

July 2024 MPT-1 Item

In re Girard

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In re Girard

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Collins & Timaku LLP
Attorneys at Law
800 Bagby St., Suite 150
Franklin City, Franklin 33715

MEMORANDUM

TO: Examinee
FROM: Hannah Timaku
DATE: July 30, 2024
RE: Laurel Girard matter

We represent Laurel Girard in a landlord-tenant dispute. Girard rents an apartment at the Hamilton Place apartment complex. Yesterday morning, she received a "Three-Day Notice to Cure or Quit" (Notice) from her landlord, Hamilton Place LLC (Hamilton). The Notice alleges that Girard failed to pay a portion of her rent and also violated the no-pet clause in her lease.

The Notice gives Girard three days to either "cure" the alleged lease violations or "quit" (vacate) the premises. Hamilton is threatening to file an eviction action against Girard seeking a court order terminating the lease if she remains in the apartment and does not cure the alleged violations within the three-day time frame. Needless to say, this is a time-sensitive matter that requires our immediate attention.

Please prepare an objective memorandum to me analyzing whether the alleged violations in the Notice are valid bases for termination of Girard's tenancy. Be sure to explain and support your conclusions. In addition, based on your analysis, let me know what steps we should advise the client to take. Once I have reviewed your memorandum, I will determine the appropriate legal response to the Notice and pass along your advice to the client.

Do not include a separate statement of facts, but be sure to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect your conclusions.

Collins & Timaku LLP
Attorneys at Law

MEMORANDUM TO FILE

FROM: Hannah Timaku
DATE: July 30, 2024
RE: Laurel Girard matter

Today I met with Laurel Girard regarding a dispute with her landlord. This memorandum summarizes the interview:

- This morning, Girard received a Notice to Cure or Quit from her landlord referencing her failure to pay rent and her ownership of a cat.
- Since January 2023, Girard has lived at the Hamilton Place Apartments, where she rents a one-bedroom apartment from her landlord, Hamilton Place LLC.
- Her initial monthly rent was \$1,500. On June 1, 2024, Hamilton notified Girard that her rent would be increasing to \$1,650, effective July 1, 2024.
- Girard was alarmed by the 10% increase in her rent and felt it was unfair, so for the month of July she paid only \$1,500 and did not pay the additional \$150.
- When I spoke with her, she specifically asked if she is required by law to pay the additional \$150 of rent. I told her we would research the matter.
- We then talked about Girard's cat.
- Girard told me that she experiences anxiety. She often feels overwhelmed and, at times, has panic attacks. The medication she is taking helps somewhat, but it does not eliminate her symptoms.
- About six months ago, Girard's therapist, Sarah Cohen, recommended that Girard consider getting an emotional support animal to help alleviate the symptoms of her mental health condition.
- Initially Girard resisted her therapist's advice because she was working long and unpredictable hours in a retail position and didn't think she would have the time to properly care for an animal.

- But about two months ago, Girard got a new job as an office assistant, with set hours and a very predictable work schedule.
- Shortly after starting her new job, Girard visited the local animal shelter and adopted a kitten, whom she named Zoey.
- Girard is already very attached to Zoey and has noticed a dramatic improvement in her overall mental well-being since she brought Zoey home from the animal shelter. She has fewer panic attacks and generally feels a lot less overwhelmed. After she gets home from work and eats dinner, she watches TV on the couch while Zoey snuggles on her lap. Even the simple act of petting Zoey makes Laurel feel relaxed and, in her own words, "like I can handle anything that comes my way, no matter how stressful and challenging."
- Two weeks ago, Girard needed to take Zoey to the veterinarian for a 12-week vaccination booster shot. She put Zoey in a cat travel carrier and was walking with Zoey to her car when she ran into the on-site property manager for Hamilton Place. When the manager saw Zoey in her travel carrier, the manager told Girard that she was not allowed to have pets. When Girard responded that Zoey is her emotional support animal, the property manager rolled her eyes and sarcastically commented, "Sure! Whatever!"
- That day, Girard asked her therapist, Sarah Cohen, if she could write a letter explaining how important Zoey is for Girard's mental well-being. Girard just received the letter from Cohen a few days ago.
- She told me she loves living at Hamilton Place but will move out if that's the only way she can keep Zoey.

