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3 [Filed June 22, 2001]

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5
6 UNITED STATES BANKRUPTCY COURT
7 NORTHERN DISTRICT OF CALIFORNIA

8
9 In re:) Case No. 00-3-2164-BTC
10) Chapter 13
11 W.D. JOHNSON, SR.,)
12 a/k/a WARREN D. JOHNSON, SR.,)
13 Debtor.) **MEMORANDUM DECISION RE**

) **CLAIM OF NATALIE HERNANDEZ**

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15 The court held a trial on June 6, 2001 regarding the
16 claim asserted by Natalie Hernandez against the Debtor.
17 David Finkelstein appeared for claimant Hernandez. Richard F.
18 Kelly appeared for Debtor. Upon due consideration, the court
19 hereby issues the following memorandum decision, which shall
20 constitute findings of fact and conclusions of law under Fed. R.
21 Bankr. P. 7052.

22
23 **INTRODUCTION**

24 Creditor Natalie Hernandez (Hernandez) rented a two-bedroom
25 apartment from Debtor W.D. Johnson, Sr. (Johnson) from April 15,
26 1999 to March 1, 2001. The apartment was a second unit on the
27 lower floor of Johnson's house. Johnson filed a petition under

1 chapter 13 of the Bankruptcy Code on September 5, 2000. Hernandez
2 has asserted claims against Johnson for sexual harassment, breach
3 of contract, retaliatory eviction, breach of the implied warranty
4 of habitability, and wrongful retention of her security deposit.
5 This court has jurisdiction over those claims pursuant to 28 U.S.C.
6 § 1334(b).

7 **A. SEXUAL HARASSMENT**

8 I find that approximately three weeks after Hernandez moved
9 into the apartment, she met with Johnson in his apartment to
10 execute a written lease. During that meeting, Johnson placed his
11 hand on Hernandez' knee. She gently brushed it away. Johnson also
12 gave Hernandez a business card which stated in Spanish "mailman
13 looking for woman friend." Johnson asked Hernandez to give it to
14 any women she knew who might be interested. Several weeks later,
15 when her sister and mother came to visit Hernandez, Johnson made a
16 comment to Hernandez about her sister's buttocks.

17 Hernandez also testified that Johnson stood outside her door
18 and listened when Hernandez' boyfriend visited her. I credit
19 Hernandez' testimony that Johnson was in the garage adjacent to
20 Hernandez' apartment during some of those visits. I also credit,
21 however, Johnson's testimony that he had legitimate reasons to be
22 on the lower floor. He kept his motorcycle there, and the laundry
23 room was there. On balance, the evidence does not establish that
24 Johnson was deliberately attempting to listen to the activities in
25 Hernandez' apartment.

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1 Civil damages may be imposed on a landlord who sexually
2 harasses a tenant. In order to prevail, the tenant must establish
3 that he or she is unable easily to terminate the relationship, and
4 "The defendant has made sexual advances, solicitations, sexual
5 requests, demands for sexual compliance by the plaintiff, or
6 engaged in other verbal, visual, or physical conduct of a sexual
7 nature or of a hostile nature based on gender, that were unwelcome
8 and pervasive or severe." Cal. Civil Code § 51.9.

9 I determine that Johnson is not liable to Hernandez for
10 sexual harassment. Hernandez did establish that she could not
11 easily terminate the relationship. The evidence suggests that
12 she attempted to find another apartment early in the tenancy, but
13 was unable to do so. Hernandez did not, however, establish that
14 Johnson engaged in conduct constituting actionable sexual
15 harassment. Although Johnson's acts were unreasonable, rude, and
16 unwelcome, they were not sufficiently "pervasive or severe" to form
17 a basis for assessing damages.

18 **B. RETALIATORY EVICTION**

19 By July 1999, the relationship between Johnson and Hernandez
20 had deteriorated significantly. On July 15th, Hernandez sent
21 Johnson a letter raising several complaints about the apartment
22 and Johnson's conduct. The letter complained that the toilet
23 overflowed, that the refrigerator leaked, that an emergency exit
24 could be opened from the inside only with a key that she did not
25 have, and that Johnson had breached the lease by limiting her use
26 of the washer and dryer. In the same letter, Hernandez also
27 asserted that Johnson had falsely accused her son of damaging the
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1 property, and that Johnson had attempted to restrict her from
2 entertaining her friends at the apartment. Hernandez made at least
3 five other written complaints about the condition of the apartment
4 to the Housing Authority and Johnson by the end of October 1999.

