NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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Re: *Cedric Evans, et al. v. John Scanlon, et al.*
Case No. CL-2017-6609

John Scanlon, et al. v. Cedric Evans, et al.
Case No. CL-2017-7422

Dear Counsel:

These cases were consolidated for trial and came before the Court on January 9 and 10, 2018 for trial without a jury. At the conclusion of the trial, the Court took these matters under advisement. Since that time, the Court has had the opportunity to fully consider the testimony and exhibits presented at trial along with the arguments of Counsel. During the trial, the Court had the opportunity to observe the witnesses as they testified and made determinations as to the witnesses' credibility. For the reasons that follow, the Court finds in favor of the Scanlons in each case. In Case No. CL-2017-7422, the Court awards damages in the amount of $76,597.23 (after application of the security deposit held by the Scanlons).

OPINION LETTER

FACTUAL BACKGROUND[1]

This litigation arises over the rental of a single family home in McLean, Virginia. The Plaintiffs in each case accuse the Defendants of breaching their lease and seek damages.[2] In January 2016, the Evans family moved from Texas so that Mrs Evans could accept employment in northern Virginia. Because the Evanses had not yet sold their home in Texas, they decided to rent a home that the landlord might ultimately be willing to sell to them. The Scanlons, who live in North Carolina, own a home in McLean, Virginia, that they were seeking to rent or sell. On February 28, 2016, Mr. & Mrs. Evans completed and signed a Rental Application (Scanlon Exhibit 1C) in which they provided identifying information about themselves and immediate family, their employment, income and debts. On March 8, 2016, the Evanses and the Scanlons entered into a lease for the McLean home.

1. The Lease and Lease Addendum

The Parties signed a lease that is on a standard form used by the Northern Virginia Association of Realtors, with a non-standard lease addendum (collectively, "the Lease"). (Evans Exhibit 1.) The Lease identified the premises and fixed the lease term from May 27, 2016 at noon to 5:00 p.m on July 31, 2019. The total rent for the lease term was $209,000 to be paid at a rate of $5,500 per month.[3] The lease at issue in these cases provides in relevant part as follows:

> **4. LATE PAYMENT, RETURNED CHECKS, FAILED ELECTRONIC FUNDS TRANSFER.** Installments of Rent not received by Landlord on or before the due date are late and constitute a default under Lease. If any installment of Rent is not received by Landlord within 5 days from the due date, Tenant agrees to pay a late charge of $150.00.
>
> **5. FAILURE TO PAY RENT.** Tenant's failure to pay any installment of Rent when due constitutes a default under Lease. If Tenant does not pay the Rent within 5 days after the Landlord has given a default Notice to Tenant, Landlord may terminate Lease and proceed to obtain possession of the Premises in accordance with the law and seek such damages and other remedies as may be appropriate under lease and Virginia Law.

[1] This recitation of the facts constitutes the Court's findings of fact Given the nature of the case, a rather detailed recitation of the facts is necessary

[2] *Evans v Scanlon*, CL-2017-6609, is an appeal from the General District Court in which the Evanses are seeking the return of their security deposit and advance rental payments *Scanlon v Evans*, CL-2017-7422, is an original action filed in the Circuit Court, in which the Scanlons are seeking unpaid rent and other damages

[3] For the last few days of May 2016, the rent would be $904 11

7. TRUTHFULNESS OF REPRESENTATIONS IN THE RENTAL APPLICATION.
Tenant warrants that the statements made on the Rental Application ("Application"), which are made a part of Lease, are true and accurate representations and acknowledges that such representations have been relied upon by Landlord. If any material facts in Application are untrue or inaccurate or incomplete, Landlord shall have the right to: (a) immediately terminate Lease, (b) hold Tenant liable for any and all damages to persons, property or the Premises, (c) exercise all legal and equitable rights and remedies, and (d) recover reasonable attorney's fees and costs and all costs incurred to reclaim the Premises and to rent the Premises to another tenant.

12. UTILITIES AND SERVICES. Tenant must make any required deposits and pay for the following utilities and services: **[x]** water **[x]** sewer **[x]** gas **[x]** electricity **[ ]** trash removal **[x]** lawn service **[ ]** security system **[ ]** other _____ during the Lease Term. . . . Prior to the release of the Security Deposit, Tenant shall provide to Landlord proof of payment of final utility bills for those services for which Tenant is responsible.

17. MOVE-IN INSPECTION. Within 5 days after the beginning of the Lease Term, Landlord shall submit a written report to Tenant itemizing the condition of the Premises at occupancy including the identification of any visible evidence of mold. This report is for information only and does not constitute an agreement to decorate, alter, repair or improve the Premises. Any request for repairs must be submitted separately in writing to Landlord. This report shall be deemed correct unless Tenant submits additional items in writing to Landlord within 5 days after receipt of the report. If Tenant does not object to any item on Landlord's move-in inspection report, then Tenant thereby agrees that the Landlord's move-in inspection report is deemed to be correct, including, but not limited to, that there is no visible evidence of mold in the Premises. If Landlord's move-in inspection report states that there is visible evidence of mold in the Premises, Tenant has the option to not take possession and terminate the tenancy or to remain in possession of the Premises. If Tenant requests to take possession, or elects to remain in possession of the Premises, notwithstanding the presence of visible evidence of mold, Landlord shall promptly remediate the mold condition no later than 5 business days thereafter and re-inspect the Premises to confirm there is no visible evidence of mold in the Premises. A new move-in inspection report will reflect that there is no visible evidence of mold in the Premises.