RESIDENTIAL LEASE AGREEMENT

This Residential Lease Agreement (Lease) is entered into and effective as of January 1, 2023, by and between Hamilton Place LLC (Landlord) and Laurel Girard (Tenant).

FOR AND IN CONSIDERATION OF the mutual promises and agreements contained herein, Tenant agrees to lease the Premises (as hereinafter defined) from Landlord under the following terms and conditions:

1. **PREMISES:** 7700 Riverside Drive, Franklin City, Franklin 33725, Apartment 12, a one-bedroom, one-bathroom apartment on the first floor (the Premises).
2. **RENTAL AMOUNT:** Beginning January 1, 2023, Tenant agrees to pay Landlord the sum of \$1,500 per month by no later than the 3rd day of each calendar month. Said rental payment shall be delivered by Tenant to Landlord at [address omitted]. Rent must be actually received by Landlord in order to be considered in compliance with the terms of this Lease.
3. **RENT INCREASES:** Tenant agrees that Landlord may raise the rent no sooner than 12 months after the commencement of this lease.
4. **SECURITY DEPOSIT:** Tenant shall deposit with Landlord the sum of \$1,500 as a security deposit to secure Tenant's performance of the terms of this Lease. After Tenant has vacated the Premises, Landlord may use the security deposit for cleaning the Premises, any damage or unusual wear and tear to the Premises, or any other rent or amounts owed pursuant to this Lease.
5. **INITIAL PAYMENT:** Tenant shall pay the first month's rent of \$1,500 and the security deposit in the amount of \$1,500 for a total of \$3,000. Said payment shall be made by cashier's check or money order and is due prior to occupancy.
6. **TERM:** The Premises are leased on the following two-year lease term: from January 1, 2023, until December 31, 2024. This Lease will automatically renew on a month-to-month basis following the initial lease term, unless Landlord or Tenant provides 30 days' advance written notice of termination to the other party.

* * *

10. **LATE CHARGE/BAD CHECKS:** A late charge of \$50 shall be incurred if rent is not paid when due. If rent is not paid when due and Landlord issues a "Notice to Cure or Quit," Tenant must tender payment of any amounts owed by cashier's check or money order only.

* * *

15. **PETS:** No pet of any kind (including but not limited to any dog, cat, bird, fish, or reptile) may be kept on the Premises, even temporarily, absent Landlord's written consent. If Landlord consents to allow a pet to be kept on the Premises, Tenant shall sign a separate Pet Addendum and pay the required pet deposit and additional monthly rent, as set forth in the Pet Addendum.

* * *

20. **DEFAULT:** Tenant agrees that Tenant's performance of and compliance with each of the terms of this Lease constitutes a condition on Tenant's right to occupy the Premises. If Tenant fails to comply with any provision of this Lease within the time period after delivery of written notice by Landlord specifying the noncompliance and indicating Landlord's intention to terminate this Lease by reason thereof, Landlord may terminate this Lease.

* * *

LANDLORD:

Jim Fortnum
For Hamilton Place LLC

Dated: January 1, 2023

TENANT:

Laurel Girard

Dated: January 1, 2023

Hamilton Place LLC
2000 Greens Blvd., Suite 201
Franklin City, FR 33705

June 1, 2024

Ms. Laurel Girard
7700 Riverside Drive, Apt. 12
Franklin City, Franklin 33725

Re: Rent Increase for Lease dated January 1, 2023

Dear Ms. Girard:

Please be advised that effective July 1st, 2024, the monthly rent on your existing Residential Lease Agreement will increase from \$1,500 to \$1,650 per month. This is a \$150 increase.

Payment of the new monthly rent will be due in accordance with your existing Residential Lease Agreement.

Sincerely,

Jim Fortnum

Leasing agent
Hamilton Place LLC

THREE-DAY NOTICE TO CURE OR QUIT

TO: Laurel Girard (Tenant)

ADDRESS: Hamilton Place Apartments, 7700 Riverside Drive, Apartment 12
Franklin City, Franklin 33725 (Premises)

NOTICE TO THE ABOVE-NAMED TENANT(S) OF THE ABOVE-REFERENCED PREMISES:

You are in violation of the following provisions set forth in the Residential Lease Agreement dated January 1, 2023 (Lease):

Paragraph 2, which requires rent to be paid in full by the 3rd day of the month

Paragraph 15, which prohibits pets from being kept on the Premises

Please cure the above violations by taking the following actions immediately:

1. Pay the sum of \$150 in rent owed for July 2024, plus the \$50 late fee imposed under Section 10 of the Lease, by cashier's check or money order.
2. Remove any and all unauthorized pets from the Premises.