5 In November 1999, the Housing Authority, which paid the bulk
6 of the rent under Section 8 of the Federal Housing Act, increased
7 Hernandez' share of the rent from \$50 to \$287. When Hernandez did
8 not timely pay her share of the November rent, Johnson initiated
9 an unlawful detainer action. By the end of November, Hernandez
10 persuaded the Housing Authority to reduce her share of the rent to
11 \$50, retroactive to November 1st. She provided Johnson prompt
12 notice of this change, and the November rent was paid before the
13 unlawful detainer action went to trial on December 21, 1999. The
14 court ruled in favor of Hernandez in the unlawful detainer action
15 on January 18, 2000.

16 The initial term of the lease expired on April 30, 2000. The
17 lease provided that the lease could be terminated by the landlord
18 at that time only if he gave 90 days notice and only for cause.
19 On January 30, 2000, Johnson gave written notice of his intent to
20 terminate the lease effective April 30th, but the notice did not
21 specify any cause justifying the termination. When Hernandez
22 failed to vacate, Johnson initiated a second unlawful detainer
23 action. The court denied relief on June 20th, ruling that the
24 notice was invalid, because it failed to specify cause for the
25 termination.

26 Sometime in the Spring of 2000, Hernandez complained to the
27 Daly City Building Department about the condition of the apartment.

1 The Building Department conducted an inspection of the property,
2 and wrote to Johnson on June 12th, stating that the apartment
3 constituted an illegal second unit.

4 On June 27, 2000, shortly after he received the Building
5 Department letter, Johnson gave Hernandez a 30-day notice to quit.
6 This notice asserted that cause existed to terminate the lease
7 because Hernandez: (i) had repeatedly disturbed the neighbors and
8 damaged the property; (ii) had repeatedly violated the lease terms
9 by paying rent late; and (iii) had allowed the unit to be used by
10 other persons. Johnson did not file an unlawful detainer action
11 when Hernandez did not vacate the premises upon the expiration of
12 the notice. Although Hernandez ceased paying rent in July 2000,
13 Johnson took no further action to remove her. Hernandez vacated
14 the apartment on March 1, 2001.

15 Section 1942.5 of the California Civil Code provides in
16 relevant part:

17 (c) It shall be unlawful for a lessor to
18 increase rent, decrease services, cause a
19 lessee to quit involuntarily, bring an action
20 to recover possession, or threaten to do any
21 of such acts, for the purpose of retaliating
22 against the lessee because he or she has
23 lawfully organized or participated in a
24 lessees' association or an organization
25 advocating lessees' rights or has lawfully and
26 peaceably exercised any rights under the law.
27 In an action brought by or against the lessee
28 pursuant to this subdivision, the lessee shall
bear the burden of producing evidence that the
lessor's conduct was, in fact, retaliatory.

. . .

(f) Any lessor or agent of a lessor who
violates this section shall be liable to the
lessee in a civil action for all of the
following:

1 (1) The actual damages sustained by the
2 lessee.

3 (2) Punitive damages in an amount of not
4 less than one hundred dollars (\$100) nor more
5 than one thousand dollars (\$1,000) for each
6 retaliatory act where the lessor or agent has
7 been guilty of fraud, oppression, or malice
8 with respect to such act.

9 I determine that Johnson violated section 1942.5 on three
10 occasions.

11 Johnson first engaged in retaliatory eviction in bringing the
12 first unlawful detainer action to trial in December 1999. Johnson
13 was justified in filing the unlawful detainer complaint, because
14 Hernandez had not timely paid her share of the November rent.
15 Before the action went to trial, however, the Housing Authority had
16 retroactively adjusted her share of the rent and the full rent had
17 been paid. It thus appears that Johnson persisted in prosecuting
18 the action not to enforce the terms of the lease, but in
19 retaliation for the numerous complaints Hernandez had made about
20 the condition of the apartment. I further find that Johnson acted
21 with oppression with respect to this act, and that punitive damages
22 of \$1,000 are appropriate. Hernandez did not establish the actual
23 damages she suffered as a result of this act.