18. TENANT OBLIGATIONS. . . . Tenant shall be responsible for
A. Maintaining the Premises in a clean and sanitary condition and disposing of all trash, garbage, and waste in sealed containers.
* * *

E. Maintaining the Premises in such a manner as to prevent the accumulation of moisture and the growth of mold . . .
* * *

F. Cutting, watering and maintaining the lawn and pruning shrubbery; promptly removing ice and snow from all walks, steps and drives; maintaining exterior gutters, drains and grounds free of leaves and other debris.
* * *

J. Controlling and eliminating household pests . . . .

20. INSURANCE REQUIREMENTS. Throughout Lease Term, Tenant shall maintain an insurance policy which provides for liability coverage, protects Tenant's personal property at Tenant's sole cost and expense Tenant shall provide Landlord with a certificate of such insurance prior to occupying the Premises. . . .

If Tenant fails to provide a certificate of insurance, Landlord may obtain a policy covering Tenant's personal property and liability coverage. The cost shall be added either to the monthly Rent or paid by Tenant as invoiced by Landlord.

21. COSTS OF ENFORCEMENT, WAIVER OF EXEMPTIONS, SEVERABILITY AND STATUTORY REQUIREMENTS.
* * *

B. If Tenant fails to perform any of the provisions of Lease (other than failure to pay Rent when due), or upon abandonment of the Premises, Landlord shall give written Notice to Tenant specifying the particular non-compliance and Landlord may terminate Lease not less than 30 days after Tenant's receipt of such notice unless Tenant remedies the non-compliance within 21 days in a manner acceptable to Landlord. In addition to any costs of enforcement, Landlord shall be entitled to possession of the Premises, a money judgment for Rent, damages including physical damages to the Premises and actual damages for what would have been the Rent for the balance of the Lease Term, subject to Landlord's duty to mitigate damages

and re-rent the Premises . . . . If Landlord does not pursue Lease termination when non-compliance is noted or accepts additional Rent payments, such actions do not constitute a waiver or acceptance of the non-compliance. Landlord reserves the right to take future action against non-compliance.

43. ADDITIONAL TERMS.

* * *

2) Landlord will have agreed upon rooms painted a neutral color of their choosing

At the same time the Lease was signed by the Parties, they also executed a Lease Addendum. The Lease Addendum states, in relevant part, that the Landlord is exempt from the Virginia Residential Landlord and Tenant Act and that its terms do not apply to the Lease. The addendum includes a provision that "Landlord may choose to remedy any noncompliance directly rather than hire independent contractors for such purposes.... Landlord may charge to Tenant any such time spent . . . at the rate of $40 per person per hour." The Addendum also provided for the Tenant to pay Landlord and / or family members performing pro se legal work to enforce Tenant's obligations under the Lease at the rate of $100 per hour. Lastly, the Lease Addendum included the following provisions:

Tenant's Early Termination of Occupancy

Tenant and Landlord agree that in the event of Tenant's early termination of occupancy . . . Landlord shall not be obligated to lease the premises to a third-party in an effort to reduce Tenant's liability for rent for the remainder of the lease term. Further, Tenant and Landlord agree that Tenant shall not be entitled to receive the benefit of any rent paid by a third party following Tenant's early termination of occupancy.

Tenant's Obligations for Maintenance, Repairs and Cleaning

* * *

Tenant agrees that his/her obligations under the Lease shall include, but not be limited to the following

1. Establishing utility accounts in tenant's name for gas, electric, water, phone, cable and/or other services (including any change fees imposed by such utilities), and promptly contacting all such utilities to request transfer of service back to Landlord upon termination of the Lease.

* * *

Upon signing the Lease, the Evanses paid the Scanlons $6,404.11 in rent for the period of May 27 through June 30, 2016 The Evanses also paid a security deposit of $6,000.

2. The Parties' actions in March and April 2016

On March 16, 2016, eight days after signing the Lease, Mrs. Evans sent an email to the Scanlons requesting permission to enter the house with Mrs. Evans' sister in order to plan interior decorating. The Scanlons agreed and provided Mrs. Evans with the keypad code to enter the garage and the location of a hidden key. (Scanlon Exhibit 5.)

The next contact between the Parties occurred on April 13, 2016, when Mrs. Evans sent an email to the Scanlons seeking to schedule a telephone call to discuss the areas of the house to be painted, timing of the walk-through, obtaining historical utility bills and expenses, "home inspection timing" and remodeling opportunities. (Scanlon Exhibit 6.) The requested telephone call occurred on April 26, 2016, between Mr. Scanlon and Mrs Evans. In the telephone call, they discussed the items mentioned in Mrs. Evans's email of April 13. Mr. Scanlon declined to make the remodeling changes requested by Mrs. Evans.[4] Mr. Scanlon also declined to accelerate the move-in inspection provided for by Paragraph 17 of the Lease. Mr. Scanlon explained that the purpose of this inspection was to establish the condition of the home at the time the tenants take occupancy. Mr Scanlon stated that he needed to return to Virginia to perform maintenance and clean the premises before the move-in inspection could be completed. Mr. Scanlon agreed to send the utility history to Mrs. Evans, which he did shortly thereafter.