PLEASE TAKE NOTICE THAT if you fail to cure the above violations or deliver possession of the Premises to Hamilton Place LLC **WITHIN THREE (3) DAYS**, Hamilton Place LLC will declare a forfeiture of the Lease and institute legal proceedings against you to recover possession of the Premises and to have the Lease forfeited, which could result in a judgment against you including rent, damages, costs, and attorneys' fees. If a judgment is entered against you, your credit rating and ability to obtain rental housing may be negatively impacted.

Dated: July 29, 2024

Jim Fortnum

Leasing agent
Hamilton Place LLC

SARAH COHEN, M.Ed., LPC Wellington Counseling Associates Inc.	FRANKLIN #72386 Phone: 664-555-1970
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Re: Laurel Girard (DOB 06/17/1998)
Need for Emotional Support Animal

Date: July 26, 2024

To: Hamilton Place LLC

The above-mentioned individual is currently under my care. I have been treating this individual for the past four years, and I am familiar with her history and the functional limitations imposed by her mental health condition. Her emotional difficulties meet the definition of disability under the Franklin Fair Housing Act.

Due to her emotional disability, Ms. Girard has certain limitations related to coping with anxiety. To help alleviate these difficulties and to enhance her ability to function optimally, she is in possession of an emotional support animal (a cat named Zoey). The presence of this animal is necessary for Ms. Girard's emotional/mental health because its presence mitigates the symptoms she is currently experiencing. In particular, the presence of this animal assists Ms. Girard in regulating psychological distress associated with anxiety and panic attacks.

Please let me know if any other information is needed.

Sincerely,

Sarah Cohen

Sarah Cohen, M.Ed., LPC
Franklin Licensed Professional Counselor #72386

Franklin Tenant Protection Act
Franklin Civil Code § 500 *et seq.*

§ 500 Applicability

- (a) Notwithstanding any other law, after a tenant has continuously and lawfully occupied a residential real property for 12 months, the owner of the residential real property shall not terminate the tenancy without just cause, which shall be stated in the written notice to terminate tenancy.
- (b) For the purposes of this statute, the following definitions shall apply:
 - (1) "Owner" includes any person, acting as principal or through an agent, having the right to offer residential real property for rent.
 - (2) "Residential real property" means any dwelling or unit that is intended for human habitation.
 - (3) "Tenant" means a person lawfully occupying residential real property for 30 days or more, including pursuant to a lease.
 - (4) "Tenancy" means the lawful occupancy of residential real property by a tenant.

§ 501 Termination for Cause

- (a) Just cause to terminate tenancy includes any of the following:
 - (1) Material breach of a term of the lease.
 - (2) Maintaining or committing a nuisance.
 - ...
- (b) Before an owner of residential real property files an eviction action seeking to terminate a tenancy for just cause that is a curable lease violation, the owner shall first give notice of the violation to the tenant with an opportunity to cure the violation.
 - ...
- (g) Any waiver of the rights under this section shall be void as contrary to public policy.

§ 505 Limitation on Rent Increase

- (a) An owner of residential real property shall not, within any 12-month period, increase the rental rate for a dwelling or a unit more than 10 percent.
- ...

Franklin Fair Housing Act
Franklin Civil Code § 750 *et seq.*

§ 755 Definitions As used in this Act, the following definitions apply:

...

(c) "Disability" shall be broadly construed to mean and include any of the following definitions:

- i. "Mental disability" includes, but is not limited to, having any mental or psychological disorder or condition that limits a major life activity. Examples of mental disability include, but are not limited to, anxiety, post-traumatic stress disorder, or clinical depression.
- ii. "Physical disability" [definition omitted]

...

(m) "Service animals" [definition omitted]

(n) "Support animals" are animals that provide emotional, cognitive, or other similar support to an individual with a disability. A support animal does not need to be trained or certified. Support animals are also known as comfort animals or emotional support animals.

(o) "Assistance animals" include service animals and support animals, as described in subsections (m) and (n) above. An assistance animal is . . . an animal that . . . provides emotional, cognitive, physical, or similar support that alleviates one or more identified symptoms or effects of an individual's disability.

