STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

STACY BURLESON,

Plaintiff,

v. Case No. D-202-CV-2020-02851

SUN PLAZA LIMITED PARTNERSHIP,

Defendants.

ORDER ON DEFENDANT SUN PLAZA LIMITED PARTNERSHIP'S MOTION FOR PARTIAL SUMMARY JUDGMENT OF COUNT I (UNLAWFUL RETALIATION), COUNT III (ILLEGAL DEBT COLLECTION) AND PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT THAT DEFENDANTS WERE BARRED FROM INITIATING AN EVICTION AGAINST MS. BURLESON PURSUANT TO THE CARES ACT OR, IN THE ALTERNATIVE, MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS MATTER comes before the Arbitrator on *Defendant Sun Plaza Limited Partnership's Motion for Partial Summary Judgment of Count I (Unlawful Retaliation), Count III (Illegal Debt Collection)* and *Plaintiff's Motion For Declaratory Judgment That Defendants Were Barred From Initiating An Eviction Against Ms. Burleson Pursuant To The CARES Act Or, In The Alternative, Motion For Partial Summary Judgment.* The Arbitrator having reviewed the pleadings and being fully advised of the same hereby finds as follows:

One of the issues in this matter is the dispute as to the applicability of the Coronavirus Aid, Relief, and Economic Security Act, also known as the CARES Act. Count I of Plaintiff's Complaint alleges unlawful retaliation in violation of the Uniform Owner Resident Relations Act (UORRA). This Count, as alleged by Plaintiff, is partially dependent on the argument that:

1. The CARES Act applies to Plaintiff's tenancy;

2. Defendant's action in filing a petition for restitution was in violation of the CARES Act; and,
3. Defendant's filing a petition for restitution was a retaliatory action filed in response to Plaintiff's complaints regarding the inhabitability of her unit.

Defendant also moves for Summary Judgment on Count III of the Amended Complaint arguing that the Unfair Practices Act does not apply to the lease of an apartment because such a lease does not constitute "goods or services".

UNDISPUTED MATERIAL FACTS

The Arbitrator finds that the following material facts are undisputed.

1. The parties entered into a Rental Agreement on September 6, 2019.
2. Plaintiff moved into the apartment on September 14, 2020.
3. On April 14, 2020, Plaintiff reported a bed bug problem.
4. On April 21, 2020, Sun Plaza treated Plaintiff's unit.
5. On April 30, 2020, Plaintiff filed the instant action.
6. On May 2, 2020, Plaintiff's unit was inspected and no bedbugs were found.
7. Plaintiff failed to pay rent for May, 2020.
8. Plaintiff did not notify Defendant in writing of any other bed bug issues after May 1, 2020.
9. On May 4, 2020, Plaza issued Plaintiff a 3-day notice of non-payment of rent.
10. On May 26, 2020, Sun Plaza filed a petition for restitution for nonpayment of rent.
11. Plaintiff failed to pay June rent.
12. On June 6, 2020, Plaintiff's counsel informed Defendant's counsel of the CARES Act.
13. On June 9, 2020, Plaintiff's counsel asked Defendant's counsel to stipulate to dismissal.

14. On June 15, 2020, Sun Plaza filed a notice of dismissal.

15. Plaintiff failed to pay rent for July and August 2020.

16. Plaintiff never abated rent for any reason, nor provided any written notice of abatement of rent during her tenancy.

17. Defendant accepts Section 8 vouchers.

COUNT I
UNLAWFUL RETALIATION IN VIOLATION OF UORRA

A. THE CARES ACT

The CARES Act was signed into law on March 27, 2020. The CARES Act § 4024(b) prohibits landlords of certain rental "covered dwellings" from initiating eviction proceedings or charging fees, penalties, or other charges against a tenant for the nonpayment of rent. Section 4024 protections, however, do not absolve tenants of their legal responsibilities to pay rent. Tenants who do not pay rent during the eviction grace period may still face financial and legal liabilities, including eviction, after the moratorium ends.