During the April 26, 2016 telephone call, Mr. Scanlon offered to have Mr.& Mrs. Evans meet him at the property on May 9 at 5:30 p.m. to review with Mr. Evans the operation of the home's systems and maintenance procedures. Mr. Scanlon suggested that Mr. & Mrs. Evans could at that time identify any other items about the house that needed maintenance, and he would have the opportunity to address them as he prepared the home for occupancy. Mrs. Evans' recollection on this point is different. Mrs. Evans testified that she asked Mr. Scanlon for permission to enter the home with an inspector prior to May 9 and that he agreed. Mr. Scanlon denies that Mrs. Evans ever made such a request, and he denies ever granting permission for an inspector to enter the home, particularly without him being present at the time. It is unnecessary for the Court to resolve this factual dispute. However, the Court notes that the different understandings regarding this issue put the Parties on the path to this litigation.

[4] The remodeling requests included removing wallpaper in a bathroom and repainting, refinishing the hardwood floors from light oak to dark brown, and replacing a doorway with a wall Mrs Scanlon sent an email to Mrs Evans the day after the telephone call explaining her reasoning for declining the remodeling request (Scanlon Exhibit 7 at 377)

The Parties exchanged several emails over the next two days, April 27 and April 28, 2016 In those emails, Mrs. Evans stated that she was "[h]appy to concede on most points below, but the half bathroom is a non-starter .... Please neutralize it . . . ." Mrs. Evans acknowledged receipt of the past utility bills and stated that she would "ensure we have appointments scheduled to turn on service upon taking occupancy. Also, we are confirmed for 5:30pm *(sic)* on 5/9 . . ." Mrs Scanlon responded, stating that she and Mr. Scanlon "are already feeling pushed ... [ellipsis in original] hard." (Scanlon Exhibit 7 at 377.) Mrs. Scanlon proposed another telephone call to address "a disconnect between our collective negotiations over the lease terms and your subsequent requests for changes." Mrs. Evans responded, stating that she and Mr. Evans "have conceded on all other issues" regarding remodeling requests and that her original concerns from April 13 had been discussed. (Scanlon Exhibit 7 at 376.)

3. The May 4, 2016 four-way telephone call

The proposed telephone call between the Parties occurred on May 4, 2016 Rather than resolving any differences between them, this telephone call created more problems. During this call, Mrs. Evans informed the Scanlons that she had entered the house with inspectors and that mold had been observed in the attic. Mrs. Evans told the Scanlons that she had reports from the inspectors, including photographs, but would not provide those to the Scanlons.[5] Mr. Scanlon testified that this was the first he learned that Mrs Evans had used the code previously provided to enter the house with an inspector. The Scanlons were quite surprised, displeased and upset. Mrs. Evans testified that she was equally surprised by the Scanlons' reaction to this information, because she believed she had been given permission to enter and inspect the house. The telephone call terminated abruptly due to a technical glitch When the Scanlons reconnected with Mrs. Evans, she declined to continue the conversation at that time, but stated that she would call again Mrs. Evans, however, did not call again.

Mr. & Mrs. Scanlon sent an email to Mr. & Mrs. Evans late in the evening on May 4, 2016 (Scanlon Exhibit 9 at 0552.) In that email, the Scanlons stated that the Evanses would need express permission to enter the home for any reason before the beginning of the lease term, and that Mr. Scanlon would meet with them on May 9 to review maintenance procedures at which time they could address anything that needed fixing The Scanlons also requested copies of the reports of any inspections before agreeing to take any remedial action. The Scanlons closed this email by telling the Evanses that they

[5] On April 29, 2016 Mrs Evans had contacted Drying Tech, a company that performs mold remediation, to inspect the home (Evans Exhibit 2, Scanlon Exhibit 8) That inspection occurred on April 30 and was provided for free, without any cost to the Evanses The inspector provided a cost estimate for remediation, but did not issue a report detailing his inspection efforts, observations, or conclusions There was no evidence presented that any other inspection of the home had actually occurred

were open to limited reasonable requests beyond the lease terms, but that "generally following the lease terms will keep our business relationship positive "

4. Mr. & Mrs. Evans terminate the Lease

Early in the morning on May 6, 2016, Mr. & Mrs. Evans responded to the Scanlons' May 4 email. (Scanlon Exhibit 9 at 0551.) The Evanses recounted their belief that they had been granted express permission for inspectors to visit the home before taking possession, and that their intention in the telephone call was to discuss remediation of the mold observed. The Evanses expressed that they were offended by the Scanlons' implication that they were liars, and also stated that the Scanlons had not acted "as reputable people that we could trust to be straightforward, accountable, business-minded and respectful." Mr. & Mrs. Evans closed the email with the following statement: "For the avoidance of doubt, we have decided at this point not to take possession of the home and terminate the tenancy based on the provision in Section 17 of the lease agreement when mold is identified in the home. . . . In the interim, we will start over again with our home search and seek alternative housing arrangements." The Evanses also requested return of the $12,404.11 that had been paid to the Scanlons under the Lease.

5. Mr. & Mrs. Scanlon refuse termination

On the evening of May 8, the Scanlons responded by email to the Evanses' May 6 email (Scanlon Exhibit 10 at 880.) The email details the Scanlons' view of the interaction between the Parties through the May 4 telephone call. The Scanlons told the Evanses that they understood the May 6 email to be "a clear and unequivocal written statement that you have abandoned our lease agreement. ... [W]e do not believe you have any right under paragraph 17 or otherwise to avoid or terminate your obligations under the lease. We believe the lease remains in effect and if needed, we intend to enforce it to the fullest extent of the law." The Scanlons encouraged the Evanses to speak with their real estate agent, Tamer Eid, who would try to resolve the issues between them The Scanlons closed their email with the following: "If you would like to have any input on how the house will be turned over to you at the beginning of your lease term on May 27th, or you want to negotiate some other arrangement to release you from your lease obligations, please reply in writing by early afternoon on Monday [May 9, 2016]."