24 Johnson also engaged in retaliatory eviction in attempting to
25 terminate the lease at the end of the initial one-year term. As
26 noted by the state trial court, the lease was subject to
27 termination only for cause, and Johnson did not establish cause.
28 The evidence suggests that this attempt to terminate the lease
was motivated by Johnson's desire to get rid of a tenant who had
repeatedly complained about the condition of the apartment. I

1 determine, however, that Johnson is not guilty of fraud,
2 oppression, or malice with respect to this act. The written
3 lease terms regarding termination are complex, Johnson was not
4 represented by an attorney and, as a result, I believe Johnson
5 subjectively believed that he was not required to extend the lease
6 beyond its initial term. Thus, he did not consciously pursue an
7 oppressive course of action, as he did with the initial unlawful
8 detainer action. Hernandez established actual damages totalling
9 \$3,872, consisting of attorneys fees and costs she incurred in
10 defending the second unlawful detainer action.

11 The final instance of retaliatory eviction was Johnson's
12 issuance of a notice to quit in June 2000. I find that there was
13 no factual basis for the allegations against Hernandez contained in
14 the notice. Because the notice to quit came quickly on the heels
15 of the letter from the Building Department, I find that the notice
16 was issued in retaliation for Hernandez' complaint to that agency.
17 I find that Johnson acted with oppression with respect to this act,
18 and that punitive damages of \$1,000 are appropriate. Once again,
19 Hernandez did not establish the amount of actual damages she
20 suffered.

21 As the prevailing party in the retaliatory eviction claim,
22 Hernandez is entitled to recover reasonable attorneys fees incurred
23 in prosecuting that claim. Cal. Civil Code § 1942.5(g). Hernandez
24 shall segregate the fees incurred in the retaliatory eviction claim
25 from those incurred on her other claims and shall file and serve a
26 motion for allowance of fees in the time and manner prescribed in
27 Civil Local Rule 54-5 of the Local Rules of the United States

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1 District Court for the Northern District of California. Johnson's
2 response to the motion shall be filed within fourteen days after
3 service of the motion. The court will conduct a hearing regarding
4 the motion on August 10, 2001 at 9:30 a.m.

5 **C. BREACH OF CONTRACT RE LAUNDRY FACILITIES**

6 Hernandez testified that when she and Johnson agreed upon the
7 terms of the lease, Johnson stated orally that Hernandez would be
8 entitled to use the washer and dryer. Johnson testified that he
9 made no such representation. The written lease, executed three
10 weeks after Hernandez moved into the apartment, does not mention
11 the washer or dryer one way or the other. The lease provides in
12 relevant part:

13 **UTILITIES AND APPLIANCES:** The owner and the tenant agree to provide and pay for
14 the following appliances and utilities.

<u>Utility</u>	<u>Owner</u>	<u>Tenant</u>	<u>Utility</u>	<u>Owner</u>	<u>Tenant</u>	<u>Appliance</u>	<u>Owner</u>	<u>Tenant</u>
Garbage	<u> X </u>	_____	Heat	<u> X </u>	_____	Range	<u> X </u>	_____
			(Gas)(Elec.)					
Hot Water	<u> X </u>	_____	Light	<u> X </u>	_____	Refrigerator	<u> X </u>	_____
Cold Water	<u> X </u>	_____	Cooking	<u> X </u>	_____	Other	_____	_____
			(Gas)(Elec.)					

19 The tenant must pay for any utilities and provide any appliances that the owner
20 is not required to pay for or provided under the lease.

21 It is undisputed that Johnson allowed Hernandez to use the laundry
22 facilities only one day a week between the hours of 9:00 a.m. and
23 4:30 p.m.

24 I find that Johnson did agree that Hernandez would have use
25 of the laundry facilities, and that the restrictions he imposed on
26 Hernandez' use constituted a breach of that premise. I further
27 find that the written lease is ambiguous regarding use of the
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1 laundry facilities, that Johnson's oral promise to allow Hernandez
2 to use the laundry is not inconsistent with the written lease, and
3 therefore that enforcement of Johnson's oral promise does not
4 violate the parole evidence rule. The only damages from this
5 breach are the inconvenience of arranging to do all laundry one day
6 a week, or the cost and inconvenience of having someone else do the
7 laundry. Although it is difficult to value such inconvenience, I
8 determine that a reasonable estimate is \$20 per week. Over the
9 102 weeks Hernandez resided in the apartment, such damages total
10 \$2,040.^{1/}

11 **D. HABITABILITY**

12 Hernandez contends that the apartment was maintained in such
13 poor condition and exhibited such extensive housing code violations
14 that it breached the implied warranty of habitability. See Green
15 v. Superior Court, 10 Cal. 3d 616 (1974). Hernandez asserts she is
16 therefore entitled to recover damages and was excused from paying
17 rent.