§ 756 Assistance Animals

(a) Tenants, occupants, invitees, and others with disabilities are permitted to have assistance animals as defined in § 755(o) in all dwellings (including common and public use areas), subject to the restrictions set forth in subsection (c) below.

(b) Information confirming that the individual has a disability, or confirming that there is a disability-related need for the accommodation or modification, may be provided by any reliable third party who is in a position to know about the individual's disability or the disability-related need for the requested accommodation or modification, including a medical professional . . . [or] health-care provider. A support animal certification from

an online service that does not include an individualized assessment from a medical professional is presumptively considered not to be information from a reliable third party.

(c) Provisions applicable to all assistance animals as defined in § 755(o) include:

- i. An individual with an assistance animal shall not be required to pay any pet fee, additional rent, or other additional fee, including additional security deposit or liability insurance, in connection with the assistance animal.
- ii. An individual with an assistance animal may be required to cover the costs of repairs for damage the animal causes to the premises, excluding ordinary wear and tear.
- iii. No breed, size, and weight limitations may be applied to an assistance animal (other than specific restrictions relating to miniature horses as service animals under the Americans with Disabilities Act).
- iv. Reasonable conditions may be imposed on the use of an assistance animal to ensure that it is under the control of the individual with a disability or an individual who may be assisting the individual with a disability, such as restrictions on waste disposal and animal behavior that may constitute a nuisance, so long as the conditions do not interfere with the normal performance of the animal's duties. For example, a "no noise" requirement may interfere with a dog's job of barking to alert a blind individual to a danger or someone at the door, but incessant barking all night long or when the individual is not at home may violate reasonable restrictions relating to nuisance.
- v. An assistance animal need not be allowed if the animal constitutes a direct threat to the health or safety of others (i.e., a significant risk of bodily harm) or would cause substantial physical damage to the property of others, and that harm cannot be sufficiently mitigated or eliminated by a reasonable accommodation.

Westfield Apartments LLC v. Delgado
Franklin Court of Appeal (2021)

Plaintiff Westfield Apartments LLC rented an apartment to defendant Maria Delgado. Westfield brought a successful eviction action against Delgado and obtained an order from the trial court forfeiting the lease agreement and terminating Delgado's tenancy. The issue on appeal is whether Delgado's failure to obtain renter's insurance justified forfeiture of the lease and termination of her tenancy. We hold that the breach was not material and reverse the trial court's order.

BACKGROUND

Delgado and Westfield entered into a residential lease agreement in August 2018. The lease contained a forfeiture clause stating that "any failure of compliance or performance by Renter shall allow Owner to forfeit this agreement and terminate Renter's right to possession" (Forfeiture Clause). The lease also contained an insurance clause stating that Delgado "shall obtain and pay for any insurance coverage necessary to protect Renter" "for any personal injury or property damage" (Insurance Clause). After two years of Delgado's failure to obtain this insurance, Westfield gave Delgado a three-day "notice to perform or quit," which required Delgado to either obtain the insurance or vacate the premises within three days. Delgado refused to obtain renter's insurance or move out.

Westfield then commenced an eviction action against Delgado. The trial court concluded that the failure to obtain renter's insurance constituted a material breach of the lease. As a result, the trial court held that Delgado had breached the lease by failing to obtain renter's insurance and Westfield was entitled to forfeit the lease.

DISCUSSION

The lease in question is subject to the Franklin Tenant Protection Act, Fr. Civil Code § 500 *et seq.* (FTPA). Where, as here, the tenant has lived in the premises for more than 12 months, the landlord must have "just cause" to terminate the lease. "Just cause" includes "material breach of a term of the lease." FR. CIV. CODE § 501(a)(1).

Materiality

Courts have consistently concluded that "a lease may be terminated only for material breach, not for a mere technical or trivial violation." *Kilburn v. Mackenzie* (Fr. Sup. Ct.

2003). Although every instance of noncompliance with a contract's terms constitutes a breach, not every breach justifies treating the contract as terminated. *Id.* To be material, the breach "must 'go to the root' or 'essence' of the agreement between the parties," such that it "defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract." *Id.* (quoting WALKER'S TREATISE ON CONTRACTS § 63 (4th ed. 1998)). This materiality limitation even extends to leases that contain clauses purporting to dispense with the materiality limitation.

