IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

TEMPLETON PROPERTY MANAGEMENT, PINE SQUARE INVESTMENTS LLC, Plaintiff, v. DAVID WINCLAIR, Defendant.	)	Case No. 17LT16371 FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING TRIAL

Plaintiffs' Complaint seeking possession of the premises described therein came before the Honorable Marilyn Litzenberger for trial on February 6, 2018. Plaintiffs Templeton Property Management and Pine Square Investments, LLC appeared through their representative, Norma Mullinax, and were represented by their attorney, Marcel Gesmundo of Greenspoon Marder, LLP. Defendant David Winclair appeared personally and was represented by his attorney, Harry Ainsworth.

Defendant conceded the facts that Plaintiffs would otherwise have to prove to be entitled to restitution of the premises. Therefore, the trial proceeded to adjudicate Defendant's defense under ORS 90.385, which alleged that Plaintiffs had unlawfully evicted (or attempted to evict) him based on complaints he made to Plaintiffs' employees concerning matters related to his tenancy and therefore Plaintiffs were not entitled to take possession of his premises. In response, Plaintiffs asserted, pursuant to ORS 90.385 (4), that Defendant's complaints were unreasonable and therefore did not constitute protected activity that would bar Plaintiffs from evicting Defendant. At trial, Plaintiffs' position was different. There, Plaintiffs contended that Defendant's complaints were not a factor that caused them to terminate the tenancy by issuing a 60-day "no cause" notice to Defendant.

A "no cause" notice of eviction permits a landlord to terminate a residential tenancy without any reason, so long as the notice was not motivated by an unlawful purpose. Unlawful purpose includes, but is not limited to, attempting to evict a tenant after the tenant complained to the landlord or its agents about matters that related to

his tenancy. While a landlord may have other reasons to issue a "no cause" notice, if the tenant's complaints were one of the factors the landlord considered in making its decision to evict, and the landlord would not have made that decision "but for" the tenant's complaints, then the landlord is prohibited from doing so. *Elk Creek Management Co. v. Gilbert*, 353 Or 565, 586 (2013). This is true even if the landlord had other reasons for terminating the tenancy. *Id.* And, where the landlord has two different but independent reasons for deciding to evict a tenant, and either alone would have caused the landlord to make the decision to terminate, the landlord may not do so if the tenant's protected activity was one of those independent reasons. *Id.*

In this case, Plaintiffs presented evidence through the testimony of their Vice President, Multi-Family Division, Laura Rosales, that the sole reason for terminating Defendant's tenancy was to protect Plaintiffs' employees from Defendant's unreasonable conduct. She had received reports from the employees she supervised, including Plaintiffs' Regional Manager, Lisa Shoop,[1] and its onsite Portfolio Manager, Norma Mullinax, concerning what they described as Defendant's persistent and demanding complaints which they considered to be harassing and aggressive in their tone and frequency. According to Ms. Rosales' testimony, however, the substance of Defendant's complaints had nothing to do with her decision to instruct Plaintiffs' attorneys to serve Defendant with the "no cause" eviction notice.

Plaintiffs' closing argument suggested that Ms. Rosales was the sole decision maker and there was only one reason she decided to terminate Defendant's tenancy—to protect "her" employees from harassment. If so, then Defendant's complaints about landlord's management practices and regarding the repair and maintenance of his dwelling unit would not be the "but for" cause of the landlord's eviction notice because they were not "a factor" in Plaintiffs' decision to end the tenancy. However, as Defendant's closing argument implied, circumstantial evidence of Plaintiffs' motive for evicting Defendant leads the court to a different conclusion.

The veracity of Ms. Rosales' testimony relating the sole reason for Plaintiffs' decision to end Defendant's tenancy is called into question by other evidence received during the trial. For example, communications between Ms. Mullinax and her superiors both before and after her vacation. On August 17, 2017, Ms. Rosales stated she wanted to

[1] Ms. Shoop did not testify during the trial; however, her directions to Plaintiffs' employees were memorialized in email communications that were received in evidence as Exhibits 106 and 110.

send Defendant a "For Cause or a No Cause" notice.[2] On August 24, 2017, Ms. Mullinax confirmed her understanding that Plaintiffs were proceeding with a "30/14" notice to Defendant that he was being evicted for cause.[3] A "for cause" notice would have allowed Defendant an opportunity to correct the conduct the landlord listed as the reasons supporting Plaintiffs' decision to evict Defendant from the premises.[4] In other words, there were multiple reasons—not just one—to terminate Defendant's tenancy. Among those reasons were Defendant's complaints to Plaintiffs' employees about his tenancy.