6. No change in the Parties' positions from May 9 through May 20

Over the next 12 days, the Parties engaged in a limited dialogue concerning the issues between them. On or about May 9, Mr. Scanlon traveled from North Carolina to McLean to prepare the home for occupancy. He was present at the home on May 9 at 5:30 p.m. for the previously scheduled meeting with the Evanses to review maintenance

procedures for the home and to discuss any repairs needed before they took possession. Mr. & Mrs. Evans did not appear for that meeting.

On the morning of May 17, Mrs. Evans sent an email to Mr. Eid as a follow-up to a conversation they had the day before. (Scanlon Exhibit 15 at 876.) Mrs. Evans sent the mold remediation cost estimate and photographs of the alleged mold from the attic. Mrs. Evans told Mr. Eid that "Our main concern is the decontamination work that needs to be done in the attic . . . [W]e'd like to ensure that this is completed, and in turn, we'd also like to shorten the lease term to 12 months . . . ." Mr. Eid acknowledged receipt of the remediation cost estimate, but requested the "actual inspector report where the inspector comments on the finds, etc." (Scanlon Exhibit 15 at 875.) Although no inspection report other than the remediation estimate ever existed, Mrs. Evans responded, "As I've stated to the Scanlons and in our conversation yesterday, we are not comfortable providing the reports because it is an investment on our part and a sunk cost should we decide not to purchase the home [[6]] . . . We do not believe the full home inspection and mold reports would be required in order to fix this immediate issue " (Scanlon Exhibit 15 at 875.) Mr. Eid provided Mrs. Evans' email to the Scanlons. The Scanlons rejected the proposal for a 12 month lease and were unwilling to undertake remediation without the reports.[7]

On the morning of May 20, Mrs. Evans contacted Mr. Eid "to see if we can regroup and clear a path toward closure with the [address omitted] property. Our relocation consultant at Graebel has been notified about the pending suspension and extended temp housing needs but we must inform other vendors like Budd Van Lines and MSS [Movers Specialty Service] by EOB today so that they have at least one week's notice for scheduling changes." (Scanlon Exhibit 15 at 872.) Mrs. Evans continued the email by stating: "[I]f you don't believe that we can reach some sort of consensus and need to part ways, that's okay – we just need to let others know asap. Thanks again for your efforts to help mediate between the two parties." When Mrs. Evans had not received a response by 7:00 p m., she sent an email to Mr. Eid stating that "I suspended the work orders today and confirmed the extension with Graebel given the sensitive timeframe and persisting uncertainty. . . . We have a few follow up meetings next week to determine next steps on our side." (Scanlon Exhibit 15 at 871.)

[6] Mrs Evans admitted at the trial that there was only one inspection that was done, and that was at no cost She explained at trial that the "sunk cost" that she referred to in this message was one of time, not money

[7] While preparing the home for occupancy, Mr Scanlon searched the attic for evidence of mold and paid an inspector to examine the attic These inspections produced no evidence of mold in the attic Mr Scanlon was informed by his inspector that the discoloration on the attic beams observed by Mrs Evans' inspector was likely from water exposure in the lumber yard before the home was constructed approximately 25 years before

7. The May 21 and May 23 emails

The Scanlons responded in writing to Mrs. Evans' email to Mr. Eid on the afternoon of May 21, 2016. (Scanlon Exhibit 15 at 867.) After recounting the events since the May 4 telephone call and detailing their own investigation of any water damage and mold issues,[8] the Scanlons stated that "there is no credible evidence of a mold problem in the attic of our home that requires remediation. Therefore, we have no plans to make any repairs, alterations or changes in our attic, and we do not authorize any other party to do so." The Scanlons expressly rejected renegotiating the lease term to a period of 12 months. The Scanlons also suggested that the Evanses contact the property's homeowners' association regarding bylaws that might preclude placement of a trampoline and basketball hoop on the premises.

Mrs Evans responded in the early evening of May 21. (Scanlon Exhibit 15 at 865) She stated that "the tone of the [Scanlons'] reply is disparaging and unproductive." Mrs. Evans further stated that "no individual from [Dry Tech] was ever involved in the home or mold inspections that were conducted ...."[9] Mrs. Evans again stated her refusal to provide the Scanlons with a copy of any inspection reports Mrs. Evans then referenced the requirement for a move-in inspection report within five days of the beginning of the lease term, stating, "please kindly advise re: which day – between 5/27/16 and 5/31/16 – the landlord will deliver the move-in inspection report and special maintenance instructions for review and response from all parties representing the Evans family. In the interim, all move-in plans have been halted as previously indicated."

On May 23, 2016, Mr. Evans spoke to Mr. Eid, who later contacted the Scanlons. The Court did not receive any testimony from any individual involved in that conversation, and thus the Court has no credible evidence as to what was actually said That conversation did not result in any agreement between the Parties. (Scanlon Exhibit 15 at 863, in which Mr. Eid writes to the Scanlons that "I was not disappointed in your response to Cedric [Evans] I'm just disappointed that it came to this and we wren't (*sic*) able to work it out....") Mr. Eid informed the Parties that "he was stepping aside at this point ..." believing he could not be of any help to the Parties in resolving their differences. (Scanlon Exhibit 15 at 865.)

