IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JOSEPH A. FEDERICO	)	
	)	
Plaintiff-Below,	)	
Appellant,	)	
	)	
v.	)	C.A. No. 2000-10-282
	)	
DOANNIE TAMBASCIO	)	
	)	
Defendant-Below,	)	
Appellee.	)	

Submitted: June 24, 2002

Decided: May 12, 2003

Joseph A. Federico
491 Wilmington
West Chester Pike
Glen Mills, PA 19342-1273
Pro Se
Appellant

Timothy J. Weiler, Esquire
727-B North Market Street
Wilmington, DE 19802-0000
Attorney for Defendant
Appellee

DECISION AFTER TRIAL

This is an appeal de novo from the Justice of the Peace Court. Appellant, Joseph A. Federico ("Plaintiff") filed a Complaint against Appellee, Doannie Tambascio ("Defendant"), alleging Defendant's violations of various provisions of the Delaware Residential Landlord-Tenant Code, 25 Del. C. §5101 et. seq. as result of I) Defendant's failure to respond Plaintiff's request for information regarding and for return of his security deposit for the rental unit; II) Defendant's

unlawful ouster of Plaintiff from his unit; and III) Defendant's unlawful denial of Plaintiff's right to use and enjoyment of the basement area in the rental property.

Defendant, in her response to Plaintiff's Complaint, asserted several counterclaims against Plaintiff seeking I) late fee for untimely rent payment in January 2000; II) portion of February rent owed; III) unpaid rent and late fee for May 2000; IV) costs incurred for remedying various damages to the unit and paying for Plaintiff's utility bills; V) compensation for loss of rentals due to tenant's early termination of lease as result of Plaintiff's unreasonable interruption of tenant's enjoyment of rental property; VI) punitive damage as result of Plaintiff's act of making a false and slanderous statement about Defendant to her place of employment; and VII) any damages to the rental unit less reasonable wear and tear.

On the day of trial, June 24, 2002, Plaintiff made a pretrial motion to dismiss Count VI of Defendant's counterclaim, the defamation claim. The Court reserved decision on the motion. During opening statement, Defendant informed the Court of her withdrawal of Count V of her counterclaim.

Trial was subsequently held. At conclusion of Plaintiff's evidence, Defendant moved for a directed verdict of Plaintiff's claim for recovery of the value for the fire wood removed from his unit. The Court granted Defendant's motion, thereby disposing of the fire wood count of the Complaint in favor of the Defendant. At the conclusion of all evidence, Plaintiff moved for Summary Judgment on the defamation claim, the Court again reserved decision on the

motion. Based on a reservation of decision on the motion presented and on the merits, the Court makes its final disposition as follows:

FACTS

The Lease

Plaintiff rented an apartment from Defendant pursuant to a lease agreement executed on July 17, 1997 (Plaintiff's Exhibit 4). The lease term was one year - from August 1, 1997 to July 31, 1998, and required a security deposit in the amount of $750. After the initial one-year term, Plaintiff continued the monthly rental payments and Defendant accepted them, a month-to-month tenancy was thus formed under the lease.

Trial testimony showed that the relationship between Plaintiff and Defendant was harmonious in the first two years of Plaintiff's tenancy at Defendant's unit. Defendant encouraged Plaintiff to contact her for possible resolution of any problems Plaintiff may have had with the rental unit.

The Basement

Defendant testified that she had made it clear to Plaintiff, at the time the lease was executed, that the use of the basement in the rental unit was restricted to storage of wardrobe type boxes in one area only. The other area of the basement was unfinished and not intended for tenants' use.

Plaintiff testified that Defendant had permitted the upstairs tenant to use the basement notwithstanding the restriction, but had prohibited him from any use of the basement. Plaintiff placed into evidence, as Plaintiff's Exhibit 7 several pictures of the basement showing the unrestricted use by the upstairs tenant.

Regarding the unrestricted use by the upstairs' tenant, Defendant testified that she had never permitted such use in the first place. According to Defendant, she did not find out about such use by the upstairs tenant until Plaintiff notified her in writing and showed her a picture he took of the basement and its contents.

Defendant testified that after she learned of the misuse of the basement by the upstairs tenant, she immediately contacted the upstairs tenant to demand his removal of personal items from the basement at once. According to the Defendant, the upstairs tenant removed everything promptly and accordingly, and apologized for his misuse. However, Plaintiff, at the same time, not only used the basement, but had also used a padlock in the unfinished and restricted area to secure his storage there. When Defendant asked the Plaintiff to open the padlock so that she could inspect what Plaintiff had stored there, he refused her access and told her that the stored items were confidential and not fit for Defendant's inspection.