Indeed, Plaintiffs' actual motive is most apparent from the landlord's decision to have their lawyers send both a "for cause" eviction notice and a "no cause" eviction notice to Defendant on the same day.[5]

Other circumstantial evidence of Plaintiffs' motive includes correspondence the landlord's Regional Manager sent to staff employees who were most likely to have direct contact with Defendant. Her instructions were communicated in an email message sent while Ms. Mullinax was on vacation.[6] Employees were told to call the police whenever they had contact with Defendant:

> "Hello, I'm sending this directive one more time. If David comes in you MUST CALL THE POLICE EVERY TIME. We need the documentation. We were served with a law suit today from him and in order for this to not look like retaliation to that, we need every last police report we can get. Even if you THINK you can handle him ...we need you not to.
>
> "I need you to personally document as well. I asked for this yesterday a couple of times form both Sam and Briana and have not received it.
> EVERY SINGLE TIME something happens I need it to be factually documented after it happens so the details are fresh.
>
> "See the below that I wrote to the attorneys. Tell me if you have questions."

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[2] Exhibit 8 (Ms. Rosales asking Ms. Mullinax if any resident witnesses will corroborate Defendant's behavior). Plaintiffs did not call any residents to testify and corroborate Plaintiffs' employees' opinions of Defendant's behavior or the frivolous nature of his complaints to landlord.

[3] Exhibit 110 (email exchange between Ms. Mullinax and Ms. Shoop).

[4] Exhibit 117 ("for cause" notice letter dated August 28, 2017).

[5] Exhibit 2 ("no cause" notice letter dated August 28, 2017, referencing concurrent service of "for cause" notice).

[6] Exhibit 106 (email from Lisa Shoop to Norma Mullinax, Samantha Dean, and Briana Brown sent August 23, 2017 at 4:54 PM).

On its face, this communication reveals Plaintiffs' realization that the notices given to Defendant the day after they were served with Defendant's lawsuit for defamation would be viewed as retaliatory due to the close temporal relationship between the two events.[7] Ms. Shoop's directive to Plaintiffs' staff is concerning because, as Defendant suggests, it is not difficult to conclude the landlord was telling its employees to call the police to document Defendant's unreasonable conduct when the employees themselves might think they could handle the situation themselves without police intervention. In other words, even if the employees did not believe Defendant's conduct was a legitimate safety threat, they were to call the police so there would be an official report to memorialize Defendant's behavior.[8]

Defendant does not deny that his interactions with Plaintiffs' employees at Pine Square Apartments reflected his past frustrations with what he perceived as the landlord's lack of response to his complaints about his neighbors and concerns with landlord's management activities, including his belief that the property manager's inaccurate accountings caused his credit score to decline. Defendant's present frustration with the landlord's failure to timely and completely address his concerns

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[7] Another email between Ms. Shoop and Ms. Mullinax, dated August 24, 2017, bears the subject line "RE: David Winclair Summons" and confirms Plaintiffs' decision to send Defendant a "30/14" [for cause] eviction notice. Exhibit 110. This communication directly contradicts Ms. Rosales' testimony that the sole reason for terminating Defendant's tenancy with a "no cause" notice was to end Defendant's harassment of Plaintiffs' employees and is further circumstantial evidence of Plaintiffs' retaliatory [unlawful] motive.

[8] Defendant contends Ms. Shoop's plan to "cover up" Plaintiffs' retaliatory motive is also seen by her behind-the-scenes instructions to Briana Brown regarding the August 22, 2017 event described in Plaintiffs' "for cause" notice and characterized by Ms. Rosales as harassing to Plaintiffs' employees. Ms. Brown was present in the office when Defendant came in to lodge a complaint on that date. Ms. Brown was a new employee, working as a leasing consultant at the Pine Square property. She normally reported to Ms. Mullinax, who was on vacation at the time, so Ms. Brown reported the event to her interim supervisor, Ms. Shoop, immediately after (or perhaps just before) Defendant left the office.

Based on the testimony given by Ms. Brown and Defendant describing what happened, it is reasonable to infer that Ms. Brown reported Defendant's presentation at the office to Ms. Shoop from the back office where Ms. Brown was located as the event was taking place; Ms. Shoop instructed Ms. Brown to have the police called and to complete an incident report. The Incident Report describes the date and time of the event as 8/22/17@11am and the date and time reported as 8/22/17 11:10 am. Exhibit 108. Two days later, on August 24, 2017 at 9:31 AM, Ms. Brown sent an email to Ms. Mullinax forwarding the statement she and another employee prepared. Exhibit 107. She also entered the statement into Plaintiffs' Folio software database at 9:31 AM. Approximately 15 minutes later, Ms. Brown sent another email to Ms. Mullinax describing the event, but this time, she supplemented her description with statements made by the police officers who responded to investigate the incident "shortly after" Defendant left. Exhibit 109. This supplemental information purports to capture the officers' opinions that Defendant's "continued residence will pose a potential hazard to both the community and the staff alike." None of the officers were called as witnesses at the trial so the court has appropriately disregarded their statements.

manifested itself through what Plaintiffs' on-site employees perceived to be aggressive and "threatening" behavior, with Defendant coming too close to their "personal space" and waving his arms about when he was talking to them.