The CARES Act defines a "**Covered Dwelling**" as a dwelling that is occupied by a tenant pursuant to a residential lease, or without a lease or with a lease a lease terminable under State law, and which is on or in a covered property. *See* § 4024(a)(1). "**Covered Property**" means any property that participates in one of many covered housing programs, including housing programs under the Violence Against Women Act ("VAWA") of 1994. *See* § 4024(a)(1). Programs under the VAWA include Section 8 Housing Choice Voucher program. See 34 U.S.C. 12491(a). Pursuant to the CARES Act, for a "120-day period beginning on the date of enactment of this Act, the lessor of a covered dwelling may not make, or cause to be made, any filing with the court of jurisdiction to initiate a legal action to recover possession of the covered dwelling from the tenant

for nonpayment of rent or other fees or charges; or (2) charge fees, penalties, or other charges to the tenant related to such nonpayment of rent." § 4024(b).

In the Arbitrator's opinion, the tenant protections afforded by the CARES Act were directed to tenants in any property that receive federal assistance from federal resources, including Section 8 housing vouchers.

Defendant's reliance on the HUD guidelines is also misplaced. The HUD guidelines apply to Public Housing Agencies. HUD recognizes that it does not have the authority to extend jurisdiction over unassisted tenants or the property that does not have a federally-backed mortgage. However, the Arbitrator is not dealing with the extension of a Public Housing Agency's jurisdiction over an unassisted tenant but a determination of whether Defendant's complex is a "Covered Property" under the CARES Act.

B. DEFENDANT'S PROPERTY IS A "COVERED PROPERTY"

There is no dispute that the property in question participates in the Section 8 housing choice voucher program and that such program falls under the VAWA. This fact is asserted by Plaintiff and supported with a declaration. Defendant does not specifically dispute this fact and instead argues that the support for Plaintiff's assertion of fact is not admissible. Defendant provides no support for this position and only asserts that *"[a]n affidavit requires a statement of truth, an attestation clause, and sworn signatures of the author witnessed by a notary public."* (emphasis in original) *See Defendant Sun Plaza Limited Partnership's Response In Opposition To Plaintiff's Motion For Declaratory Judgment On The Cares Act Or In The Alternative Motion For Partial Summary Judgment* at p. 3. Having provided no authority for the assertion, the Arbitrator

concludes there is none. And, Defendant fails to note that the Rules of Civil Procedure specifically provide for unsworn affirmations under penalty of perjury. *See* Rule 1-011 NMRA.

Because the property in question participates in the Section 8 housing choice voucher program, the Arbitrator finds that the unit in question is a "Covered Dwelling" and that the property in question is a "Covered Property" under the CARES Act.

C. REMEDY FOR A CARES ACT VIOLATION AND RETALIATION

The CARES Act is devoid of any reference to the remedies available for its violation. The Act sets out the conditions prohibiting the initiation of eviction proceedings. Logically, if any proceedings are begun in violation of the Act, those proceedings should be dismissed. That is exactly what happened here. As recognized by the Plaintiff, as soon as the CARES Act provisions were brought to the attention of the Defendant, the underlying petition for restitution was dismissed.

Plaintiff's reliance, in Count I, on the Uniform Owner Resident Relations Act ("UORRA") provisions are dispositive of the issues as they related to Count I. UORRA prohibits an owner retaliation, but only where the resident "**is in compliance with the rental agreement and not otherwise in violation of any provision of the Uniform Owner Resident Relations Act**..." (emphasis added) NMSA 47-8-39(A). Based on the undisputed material facts the Plaintiff was not in compliance with the rental agreement at the time Defendant filed the petition for restitution given that she had not paid May's rent. Thus, the filing of the petition for restitution, while not permitted by the CARES Act and was properly dismissed, was not a violation of the UORRA because Plaintiff was in violation of the rental agreement.

As recognized by the Plaintiff though her reliance on *William C. Stanek v. Jessie Reed,* County Court of Douglas County, Nebraska, Doc. CI20-9102 (filed June 12, 2020), given the legislation's recent enactment the issues before that court were matters of "first impression not only in Nebraska but nationwide" and "there is no relevant case law discussing the interpretation of the CARES Act..." Thus, the Arbitrator cannot find that under the facts of this case, the simple filing, and almost immediate withdrawal, of the petition for restitution, where the Plaintiff is in violation of the rental agreement, would constitute grounds for a retaliation claim under the UORRA.