[8] In addition to the mold inspection by Mr. Scanlon and his contractor, the Scanlons spoke to the Dry Tech representative regarding the nature and scope of their inspection for the Evanses The email included a detailed recounting of that conversation

[9] No evidence was produced at trial that Mrs Evans had any professional other than Dry Tech inspect the home

8. The Evanses attempt to take occupancy of the property

On the morning of Thursday, May 26, 2016 – the day before the lease term was to begin -- Mr. Evans emailed Mr. Scanlon regarding taking occupancy of the premises. (Evans Exhibit 10.) In that email, Mr. Evans wrote that "We'd like to move forward in the process but need to connect with you today for the family to take occupancy of [the property]. Let me know thoughts . . . ." Mr. Evans listed five points:

First, he requested confirmation that "the property is ready for us to take possession[,]" and that there were no burst pipes and that the home had running water. Mr. Evans stated that "We need also to switch all utilities over to us, which Nia [Evans] is working on for tomorrow."

Second, Mr. Evans requested to know when the Scanlons would provide the move-in inspection report, along with any special maintenance instructions.

Third, Mr. Evans requested to know "the best way to access the home once the lease term begins on May 27th . . . how to obtain keys, etc . . ."

Fourth, Mr. Evans stated that "We've been advised to complete another round of inspections at the onset of the lease term on May 27th for the purpose of establishing a comprehensive baseline for the homes' condition prior to move-in. . . . We want to make sure you're aware of our desire to have this done and will advise of any material outcomes in a formal response to the move-in report."

Fifth, Mr. Evans stated that "We need your commitment to help resolve any mold issues in the home given the severity of mold allergies in our family. We'd like to identify the most agreeable path forward, which can be entirely based on what we both agree is "credible" findings from another independent inspector who we will authorize access to inspect the home under our tenancy. Again, we'll include those details in a response to the move-in inspection report, and we'll also make sure we have things like free-standing filters and dehumidifiers in the areas where our son will spend the most time."

Mr. Evans concluded his email by stating that "we're now working with a real estate agent and legal counsel . . . and they're advising us appropriately to ensure that things progress smoothly from here. We look forward to hearing from you soon." On Friday, May 27, 2016, at 5:56 a.m., Mr. Evans sent a follow-up message "to get an update on the Move-in (*sic*) ready items. The Scanlons did not respond to either message from Mr. Evans.

On May 27, 2016, at approximately 11:30 a m , Mrs. Evans went to the property to take occupancy at noon. The Scanlons were in North Carolina. At 3.25 p.m., an attorney

representing the Evanses sent an email to Mr. Scanlon informing him that the Evanses were at the property, but no one was there to provide them with access. The attorney asked whether the Scanlons were going to deliver the property or not. (Evans Exhibit 11.)

At 3:52 p.m. on May 27 the Scanlons responded by sending an email to Mr. & Mrs. Evans. (Scanlon Exhibit 11A.) The email included two attachments: 1) the move-in inspection report as required by Paragraph 17 of the Lease (Scanlon Exhibit 11B) and 2) a Notice to Tenant pursuant to Paragraph 21B of the Lease (Scanlon Exhibit 11C). In that Notice, the Scanlons stated that they were "ready, willing and able to deliver possession of the Premises" to the Evanses, and to contact them to obtain occupancy "once you have fulfilled all obligations pursuant to the Lease and Lease Addendum required for Tenant to begin occupancy." The Notice alleged that the Evanses were in breach of the Lease as follows:

- Tenant's failure to pay and/or make arrangements to pay for water, sewer, gas and electric utilities as required under Lease paragraph 12 and the Lease Addendum.
- Tenant's failure to adhere to maintenance obligations of Lease paragraph 18, including but not limited to subparagraphs A, E, F, and J, and the Lease Addendum
- Tenant's failure to obtain insurance coverage as required under Lease paragraph 20, and failure to provide a certificate of insurance evidencing the same to Landlord.
- Tenant's abandonment of the Premises as referenced in paragraph 21.B.

(Scanlon Exhibit 11C.) The Notice demanded, pursuant to the Lease, that the Tenant remedy the breaches within 21 days, after which the Landlord could terminate the Lease and seek other remedies.

The Evanses concede that as of the beginning of the Lease term on May 27, they had not obtained renter's liability insurance and had not arranged for water, gas, electric, or cable services in their name. By 9 34 a.m. the next day, May 28, 2016, the Evanses provided proof of insurance. (Scanlon Exhibit 18.) The insurance would become effective at 12.01 a.m. on May 29. The Evanses explained that utilities could not be transferred to them until after the Memorial Day holiday, as such required in-person contact with the service providers which was not possible during the holiday weekend. In the email, the Evanses wrote "We also have not (and have no intention to) abandoned (*sic*) the property or breached any agreement to maintain it properly, having not yet taken possession." The email requested the access code so that they could move in.

The moving company appeared at the property on the morning of May 28, 2016 to complete the move-in. At 10:15 a m. Mr. Evans sent a text to Mr. Scanlon informing him that Mrs Evans and the movers needed the code to enter the property. (Evans Exhibit 18.) After receiving the text, the Scanlons and Mrs. Evans had a telephone conversation that lasted approximately one hour. Although the conversation was recorded by consent of the participants, it was not submitted as evidence. In the conversation, the Scanlons stated that they would not permit occupancy until the insurance policy became effective and utilities had been transferred to the Evanses. The Scanlons also requested a written statement from the Evanses affirming that they would adhere to the Lease as written. Mrs. Evans conceded that insurance was required to take possession and was unaware that the policy she had purchased would not become effective until the following day Mrs Evans disputed that transfer of utilities was a prerequisite to taking occupancy. The Parties discussed setting another date to complete the move-in, but the movers could not commit to a particular date during the telephone call.