The court heard evidence of Defendant's interactions with some of these employees on August 22, 2017, through an audio recording of the event captured on Defendant's cell phone. The recording does capture Defendant's tone of voice, which is loud. But, other than testimony that Defendant was animated and positioned too close, the evidence does not support a finding that Defendant posed a threat to the employees' physical safety using an objective standard.[9] There is no question that Plaintiffs' employees find Defendant annoying and, in their words, harassing. But Defendant is entitled to express his frustration. As long as his words would not cause an objectively reasonable person to believe Defendant poses an imminent threat to their physical safety, his words remain protected speech and landlord may not respond to such protected activity by attempting to evict him [for either "no cause" or "for cause."]. The frequency of Defendant's face-to-face interactions with Plaintiffs' staff could rightfully be characterized as annoying behavior, but a landlord may not rely on conduct that is merely annoying to evict a complaining tenant.

ORS 90.385 (4), the statute Plaintiffs rely on to permit their "no cause" termination notice, is not to the contrary because that statute must be read in the context of how the Oregon Supreme Court has interpreted the ORLTA's prohibition against a landlord's retaliation for tenant complaints.[10] In *Elk Creek*, the Court held that

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[9] *Cf., S.A.B. v. Roach*, 249 Or App 579, 585 (2012) (explaining that in the context of petitioning for a stalking protective order "offensive, hostile, and aggressive statements are not enough to satisfy the standard, nor are equivocal threats or threats that are not objectively likely to be acted upon"); *D.M.G. v. Tepper*, 285 Or App 646, 651 (2017) ("As used in ORS 30.866, 'alarm' is the 'apprehension or fear resulting from the perception of danger,' and 'danger' refers to a threat of physical injury, not merely a threat of annoyance or harassment." (internal citations omitted)). The court realizes that the standard applied under ORS 30.866 for protected speech has not heretofore been applied in a residential landlord dispute, but believes that the standard used there could be applied in deciding whether the tenant made complaints in an "unreasonable manner" or "unreasonably harassed" the landlord.

[10] ORS 90.385 (4) reads:

> "Notwithstanding subsections (1) and (3) of this section, a landlord may bring an action for possession if:
>
> "(a) The complaint by the tenant was made to the landlord or an agent of the landlord in an unreasonable manner or at an unreasonable time or was repeated in a manner having the effect of unreasonably harassing the landlord. A determination whether the manner, time or effect of a

the finder of fact must decide if the tenant's complaints were "a factor" in the landlord's decision to evict the tenant; if they were, the landlord is prohibited from deciding to do so. *Elk Creek*, 353 Or at 586. The Court recognized the logic inherent in ORS 90.385 (4)(d) that permits a landlord to evict a tenant. *Id.* It noted that a landlord is not always prohibited from evicting a tenant after a tenant complains about the condition of a dwelling; however, the landlord must prove that it had another, unrelated reason for evicting the tenant[11] or that it made its decision to evict before the tenant complained in order to disprove a tenant's allegation that the landlord's actions were retaliatory.[12] *Id.* at 586-87. The Court's conclusion that a landlord was prohibited from deciding to evict a complaining tenant captures its interpretation of the legislature's intent that retaliation bars the landlord from terminating the tenant's rental agreement (either "for cause" or for "no cause"). *Id.*

That conclusion is further supported by ORS 90.385 (3), which gives a tenant "a defense in any retaliatory action against the tenant for possession" if the tenant's complaint was a factor that made a difference in the landlord's decision to evict the

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complaint was unreasonable shall include consideration of all related circumstances preceding or contemporaneous to the complaint;

"(b) The violation of the applicable building or housing code was caused primarily by lack of reasonable care by the tenant or other person in the household of the tenant or upon the premises with the consent of the tenant;

"(c) The tenant was in default in rent at the time of the service of the notice upon which the action is based; or

"(d) Compliance with the applicable building or housing code requires alteration, remodeling or demolition which would effectively deprive the tenant of use of the dwelling unit."

[11] The examples of other unrelated reasons a landlord might terminate a residential tenancy mentioned by the Court include the tenant's failure to pay rent or the tenant's violation of another term of the residential lease/rent agreement. *Id.* at 587.

