hereby lease to the Tenant, upon the conditions hereinafter provided, the above-described premises for the rent of $34.00 per month. [Emphasis added.] */

In paragraph 7(j), Ms. Montgomery agreed to

> pay reasonable charges (other than for wear and tear) for the repair of damages to the premises, project buildings, facilities or common areas caused by the tenant [her] household or guests.

Paragraph 9 requires the tenant to pay for any consumption of utilities in excess of her allotment, as approved by HUD. **/ Paragraph 10 provides that charges to the tenant for excess consumption of utilities and/or for repairs will be billed to the tenant payable the first day of the second month following the excess use of utilities or completion of repairs. Nothing in paragraph 9 or 10 is denominated rent.

At trial, plaintiff did not identify what was included in the "maintenance" charge of $323.49, but the Court is satisfied on the basis of plaintiff's post-trial submission that it represents one or more assessments pursuant to paragraphs 7(j) and 10 of the lease for "tenant caused damage." No evidence was introduced which would shed any light as to what Ms. Montgomery did to justify these charges. It was apparent

*/ It appears to be undisputed that the rent was raised twice, once to $41.00 per month and the second time to $56.00 per month.

**/ The federal Department of Housing and Urban Development.

at the trial that Ms. Montgomery did not know what these charges were for, how they were computed, or why she was expected to pay them. She insisted simply that she owed five months' rent and evidently believed that, whatever these maintenance items represented, they were not rent.

The Court is constrained to agree. A possessory action predicated on nonpayment of rent is a particular kind of proceeding, different both from a possessory action based on some other breach of the lease (which may be brought in the Landlord-Tenant Branch) and from a suit for damages for breach of contract (which ordinarily may not). Where a possessory suit is based on nonpayment of rent a tenant may not be evicted, notwithstanding the entry of judgment for possession, if prior to the actual eviction he pays or tenders to the landlord the amount of rent then due, together with interest and costs. Trans-Lux Radio City Corp. v. Service Parking Corp., 54 A.2d 144, 146 (D.C.Mun.App. 1947); National Capital Housing Authority v. Douglas, 333 A.2d 55, 56-57 (D.C.App. 1975). It follows from these decisions that the tenant's right to redeem his or her tenancy in case of nonpayment of rent cannot be encumbered by requiring him to pay the landlord amounts not predicated on the obligation to pay rent. That does not mean that other debts are not collectible, but only that failure to pay them cannot be made the basis of a possessory action for nonpayment of rent.

Under Ms. Montgomery's lease, the tenant does have the obligation to pay for excess consumption of utilities and for repairs attributable to her, and it may be that the Administration could successfully prosecute a possessory action for breach of paragraph 10 of the lease.

Under the provisions of Section 501(b) of the Rental Housing Act of 1977, D.C. Code 1980 Supp. §45-1699.6(b)(1), however, Ms. Montgomery may not be evicted for violating an obligation of her tenancy unless she "fails to correct such violation within thirty (30) days after receiving notice thereof from the landlord." She is thus entitled to what has become known as a notice to quit or cure, which must specify the alleged breach of the lease and provide an opportunity to redress it. No such notice has been served in this case, and the Court is unable to determine from the record the basis for the allegation that Ms. Montgomery is in violation of paragraph 10 of her lease by failing to pay any charges covered thereby. Having failed to comply with the procedural requirements for a suit based on a breach of the lease other than nonpayment of rent, and having failed in any event to prove such a breach, plaintiff cannot predicate its possessory action on the so-called maintenance charges unless they constitute rent.

The maintenance charges were not treated as rent by the parties and do not constitute rent as that term is generally understood. Rent is generally defined as

> the compensation paid by a tenant for the use of land.

University Plaza Shopping Center v. Garcia, 279 Md. 61, 367 A.2d 957, 960 (1977). The term "rent" will not be extended to include all payments which, by the terms of a lease, the tenant is bound to make, and has been distinguished from the costs of alterations and repairs. 52 C.J.S. 202, Landlord & Tenant §463; see In re Cortese, 21 F.Supp. 538, 539 (N.D. Tex. 1937). As the Supreme Court of the United States explained in M. E. Blatt Co. v. United States, 305 U.S. 267, 277 (1938):

> Rent is 'a fixed sum, or property amounting to a fixed sum, to be paid at stated times for the use of property . . .; . . . it does not include payments, uncertain both as to amount and time, made for the cost of improvements . . .' */

It has even been held that rent

> cannot reasonably include the cost of repairs which the tenant should have made and which the landlord made . . . even if it be called rent, for you do not alter the essential nature of a thing by misnaming it.