At 10.02 p.m., the Evanses sent an email to the Scanlons responding to the allegations of breach in the Notice to Tenant. (Scanlon Exhibit 19) The Evanses denied abandoning the premises under paragraph 21.B., or failing to adhere to maintenance obligations, particularly when they have been denied access to the home. The Evanses stated their efforts to obtain utility services in their name and again took the position that the Lease did not make this a prerequisite to occupancy. Lastly, the Evanses acknowledged that they were not in compliance with the insurance requirement, but had provided evidence of insurance effective as of midnight on May 29. The Evanses stated that "we believe that the Landlord is in breach of the contractual terms by behaving in a manner that is inconsistent with the provisions ... in the Lease.... [W]e ask that you extend the deadline to provide a formal response to your Move-In Inspection Report ... since we have not yet been given access to the home."

The next day, May 29, 2016, at 11:35 a m , the Scanlons sent an email to the Evanses in response. (Scanlon Exhibit 21.) The email began by stating, "We are disappointed that you remain in breach of the Lease and Lease addendum, yet continue to make requests for accommodations by us beyond our obligations under those documents." The email reviewed the history between the Parties and the Scanlons' position on the allegations of breach contained in the Notice to Tenant. With regard to the alleged abandonment,[10] the Scanlons requested an expression by the Evanses "of your willingness to abide by all of the terms of the Lease and Lease Agreement (*sic*) as

[10] It is clear from this email that the word "abandonment" as used by the Scanlons in their Notice to Tenant and in this email refers to the purported repudiation of the lease stated in the Evanses' email of May 6, in which the Evanses stated that "we have decided at this point not to take possession of the home and terminate the tenancy . . ." (Scanlon Exhibit 9 *See also* Scanlon Exhibit 10 in which Scanlons state that the May 6 email amounted to "a clear and unequivocal written statement that you have abandoned our lease agreement ")

written. In this email, the Scanlons acknowledge that the breach with respect to renter's insurance had been cured. The Scanlons stated that they had no notice that the Evanses intended to move in on May 27 until Mr. Evans left a message for Mr. Scanlon, and that any statements after May 6 about moving in were conditional in nature The Scanlons declined the request for additional time for the Evanses to respond to the move-in report beyond that stated in the Lease. The Scanlons closed by again asserting that they were "ready, willing and able to deliver occupancy once you have cured your breaches cited in our Notice to Tenant . . . ."

9. The Evanses terminate the Lease

On May 31, 2016, counsel for the Evanses sent a Notice of Lease Termination to the Scanlons. (Evans Exhibit 19.) That letter asserts that the Scanlons breached the Lease by making "demands that are either impossible, or are not prerequisites to taking possession of the Premises " The letter rebuts each of the breaches alleged in the Notice to Tenant and states that the Scanlons' are in material breach of the Lease The letter declares that the Evanses are terminating the Lease as a result of that breach and pursuant to Virginia Code § 55-255.2, and demands the return of all funds paid by the Evanses. On June 1, the Scanlons responded to counsel and denied all allegations in counsel's letter of May 31. (Evans Exhibit 27.) The Scanlons also sent a second Notice to Tenant alleging that counsel's letter constituted a breach of the Lease and a waiver of the notice and cure provisions. (Scanlon Exhibit 24.) The Scanlons claimed damages of the full $209,000 in rent due under the lease plus other damages and costs.

10. Aftermath

The Evanses rented alternative housing in Maryland beginning on June 15, 2016 The Scanlons re-listed their property with a real estate agent and obtained a new tenant on March 6, 2017 for a lease term of three years at $4487.67 per month.

ANALYSIS

The Scanlons claim that the Evanses breached the Lease by repudiating it on May 6, 2016, and claim that the repudiation was never retracted. The Scanlons further claim that the Evanses breached the Lease by failing to satisfy the prerequisites to taking possession and by terminating the Lease on May 31. The Evanses deny that they repudiated the Lease, claim that any repudiation was retracted, and that the Scanlons breached the Lease by denying the Evanses occupancy even after all lease prerequisites were satisfied.

1. Repudiation and retraction

The Court turns first to the issue of repudiation and retraction. The Restatement of Contracts states in relevant part that "[a] repudiation is (a) a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach . . ." Restatement (Second) of Contracts, § 250 (1981). "[I]t has been held that where there has been a total refusal on the part of one of the contracting parties to perform the contract on his part the other may elect to sue at once, without waiting for the time of performance to arrive." *Lee v. Mutual Reserve Fund Life Asso.*, 97 Va. 160, 163, 33 S.E. 556, 557 (1899). The promisee, however, has the right of electing to wait until the time comes for the performance of the contract before declaring a breach. *Simpson v. Scott*, 189 Va. 392, 397, 53 S.E.2d 21, 23 (1949). Additionally, "[r]epudiation may be asserted as a valid defense to a breach of contract claim in Virginia." *Bennett v. Sage Payment Solutions, Inc.*, 282 Va 49, 55, 710 S.E.2d 736, 740 (2011). "It is firmly established that for a repudiation of a contract to constitute a breach, the repudiation must be clear, absolute, unequivocal, and must cover the entire performance of the contract." *Vahabzadeh v. Mooney*, 241 Va. 47, 51, 399 S.E.2d 803, 805 (1991). Likewise, "to be effective, a retraction of a repudiation must be clear, definite, absolute, and unequivocal in evincing the repudiator's intention to honor his obligations under the contract." *Id.* A statement is ineffective as a retraction if performance under the contract is conditioned upon acceptance of a new or additional provision to the contract. *Id.*