In *Vista Homes v. Darwish* (Fr. Ct. App. 2005), the landlord brought an eviction action against a tenant who failed to pay \$10 of the total \$1,000 rent owed to the landlord. The court observed that payment of the rent in accordance with the terms of the lease is one of the essential obligations of the tenant, and the failure of the tenant to properly discharge this obligation is a legal cause for dissolving the lease. However, because the rent shortfall was *de minimis* (only 1% of the rent amount owed), the court concluded that the breach was not material. See also *Pearsall v. Klein* (Fr. Ct. App. 2007) (no material breach where tenant left minor amounts of debris outside apartment because debris did not damage apartment and landlord could remove debris and back-charge tenant for the cost). *But cf.* *Sunset Apartments v. Byron* (Fr. Ct. App. 2010) (harboring a pet when a lease contains a "no-pet clause" constitutes a material breach of the lease agreement).

Westfield argues that the Forfeiture Clause forecloses any materiality argument or defense by Delgado because the Forfeiture Clause allows the landlord to regain possession of the premises if there is "any failure of compliance or performance" by the tenant. It is Westfield's position that the Forfeiture Clause trumps the FTPA's "material" breach requirement. However, the FTPA makes clear that its tenant protection provisions cannot be waived. FR. CIV. CODE § 501(g).

Not every default by a tenant justifies the landlord's termination of the tenancy, especially where the breach involves a nonmonetary covenant in the lease and/or a lease provision that is for the tenant's benefit. Here, the Insurance Clause was not related to the payment of rent. Notably, Westfield had the ability to detect and cure the breach far in advance of bringing suit but chose not to do so. Moreover, the Insurance Clause benefited Delgado, not Westfield, by protecting her against loss of her personal property in the apartment. Delgado's failure to comply with the Insurance Clause was a trivial breach,

and Westfield has no ground to argue that it was harmed by Delgado's failure to obtain insurance.

Public Policy Considerations

Public policy and other considerations also lead us to conclude that the failure to obtain renter's insurance is not a material breach of the lease. The FTPA was born out of the shortage of affordable housing. Among other things, it prohibits landlords from terminating leases without a specific enumerated "just cause," Fr. Civil Code § 501(a), and also seeks to safeguard tenants from excessive rent increases, Fr. Civil Code § 505(a), by imposing certain statutory limitations and obligations on landlords that landlords would otherwise not be subject to under normal freedom-to-contract principles. *Stark v. Atlas Leasing* (Fr. Ct. App. 2003). While the freedom to contract is important, the Franklin legislature has determined that free-market principles do not apply to residential leases due to the unequal bargaining power between landlord and tenant resulting from the scarcity of adequate housing. *Id.* Here, Delgado and Westfield's lease reflects the unequal bargaining power recognized by *Stark* and other courts in that the unilateral forfeiture clause entirely benefits Westfield as the landlord. The Forfeiture Clause makes any breach by Delgado grounds for Westfield to forfeit the lease and imposes no obligations at all on Westfield.

Permitting landlords like Westfield with superior bargaining power to forfeit leases based on minor or trivial breaches would allow them to strategically circumvent FTPA's "just cause" eviction requirements and disguise pretext evictions under the cloak of contract provisions. FTPA's public policy goals of providing stable affordable housing to Franklin residents and preventing pretext evictions outweigh the free-market and freedom-to-contract principles allowing a landlord to include a unilateral forfeiture clause in a residential rental contract.

A materiality requirement has the added benefit of preventing potentially unmeritorious litigation. Permitting forfeiture for trivial breaches of a lease could unleash a torrent of unmeritorious evictions. Without the protection of a materiality requirement, tenants potentially are in jeopardy of defending frivolous eviction actions for trivial breaches. For example, Delgado's lease prevents her from even bringing a musical instrument onto the premises. If we upheld the forfeiture clause as Westfield argues, Delgado could risk forfeiture of the lease, and eviction, for absurdly trivial reasons, e.g., if she hung a violin with no strings on

her wall for decoration because it was a family heirloom or if for a few days she had in her apartment a gift-wrapped electronic keyboard for a niece's upcoming birthday. This court will not uphold forfeiture clauses that could result in such frivolous litigation.

Reversed.

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