D. DECISION AS TO COUNT I

1. Application of CARES Act and implication on retaliation

WHEREFORE, the Arbitrator grants partial Summary Judgment on Count I in Defendant's favor, and against Plaintiff, finding that while the CARES Act applies to Plaintiff's unit, the remedy is the dismissal of the underlying petition for restitution, which has already occurred. Partial Summary Judgment on Count I is also granted in Defendant's favor to the extent that Count I is based on the allegation that the filing of the petition for restitution, in violation of the CARES Act, constitutes retaliation.

2. Bed Bugs

Plaintiff's Count I is also based on the allegation that Defendant's filing of the petition for restitution was in retaliation for her complaints in April 2020 about a bed bug infestation. *See* Amended Complaint at ¶ 46. Again, there is no dispute as to the timing of the matters.[1] Plaintiff's

[1] The Arbitrator notes that Plaintiff failed to dispute any of the material facts alleged by Defendant and simply stated that she "objects to Defendant's statement of undisputed Material Facts on the grounds that the Defendant's factual assertions are immaterial and several of Defendant's assertions are disputed.... There are currently many disputed facts regarding Count I of Ms. Burleson's Complaint still outstanding."

complaint about the bed bugs occurred in April. The petition for restitution was not filed until May 26, 2020. By that time the bed bug issue has apparently been resolved, and Plaintiff was not in compliance with the rental agreement, having failed to pay May, 2020 rent when due.

WHEREFORE, the Arbitrator grants partial Summary Judgment on Count I in Defendant's favor, and against Plaintiff, on the retaliation claim related to the bed bugs.

3. Tax Identification Information

There is insufficient factual evidence upon which to make a determination regarding the viability of the allegations in Paragraphs 48 and 49 of Plaintiff's Amended Complaint.

WHEREFORE, Summary Judgment in Defendant's favor is denied as to the allegations in Paragraphs 48-49 and Plaintiff is allowed to proceed as to these claims.

COUNT III
ILLEGAL DEBT COLLECTION IN VIOLATION
THE NM UNFAIR PRACTICES ACT

Count III of Plaintiff's Amended Complaint alleges, in part, that Defendant's filing the petition for restitution was "an attempt to collect a debt, despite being prohibited from doing so under the federal CARES Act." Amended Complaint at ¶ 66. Plaintiff further alleges that such action is an unfair or deceptive trade practice in the provision of services to Ms. Burleson and

---

See Plaintiff's Response To Defendant's Motion For Summary Judgment On Counts I And II Of Plaintiff's Complaint, at pp. 2, 8. Plaintiff also asserts that a decision on the claim for retaliation is premature because discovery is incomplete and that Defendant's discovery responses to Plaintiff's discovery are due on June 18, 2021. The Arbitrator has not received any supplementation or request for the same, related to undisputed material facts. Regardless of Plaintiff's chosen approach in not responding to Defendant's asserted undisputed material facts, some of the relevant dates for the bed bug issue are also contained in Plaintiff's Amended Complaint.

collection of debt within the meaning of the UPA. *See Id.; see also Plaintiff's Motion For Declaratory Judgment That Defendants Were Barred From Initiating An Eviction Against Ms. Burleson Pursuant To The Cares Act Or, In The Alternative, Motion For Partial Summary Judgment* at pp. 2, 5.