18 Hernandez testified to five defects in the habitability of
19 the property. The toilet overflowed until it was replaced in
20 September 1999. The refrigerator failed to work properly until
21 it was repaired in September 1999. Johnson turned off the heat in
22 the fall and early winter 1999-2000. There was a bad smell in one
23 room that apparently resulted when a small animal died inside a
24 sheetrock-covered wall. Finally, the Daly City Building Department

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26 ^{1/} It does not appear that Johnson's restriction of
27 Hernandez' use of the laundry was instituted in retaliation for
28 Hernandez' complaints about the condition of the apartment. See
Civil Code § 1942.5(c). The evidence indicates that Johnson
instituted the restrictions before Hernandez made any complaints.

1 sent a letter to Johnson on June 12, 2000 stating that the
2 apartment violated the local building code in the following
3 respects:

- 4 (1) construction had been performed without a permit;
- 5 (2) it was improper to maintain a second unit in the house
6 under the applicable zoning laws;
- 7 (3) the unit did not contain a proper entry alcove;
- 8 (4) the door between the unit was too thin and did not
9 contain an automatic closing device and weatherstripping;
- 10 (5) the handrail on the stairway must be extended;
- 11 (6) parking space was insufficient;
- 12 (7) the clothes dryer was not properly vented;
- 13 (8) the electrical outlets in the bathroom must be equipped
14 with a ground fault interrupter;
- 15 (9) one of the bedrooms needed a window;
- 16 (10) the bedrooms needed smoke detectors; and
- 17 (11) larger air intakes were needed in the spaces in which the
18 hot water heater and furnace were located.

19 I find that the defects in the property were not as serious as
20 Hernandez' testimony portrayed. I find that the toilet overflowed
21 only intermittently, and was replaced in September 1999. I find
22 that the refrigerator functioned adequately at all times. I find
23 that Johnson did not turn off the heat in Hernandez' apartment at
24 any time. Both apartments were controlled by a single thermostat.
25 While this thermostat may have been set at a temperature somewhat
26 below what Hernandez may have preferred, it was never set at an

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1 unreasonably low level. Johnson did not dispute the existence of
2 the code violations noted in the Building Department letter.

3 While California courts have pioneered in recognizing the
4 implied warranty of habitability, they have narrowly defined that
5 doctrine to encompass only certain limited requirements. A leading
6 treatise states:

7 The measure of the landlord's duty to repairs is
8 determined by the "bare living requirements" in a
9 civilized society. This means that the level of
10 maintenance must be something more than mere
11 survival, since the mere fact that the tenant has
12 inhabited the premises means that he has been able
to survive. On the other hand, the landlord is not
required to retain the aesthetic conditions in the
premises that may be necessary for comfort and enjoy-
ment but not essential for the health and safety of
the tenant.

13 H. Miller & M. Starr, The Law of California Real Estate, Vol. 6
14 § 18:103 at 264 (2d ed. 1989). Accord Penner v Falk, 153 Cal.
15 App. 3d 858, 867-70 (1984). Similarly, not every housing code
16 violation constitutes a breach of warranty. "Minor housing code
17 violations standing alone which do not affect habitability must be
18 considered de minimis and will not entitle the tenant to reduction
19 in rent" Hinson v. Delis, 26 Cal. App. 3d 62, 70 (1972).

20 The California Supreme Court stated that the statutory
21 definition of "tenantability" set forth in section 1941.1 of the
22 Civil Code is relevant in determining whether a landlord has
23 satisfied the implied warranty of habitability. Green, 10 Cal. 3d
24 at 638 n.23. Section 1941.1 provides:

25 A dwelling shall be deemed untenable for pur-
26 poses of Section 1941 if it substantially lacks any of
the following affirmative standard characteristics:

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1 (a) Effective waterproofing and weather protection
2 of roof and exterior walls, including unbroken windows
and doors.

3 (b) Plumbing or gas facilities which conformed to
4 applicable law in effect at the time of installation,
maintained in good working order.

5 (c) A water supply approved under applicable law,
6 which is under the control of the tenant, capable of
7 producing hot and cold running water, or a system which
8 is under the control of the landlord, which produces hot
and cold running water, furnished to appropriate
fixtures, and connected to a sewage disposal system
approved under applicable law.

9 (d) Heating facilities which conformed with
10 applicable law at the time of installation, maintained
in good working order.