Applying the foregoing principles, the Court finds that the Evanses repudiated the lease in their email of May 6, 2016. That email stated that "For the avoidance of doubt, we have decided at this point not to take possession of the home and terminate the tenancy based on the provision in Section 17 of the lease agreement when mold is identified in the home. . . . In the interim, we will start over again with our home search and seek alternative housing arrangements." In that same email, the Evanses demanded the return of all payments made by them to the Scanlons. This is a clear, absolute, and unequivocal expression of intent not to perform any of their obligations under the lease. Because the Evanses did not have the right to terminate the Lease pursuant to Paragraph 17,[11] or pursuant to any provision of law,[12] the Evanses' statement constitutes a repudiation and breach of the lease by the Evanses.

[11] Paragraph 17 concerned the move-in inspection report that the Landlord was required to provide to the Tenant within five days after the Tenant's occupancy If that report disclosed the presence of mold, then the Tenant would have the option to not take possession and terminate the tenancy Paragraph 17 was inapplicable on May 6, because the tenancy had not begun and the Scanlons had not yet provided a move-in inspection report Thus, on May 6, Paragraph 17 did not provide the Evanses with the right or option to terminate the lease

[12] At trial, the Evanses did not present any authority that would afford them the right to terminate the lease based on their assertion of the existence of mold To the extent that such a right indeed exists, the Court

The Evanses claim that any repudiation was retracted. The Court does not agree. The Evanses' words and conduct after the May 6 repudiation through the beginning of the lease term on May 27 were not clear, definite, absolute, and unequivocal in evincing their intent to honor their obligations under the Lease. On May 9, the Evanses did not appear for the scheduled meeting with Mr. Scanlon to discuss maintenance procedures and any needed repairs. On May 17, Mrs. Evans requested a reduction in the lease term to 12 months. On May 20, Mrs. Evans sought to reach a "consensus" on resolving the Parties' differences. When none occurred, Mrs. Evans told the Scanlons (through Mr. Eid) that she had suspended the work order to move her family's belongings. On May 21 Mrs. Evans told the Scanlons that "all move in plans have been halted as previously indicated[,]" until the Scanlons informed her of the day the landlord would deliver the move-in inspection report and special maintenance instructions for review and response.[13] Nothing changed as a result of the May 23 telephone call between Mr. Evans and Mr. Eid. Thus, through May 23, the Evanses expressed intention was that they would ***not*** honor their obligations under the Lease.

The Evanses' first statement after their May 6 repudiation that they would like to take occupancy did not occur until May 26, the day before the lease term was to begin. Mr. Evans' email to the Scanlons, however, is not a clear, definite, absolute, and unequivocal affirmation of the Evanses' intent to perform all of their obligations in accordance with the lease. In the email, Mr. Evans stated "We'd like to move forward in the process but need to connect with you today for the family to take occupancy of [the property] . . ." The email raised five matters. The fifth item sought to vary the terms of the Lease in the event that mold was observed in the home. Rather than adhere to the clear procedure for that contingency set forth in Paragraph 17 of the Lease, Mr. Evans requested a new "commitment" regarding that issue "We need your commitment to help resolve any mold issues . . . . We'd like to identify the most agreeable path forward, which can be entirely based on what we both agree is 'credible' findings from another independent inspector who we will authorize access to inspect the home under our tenancy." This proposal to modify the existing lease terms and engage in further negotiation renders this communication ineffective as a retraction of the prior repudiation. *See Vahabzadeh v. Mooney*, 241 Va. at 51, 399 S.E.2d at 805. The Court finds that prior to the commencement of the lease term, the Evanses had not retracted their repudiation of May 6.

finds that the Evanses have not proved by a preponderance of the evidence that mold existed in the property.

[13] Paragraph 17 of the lease required the Scanlons to provide the move-in report within five days after the beginning of the lease term Nothing in the lease required the Scanlons to provide advance notice of when within that five day period the move-in report would be provided Also, although Mr Scanlon had offered to personally review the home's maintenance procedures with the Evanses, nothing in the lease required the Scanlons to provide those maintenance procedures orally or in writing

The Evanses claim, however, that any repudiation was retracted when they attempted to take possession of the property. The Court does not agree, because those actions did not evince a clear, definite, absolute and unequivocal affirmation of all of their future obligations under the Lease. The Evanses could take possession of the property without any intent to remain for the full lease term or to perform their other obligations under the Lease. In fact, while attempting to take possession, the Evanses were in breach of the Lease because they had not obtained liability insurance prior to the beginning of the lease term. The Evanses also sought to change the terms of the Lease by asking for more time to respond to the move-in report. (Scanlon Exhibit 19.) These facts negate any inference that the Evanses were affirming all of their obligations under the Lease by attempting to take possession The next communication from the Evanses came through their counsel on May 31, in which the Evanses terminated the Lease. (Evans Exhibit 19.) Thus, the Court finds that the Evanses never retracted their May 6 repudiation.