In re Receivership of Lightwell Steel Sash Co., 12 Del. Ch. 60, 105 Atl. 376, 377 (1918); but cf. Chicago Housing Authority v. Bild, 346 Ill.App. 2d 272, 104 N.E.2d 666 (1952), discussed infra, p. 17 . A security deposit in a public housing tenant's lease, designed to protect the Housing Authority from the very kind of tenant-caused damage here alleged, has been held not be rent. Peterson v. Oklahoma City Housing Authority, 545 F.2d 1270, 1274 (10th Cir. 1977). It is difficult to see how the charge here in question could be thought to fall within the conventional definitions of rent.

In arguing to the contrary, plaintiff relies on Irving Trust Co. v. Burke, 65 F.2d 730, 732 (4th Cir. 1933); Chicago Housing Authority v. Bild, supra; and Vineland Shopping Center v. DeMarco, 35 N.J. 459, 173 A.2d 270 (1961). None of these cases supports plaintiff's position. In Irving Trust Co. v. Burke, a commercial lease case, the Court held that

*/ Cf. D.C. Code 1980 Supp. §45-1681(a), defining rent as

> the entire amount of money, money's worth, benefit, bonus, or gratuity demanded, received, or charged by a landlord as a condition of occupancy or use of a rental unit, its related services, and its related facilities.

> taxes may be made the basis of a distraint when the tenant covenants to pay them as rent and fails to do so.

65 F.2d at 732 (emphasis added). Likewise, in Chicago Housing Authority v. Bild, the lease in question

> made provision for the payment of additional sums as rent when electricity in excess of the amounts fixed by the lease for the respective months was used,

140 N.E. 2d at 668 (emphasis added) and it was on that basis that the Court held that the charge for excess utilities constituted rent. In Vineland Shopping Center v. DeMarco, which presented a dispute over a commercial lease, the Court characterized sewerage charges as rent, in part because "businessmen deal in gross rent and net rent," 173 A.2d at 276, and treat such charges as the latter, and the considerations leading to that result are distinctly foreign to the present context, in which there was obviously no bargaining between commercial entities, or, indeed, by anyone, as to the terms of the lease. */ The Court therefore concludes that the maintenance charges may not be allowed, both because they were not rent and because, even if they were rent, no proof was offered to show that the repairs on which they were allegedly based were in fact caused by Ms. Montgomery or by her family or

*/ For a compelling exposition of the distinction between commercial cases like Vineland and situations like the present one, see University Plaza Shopping Center v. Garcia, supra, 367 A.2d at 961, wherein the Court explained that

> in the negotiation of a lease of premises to be used for a commercial enterprise there is little likelihood of successful overreaching on the part of the landlord and of coerced adhesion on the part of the tenant, so that the final agreement would fairly represent the actual intention of the parties.

guests. */

If the Court correctly understood him, counsel for plaintiff also represented at trial that the defendant owed $225.00 in costs arising from unspecified prior litigation. No evidence was offered as to the source or character of these costs, or whether they could possibly be the types of costs which must be paid if the tenant is to redeem in conformity with the Translux and Douglas decisions. **/ Absent some proof that they were -- and it seems unlikely that such proof could have been available, for Translux was obviously concerned with costs of the ongoing litigation -- Ms. Montgomery need not pay them in order to prevent eviction, and plaintiff appears to have dropped the matter in its post-trial submission.

To avoid any misunderstanding, the Court reiterates that the maintenance charges and the costs may well be collectible in another forum. If there is a meritorious

*/ Compare the decision in favor of the landlord in Fargo Realty, Inc. v. Harris, 173 N.J. Super. 262, 414 A.2d 256 (1980), in which the cost of repairing tenant-inflicted damage was expressly included in the definition of rent, and in which specific proof was offered that the tenant had incurred plumbing bills for unclogging the toilet and bathtub. Since Fargo is distinguishable on both of these grounds, the Court need not decide whether it should follow this astonishing decision, which also afifrmed the exclusion of evidence of uninhabitability in February 1979 in a suit for possession based on nonpayment of rent in April.

**/ If there was a prior possessory action and if Ms. Montgomery was supposed to pay costs, then the record fails to disclose how she redeemed her tenancy without paying them. In any event, such costs may not be kept hanging over her head, unenforced, and then treated as incidents of current rent to prevent redemption of the tenancy. See this Court's recent opinion in Charles E. Smith Co. v. McCamey and Makins, 108 D.W.L.R. 1745, L&T No. 43511-80 (Super.Ct.D.C. decided August 7, 1980) (concealed late charges), and Judge Harold Greene's characteristically brilliant analysis in Diamond Housing Corp. v. Munson, L&T No. 69651-65 (D.C.Gen.Sess. decided July 16, 1966) (concealed costs, interest and late charges).

claim for these amounts, then plaintiff may proceed to recover or collect them in the appropriate Branch of this Court. The Court holds only that plaintiff is not entitled to predicate its possessory action on Ms. Montgomery's failure to pay these items.