11 (e) Electrical lighting, with wiring and electrical
12 equipment which conformed with applicable law at the time
of installation, maintained in good working order.

13 (f) Building, grounds and appurtenances at the
14 time of the commencement of the lease or rental agree-
15 ment in every part clean, sanitary, and free from all
16 accumulations of debris, filth, rubbish, garbage, rodents
and vermin, and all areas under control of the landlord
kept in every part clean, sanitary, and free from all
accumulations of debris, filth, rubbish, garbage,
rodents, and vermin.

17 (g) An adequate number of appropriate receptacles
18 for garbage and rubbish, in clean condition and good
19 repair at the time of the commencement of the lease or
20 rental agreement, with the landlord providing appro-
21 priate serviceable receptacles thereafter, and being
responsible for the clean condition and good repair of
such receptacles under his control.

22 (h) Floors, stairways, and railings maintained in
good repair.

23 Judged against this standard, Johnson did not breach the
24 implied warranty of habitability. There was no material deficiency
25 regarding the heat, refrigerator, and toilet. The smell in the
26 wall was only an aesthetic annoyance. While some of the code
27 violations cited in the Building Department letter relate in some
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1 way to health and safety concerns, those violations were not
2 substantial and did not pose any immediate danger to the tenant.
3 The primary concern identified in the Building Department letter
4 is that the apartment violated local restrictions on second units,
5 which restrictions are aimed at parking and density concerns rather
6 than health and safety issues. The Housing Authority inspected the
7 apartment twice during Hernandez' tenancy and did not note any
8 defects.

9 **E. RETURN OF SECURITY DEPOSIT**

10 Hernandez contends that Johnson improperly failed to return
11 her security deposit. Johnson contends that Hernandez failed to
12 pay rent for the last ten months she lived in the apartment, and
13 that he is entitled to offset that claim against the security
14 deposit. It is undisputed that Hernandez paid Johnson a \$1,600
15 security deposit and that Johnson did not return any of it. It is
16 also undisputed that Johnson failed to provide Hernandez a written
17 statement specifying the reasons for retaining the deposit.
18 Johnson testified that Hernandez failed to pay rent after April
19 2000. Hernandez acknowledged that she failed to pay rent after
20 June 2000, but testified she did pay rent for May and June. I
21 credit Hernandez' testimony regarding this issue.

22 Regarding residential leases, California law provides that
23 within three weeks after the tenant has vacated the premises, the
24 landlord must either return the security deposit or provide the
25 tenant a written accounting regarding any amounts withheld. A
26 landlord who retains a deposit in bad faith is subject to statutory
27 damages. Civil Code § 1950.5. The California Supreme Court has

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1 held, however, that a landlord who in good faith fails either to
2 return the deposit or provide an accounting is not precluded from
3 asserting any claim for unpaid rent as a setoff in an action by the
4 tenant for return of the deposit. Granberry v. Islay Investments,
5 9 Cal. 4th 738, 745 (1995), cert. denied, 516 U.S. 866 (1995). The
6 decision does not define what "good faith" means in this context.
7 I conclude good faith exists, inter alia, where the landlord has an
8 objective, good faith basis to assert a claim for unpaid rent that
9 exceeds the amount of the deposit. The landlord bears the burden
10 of proof regarding both good faith and the validity of the offset
11 claim.

12 I determine that Johnson acted in good faith and that
13 Hernandez' claim for return of the security deposit is completely
14 offset by Johnson's claim for unpaid rent. It is undisputed that
15 Hernandez did not pay her \$387 share of the rent for the last eight
16 months of her tenancy. This amount exceeds the \$1,600 deposit.
17 She contends she was not required to do so because Johnson breached
18 the implied warranty of habitability. For the reasons noted in
19 Part D, supra, I find there was no breach of warranty.
20 Consequently, Hernandez is not entitled to recover any part of the
21 security deposit or recover statutory damages for Johnson's failure
22 to provide an accounting. Johnson did not assert any affirmative
23 claim for recovery of the unpaid rent or seek to assert any setoff
24 rights against the claim for retaliatory eviction.

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1 **CONCLUSION**

2 Hernandez has an allowed unsecured claim in the amount of
3 \$7,912, plus costs of suit, plus those attorneys fees subsequently
4 awarded regarding the retaliatory eviction claim.

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8 Dated: June 22, 2001

9 Thomas E. Carlson
United States Bankruptcy Judge

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