As a result of the Evanses May 6 repudiation which was not retracted, the Scanlons were not obligated to perform under the Lease. *See Horton v. Horton*, 254 Va. 111, 116, 487 S.E 2d 200, 204 (1997) ("If the initial breach is material, the other party to the contract is excused from performing his contractual obligations."), Restatement (Second) of Contracts, § 253 (1981) ("Where performances are to be exchanged under an exchange of promises, one party's repudiation of a duty to render performance discharges the other party's remaining duties to render performance."). Thus, the Court need not resolve whether the Evanses ultimately had met all of the prerequisites for taking occupancy as they claim, or had failed to do so as claimed by the Scanlons. The Evanses' unretracted repudiation constitutes a breach of the Lease by them and entitles the Scanlons to an award of damages.

2. Damages

The Scanlons seek as damages the unpaid rent, late fees, utility costs, costs of maintaining the property and preparing it for occupancy, listing fees by their real estate agent, and attorney's and *pro se* legal fees.[14] Of these elements of damages, the claim for $209,000 in unpaid rent is by far the largest component.

a. Enforceability of the Lease provision denying a reduction in damages for rent paid by third parties

The Lease Addendum includes a provision that relieves the Scanlons of any obligation to mitigate their damages by trying to re-let the property and, if they do re-let the property, "Tenant shall not be entitled to receive the benefit of any rent paid by a third

[14] By agreement of the Parties, argument and a decision regarding attorney's fees was deferred for a separate hearing to occur after the Court ruled on the issues decided by this letter opinion

party following Tenant's early termination of occupancy." The Scanlons re-let the property as of March 5, 2017 for a term of three years at $4487.67 per month. Consequently, the Scanlons will have collected $49,364.37 in rent from the new tenant through the date of trial and $134,630.10 by the end of the Evanses' lease term on July 31, 2019. The Evanses claim that this provision is unenforceable as a penalty The Court agrees.

The Lease does not include a liquidated damages clause. In the event of a breach, the aggrieved party must establish the nature and amount of the damages caused by the breach. By denying a credit toward damages for the rent paid by a subsequent tenant, the Lease allows the Scanlons to collect substantially more than their actual damages Consequently, the court finds that the denial of credit provision was intended not to compensate the Scanlons for losses actually suffered, but rather to compel the Evanses' performance of the Lease or inflict punishment for defaulting. *See Sagatov Builders, LLC v. Hunt*, 88 Va. Cir. 410, 2014 Va. Cir. LEXIS 42 (2014). This provision of the Lease constitutes a penalty, and is, therefore, unenforceable. The Evanses are entitled to a credit on any damages in the amount of rent paid by the new tenants during the relevant period.

b. Calculation of damages.

Having found the Evanses in breach of the Lease, the Court awards damages, exclusive of attorneys' fees and *pro se* legal costs, which will be the subject of a subsequent hearing, as follows:

Unpaid rent, July 1, 2016 – March 4, 2017		$ 44,579.04[15]
Rent difference, March 5, 2017 – July 31, 2019		29,226.93
Rent late fees, July 1, 2016 – February 28, 2017		1,200.00
Utilities, June 1, 2016 – February 28, 2017		
Electric	$ 660.76	
Water	114.09	
Gas	517.14	
Total Utilities	$1,291.99	1,291.99[16]

[15] The Court finds that the Scanlons are entitled to damages for the entire term of the Lease, rather than only through the date of trial The Evanses' repudiation occurred prior to their taking occupancy of the property Therefore, there was no landlord – tenant relationship between them. The limitation on damages applicable to a tenant who abandons the property after taking possession is not applicable *See Branning Mfg Co. v. Norfolk Southern R R* , 138 Va 43, 121 S E 74 (1924), *James v Kibler's Adm'r* , 94 Va 165, 26 S E.417 (1896), *see also Ten Braak v Waffle Shops, Inc* , 542 F 2d 919, 923 n 3 (4th Cir. 1976)

[16] Some utility charges have been prorated to fit within the period for which damages are awarded

Maintenance, out of pocket	1,540.00[17]
Maintenance, owners' hours	720.00[18]
Broker fee for re-listing home	4,487.67[19]
TOTAL DAMAGES	$ 83,045 63

The Evanses are entitled to a credit of $6,000, which is the amount of the security deposit paid to the Scanlons. In case number CL-2017-7422, therefore, the Court awards the Scanlons $77,045 63 in damages, exclusive of attorneys' fees and *pro se* legal costs. In case number CL-2017-6609, the Court finds in favor of the Defendants, Mr & Mrs. Scanlon.

CONCLUSION

The Evanses breached the Lease on May 6, 2016 when they repudiated the agreement. The Evanses never retracted that repudiation, and therefore remained in breach, notwithstanding their attempt to take possession of the property at the beginning of the lease term. The Scanlons are awarded $77,045.63 (after application of the security deposit held by them) as compensation for their actual damages as a result of the Evanses' breach.

Counsel are directed to contact my courtroom clerk to arrange a hearing on the issue of attorneys' fees and *pro se* legal costs.

Sincerely yours,

[redacted]

Michael F. Devine
Circuit Court Judge

[17] The Court awards damages for lawn maintenance out of pocket expenses commencing on June 3, 2016 through January 2017, and for gutter cleaning in March 2017

[18] The Court awards damages for outdoor maintenance in November 2016 and March 2017 The Court declines to award damages for travel time, indoor cleaning, power washing and deck maintenance

[19] The Court awards as damages the cost of re-listing the property to obtain a new tenant The Court declines to award damages for the cost of listing the property to obtain the Evanses as tenants