Defendant's position is that the New Mexico Unfair Trade Practices Act does not apply to the leasing of real property. Defendant asserts that "[t]he renting of real estate does not constitute a sale of goods or services but 'means an estate in real estate or real property.'" *Defendant Sun Plaza Limited Partnership's Motion For Partial Summary Judgment Of Count I (Unlawful Retaliation), Count III Illegal Debt Collection)* at p. 11 *citing* NMSA 47-1-1. Defendant also relies on *McElhannon v. Ford*, 2003-NMCA-091, 134 N.M. 124; NMSA for the proposition that "New Mexico statutes and case law are clear, the leasing of real property is distinguished from goods and services." *See Defendant's Reply To Plaintiff's Response In Opposition To Defendant's Motion For Summary Judgment at* p. 8. Defendant then posits that the Unfair Practices Act does not apply to evictions and the leasing of real property because the law is clear that the word "goods" is understood to mean personal estate as distinguished from real property and leased or purchased real property is not personal property. *Id.*

The Arbitrator has significant disagreement with Defendant's positions. First, the language from NMSA 47-1-1 quoted by Defendant comes directly from the definition of "leasehold." Specifically, "[a]s used in this section 'leasehold' means an estate in real estate or real property held under a lease." *See* NMSA 47-1-1. Thus, for purposes of the conveyance statutes, a "leasehold" means an estate in real estate or real property held under a lease. However, as noted by the annotations to this particular statute, "[t]hough inclusion of leaseholds under this section makes conveyances of leaseholds subject to the rules and procedures that pertain to the conveyance

of real property, **it does not change them from personal into real property**." (*emphasis added*) *citing Resolution Trust Corp v. Binford*, 1992-NMSC-068, 114 N.M. 560, 844 P.2d 810. *See also Garrison Gen Tire Serv., Inc. v. Montgomery,* 1965-NMSC-077, ¶ 9, 75 N.M. 321, 404 P.2d 143 *("*...this section does not attempt to convert what was personal property at common law into real estate, but only to bring leasehold estates within the compass of the conveyancing statutes.")

Second, Defendant's reliance on *McElhannon v. Ford, supra.* is misplaced. *McElhannon* dealt with the applicability of the Unfair Practices Act but to the sale of reals estate, a completed house, and not to a lease. In that context, the *McElhannon* court held that the UPA does not apply to sales of real estate. However, the court also noted that for conduct to constitute an 'unfair or deceptive trade practice' with respect to a sale, the transaction must involve goods or services, and that "[t]***he word 'goods' is generally understood to mean personal estate as distinguished from realty***." (*emphasis added*) *McElhannon supra at* ¶ 17.

Here lies the crux of the issue. *State ex Rel. Truitt v. District Court of Ninth Judicial Dist.*, 1939-NMSC-061, 44 N.M. 16, 96 P.2d 710 has held that that a lease is personalty. The *Truitt* court has stated that a leasehold for a term of years is an interest in land, "[b]ut notwithstanding it is an interest in land, yet at the common law it was personalty, in the sense that it was held to be a chattel and governed generally by rules applicable to personal property, and we have so held." *Id.* at ¶ 38, citing *American Mortgage Co. v. White*, 34 N.M. 602, 287 P. 702 and *Terry v. Humphreys*, 27 N.M. 564, 203 P. 539.

The Arbitrator finds that the *Truitt, American Mortgage* and *Terry* decisions are controlling on the question of whether a lease is personalty or real property. A lease, under the common law, was a chattel and personalty. Nothing in the case law or statues cited by Defendant warrant a deviation from the common law.

WHEREFORE, the Arbitrator finds that Unfair Trade Practices Act applies to the lease at issue. Summary Judgment in Defendant's favor is denied as to Count III. However, on the facts presented Plaintiff has not satisfied all elements of a UPA claim. Therefore, Summary Judgment in Plaintiff's favor is also denied as to Count III.

7-13-2021
DATED

JUAN L. FLORES, Arbitrator
Stelzner, Winter, Warburton,
Flores & Dawes, P.A.
P.O. Box 528
Albuquerque, NM 87103
(505) 938-7770
Email: jflores@stelznerlaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Order was emailed to the following counsel of record on the 13th day of July, 2021:

Charles Parnall
Email: charles@parnalladams.com

David Adams
Email: david@parnalladams.com

Lindsay Cutler
Email: lindsay@nmpovertylaw.org

Maria Griego
Email: maria@nmpovertylaw.org

Ron A. Tucker
Email: ron@moseslaw.com

Kathleen Ahghar
Email: kathleen@moseslaw.com

JUAN L. FLORES

S:\TXTLIB\20060\pldgs\Order -final.docx