[12] The latter does not apply here because landlord's decision post-dated Defendant's complaints regarding his tenancy. Plaintiffs' Vice President testified that she made the decision to terminate Defendant's tenancy on August 15, 2017. Defendant's Complaint was filed on May 19, 2017, but it was not served on landlord until August 23, 2017. Defendant had, however, expressed his intention to sue the landlord for defamation arising out of a "for cause" notice noticed posted, in plain view, on the door to his dwelling unit, through written correspondence addressed to landlord's property manager dated May 19, 2016. Exhibit 103. Defendant also referred Plaintiffs and their attorney of "litigation pending" on September 6, 2016. Exhibit 120.

tenant.[13] *Elk Creek*, 353 Or at 587. Subsection (3) also makes clear that a tenant is entitled to injunctive relief to obtain possession of the premises if a landlord unlawfully "removes or excludes the tenant from the premises, seriously attempts or seriously threatens unlawfully to remove the tenant from the premises * * *." ORS 90.385 (3) (quoting ORS 90.375). In sum, despite Plaintiffs' arguments that a landlord is entitled to recover possession if it proves the tenant has complained in "an unreasonable manner or at an unreasonable time or [tenant's complaint] was repeated in a manner having the effect of unreasonably harassing the landlord," the Supreme Court's ruling in *Elk Creek* is to the contrary. At most, the legislature authorized a landlord to "bring an action for eviction." ORS 90.385 (4). The statute does not excuse a landlord's unlawful retaliatory conduct on the ground that the tenant's complaints were unreasonably harassing. Once an action is brought for eviction, the ultimate determination of whether the tenancy will be lawfully terminated turns on whether the tenant's complaints about the tenancy alone, or in connection with a different, independent and lawful reason caused the landlord to make the decision to evict.

With that standard in mind, the court returns to what is shown by the evidence presented in the trial of this case. The temporal connection between Defendant's complaints and Plaintiffs' decision to evict him is well established by the evidence. This included many email messages Defendant sent to Plaintiffs' employees, most commonly the Property Manager of the apartment complex where Defendant lives. This correspondence is in the record and, in the interest of time, will not be summarized here. Defendant's correspondence pre-dates Ms. Mullinax's tenure in this position. While Plaintiffs dispute the matters captured in these emails, it is beyond dispute that Defendant was complaining about matters related to his tenancy over an extended period of time.[14]

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[13] ORS 90.395(3) states:

> If the landlord acts in violation of subsection (1) of this section the tenant is entitled to the remedies provided in ORS 90.375 and has a defense in any retaliatory action against the tenant for possession.

[14] For example, in May 2016, Defendant responded to a "Notice of Violation" issued to him a few days before regarding "unauthorized items stored" on his balcony. Exhibit 101. This correspondence communicates Defendant's continuing complaint that Plaintiff Templeton Property Management had made erroneous reports to credit agencies about him. It also mentions Plaintiffs' allegedly inadequate response to a complaint he made to the landlord about his upstairs neighbor. A week later, on May 16, 2016, Defendant sent another email expressing his frustration at having received no response to his last correspondence regarding his neighbor's "ongoing threats and harassment" that had continued. Exhibit

In sum, based on the findings of fact set forth above, the court concludes that Defendant has met his burden of proving unlawful retaliation and therefore is the prevailing party in this matter. Defendant is instructed to draft a proposed judgment incorporating the court's opinion by reference and to serve the proposed judgment in the manner required by UTCR 5.100 before filing it for the court's consideration.

IT IS SO ORDERED.

DATED: May 30, 2018.

Marilyn E. Litzenberger
Circuit Court Judge

Original: Court File
cc: Marcel Gesmundo, Plaintiffs' Counsel
Harry Ainsworth, Defendant's Counsel

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102. In this email, Defendant advises the landlord that he will hold Plaintiffs directly responsible if he is assaulted and that he is "prepared to undertake such action" if the landlord is unwilling to resolve his complaints in a "professional and businesslike manner." Defendant infers that his complaints have not been addressed to his satisfaction "after almost two years."

Defendant sent another email on May 19, 2016, regarding a "fire safety concern." Exhibit 102. Then, on that same date, the landlord posted a "for cause" notice of eviction on the door to Defendant's dwelling unit. Exhibit 103. Defendant responded to the Notice with a letter addressed to Templeton Property Management and its attorney as "To Whom it May Concern," accusing them of defaming him by posting the Notice where it could be read by his neighbors. The Notice indicates Defendant had disturbed "the peaceful enjoyment of the premises by other residents by taking pictures or videotaping other residents inside of their own units, yelling and engaging in loud arguments with your neighbors and using racially derogatory and gender-based derogatory terms toward your neighbors." Defendant contends the notice untruthfully labeled him a peeping Tom, sex offender, and racist. This is the notice that Defendant contends is defamatory and which led to his assault by other tenants or persons living at the apartment complex.