V

Returning to the judicial arithmetic on which we embarked at p. 6, supra, the so-called maintenance charges and court costs must be excluded from the amount required to redeem. This leaves the $797.00 in unpaid rent. The Court having held that the two months for which Ms. Montgomery was charged $236.00 must each be reduced to $56.00, this requires a further subtraction of $360.00, leaving $437.00

Against this amount, the Court must measure any housing code violations, on which a tenant may predicate the defense of breach of the implied warranty of habitability. See Javins, supra. The Court finds in this connection that Ms. Montgomery was a credible and indeed understated witness who volunteered nothing and did not appear to the Court to be exaggerating. The Court was particularly impressed by her testimony about her dysfunctional and leaking commode and about the rats which were her family's common if not constant companions. Small children, even those whose parents are impoverished, should not have to live in such conditions, irrespective of the level of rent which their parents pay. Mr. Burnett's testimony */ that bait for rats was set in the

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*/ The Court also found Mr. Burnett to be an honest and candid witness.

week before trial and that the last time this was done was three quarters of a year ago tended to corroborate Ms. Montgomery's account. The Court cannot agree with plaintiff's contention that the violations were comparatively minor. Some bona fide efforts to repair were obviously made, but personnel shortages resulted in substantial and unfortunate delays.

The Court observes that the rent paid by Ms. Montgomery is minimal and that any abatement must be assessed with that in mind. Tenants of private housing who live in the most deplorable conditions must pay much more than $56.00 per month even after a substantial abatement has been awarded. To award no abatement at all because of the minimal rent would, on the other hand, remove one incentive to improve conditions in public housing.

After giving careful consideration to all of these factors, the Court finds that Ms. Montgomery is entitled to an abatement of $12.00 per month for each month during the period for which suit is brought (April 1979 through February 1981), for a total abatement of $264.00. The amount is admittedly imprecise, but the Court will not require precision in this type of case. Cf. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931). If $264.00 is subtracted from $437.00, plaintiff's remaining total claim at the end of February 1981 is for $173.00. $56.00 of that amount is in the registry, leaving a balance of only $117.00 if the money in the registry is released to plaintiff. Since the Ides of March have now almost come, however, Ms. Montgomery must pay $56.00 more for March, or a total of $173.00, to redeem her tenancy.

VI

The Court has been particularly troubled in this case by the fact that the most dubious legal claims have been presented to relatively defenseless citizens more or less as a matter of course, apparently without careful consideration of their implications. Evidence that Ms. Montgomery had been charged $236.00 per month instead of $56.00 for two months emerged at the trial as a result of a chance question by the Court. The inclusion in one lump sum of standard rent, charges for repairs and maintenance, and raised rent appears to be a bureaucratic habit which, in many cases, may not be recognized by the unsophisticated tenant and may never be detected by an overworked lawyer or judge operating in the often frenetic atmosphere of the Landlord-Tenant Branch. Yet these charges are questions of the most compelling moment for the lives of real people who do not own much and who surely ought not to be almost casually deprived of the little they have or any part of it.

The Court is satisfied that the persons who acted for the District of Columbia in this case did so in good faith. In particular, the Court expresses its appreciation to counsel for plaintiff, who acted in a candid and professional manner throughout, and whose disagreement with some of the Court's views was obviously a matter of honest conviction. No one intended any harm to Ms. Montgomery or to her young children, and nothing in this Opinion should be construed to imply the contrary.

Good faith, however, is not enough. It is of little consolation to those who have been denied their rights that those responsible acted in good faith.

Burton v. Wilmington Parking Authority, 365 U.S. 715, 720 (1961). As eloquently stated by Judge Wright,

> the arbitrary quality of thoughtlessness is as disastrous and unfair to private rights and to the public interest as the perversity of a willful scheme.

Hobson v. Hansen, 269 F.Supp. 401, 497 (D.D.C. 1967), aff'd sub nom Smuck v. Hobson, 132 U.S.App.D.C. 372, 408 F.2d 175 (1969) (en banc). If the Court's perception of the issues in this case has any merit at all, then a thorough look at the manner in which these things are done is surely called for.

VII

For the foregoing reasons,

1. The funds deposited in the registry of the Court shall be released forthwith to plaintiff;

2. Plaintiff shall have judgment of possession, provided, however, that said judgment is stayed for ten days following the entry of this Order to permit defendant to redeem her tenancy by tendering to plaintiff the amount of $173.00;

3. No costs are awarded to either party, and no costs or interest need be paid by defendant in order to redeem;

4. Clay Guthridge, Esq. is appointed counsel for respondent for the purpose of ensuring that she understands her rights pursuant to this Order.

IT IS SO ORDERED this 12th day of March, 1981.

Frank E. Schwelb

FRANK E. SCHWELB
Judge