The Mortgage Application

Plaintiff testified that on or about July 1, 1999, Defendant contacted him to request his permission for switching the utilities accounts for Plaintiff's rental unit into Defendant's name for a month or two. According to Plaintiff, Defendant's reason for doing so was to establish "proof" of her residency at Plaintiff's address, for the purpose of obtaining a preferred interest rate on her mortgage refinancing application. Cable TV service was later installed in Plaintiff's unit under the name of Richard Tambascio, Defendant's husband, for the same purpose (Plaintiff's Exhibit 5).

Plaintiff testified that as result of his intervention, by informing the loan officer from Defendant's mortgage company of Defendant's actions at the time when the loan officer showed up at his unit, Defendant did not obtain the preferred interest rate on her mortgage application. Plaintiff testified that his disclosure to the loan officer was the cause of the deterioration of his relationship with Defendant.

Defendant testified that the deterioration of her relationship with Plaintiff had nothing to do with the alleged mortgage scheme. According to Defendant, she was tired of having Plaintiff as a tenant due to Plaintiff's often late and insufficient rent payment, as well as the daily nuisance and disturbances he created for her as his landlord. Additionally, Defendant testified that there is no indication on her mortgage application that she had any intention to defraud her mortgage company.

The Conversation

Testimony showed that in March 2000, Plaintiff called Defendant's place of employment and informed her supervisor, Lewis Heck, about her attempt to defraud her mortgage company by attempting to fraudulently obtain a lower interest rate on her mortgage refinancing application. Plaintiff told Heck that Defendant "is not a worthy person" and "should not be trusted." Plaintiff wanted Heck to know that Defendant was a person of "poor character", and that the purpose for his call was to let Heck know "what kind of person was working for him."

Following Plaintiff's phone call, Heck wrote a note to file summarizing the content of their phone conversation. Heck also contacted Defendant and informed her of Plaintiff's phone call and their conversation verbatim. Upon learning of Plaintiff's phone call, Defendant told Heck that she was having problems with the Plaintiff, who was her tenant at the time. Heck testified that Plaintiff told him that Defendant had "violated the law in a mortgage application".

Heck also testified that, "in all his forty some years" in the real estate business, he had never had a complaint like the one made by the Plaintiff, concerning the conduct of one of his agents in a matter unrelated to any business transacted at his office. Heck further testified that he had known Defendant for about five years, and had never had any complaints from customers about Defendant in her capacity as a real estate agent. Heck believes that Defendant is a good agent.

Furthermore, Heck testified that he did not know whether other people in the office knew about the contents of the telephone conversation between he and the Plaintiff, and that he did not believe Defendant had suffered any financial loss because of the plaintiff's phone call.

The Termination Notice

It was unclear in the record which party first gave the other party a lease termination notice. Defendant testified that on or about March 1, 2000, she first gave Plaintiff a verbal 30-day notice, and followed that up with a written notice thereafter. However, Defendant did not put in evidence a copy of said written notice.

Plaintiff testified that he gave Defendant a certified copy of letter on or about March 5, 2000 indicating his intention to terminate the lease after 60 days and move out of the rental unit on May 31, 2000. Plaintiff did send such a letter however, plaintiff did not move to place the certified letter in evidence.

Trial testimony showed that Plaintiff and Defendant had exchanged much correspondence since they gave each other their respective notices of termination. Plaintiff testified that Defendant told him to move out of the rental unit at the end of 30 days, and that Defendant had started to advertise the apartment as being available on May 1, 2000. Additionally, Plaintiff testified that Defendant had started showing the unit while he was still living there, and at times, Defendant would not give him more than one-hour notice in advance before she appeared at his unit with prospective tenants, once calling Plaintiff from her cell phone as she stood on the property.

The Security Deposit

On March 4, 2000, Plaintiff sent Defendant a letter requesting Defendant's disclosure of certain information related to the security deposit paid by Plaintiff under the lease. (See Plaintiff Exhibit 1). Defendant showed Plaintiff's letter to an attorney, and was advised not to respond to it. (Note: Defendan's trial counsel was not the Attorney). On March 27, 2000, Plaintiff sent Defendant a follow-up letter stating that since Defendant had failed to respond to his request within the allotted time period pursuant to the Residential Landlord-Tenant Code, he was entitled to a refund of his security deposit. (See Plaintiff's Exhibit 2). Again, Defendant did not respond to the letter as advised by her then attorney.

The Inspection

Sometime prior to May 11, 2000, Plaintiff reported to the County Housing Authority that Defendant had violated the Housing Code by failing to maintain the rental property free of defective conditions. Defendant's attorney faxed Plaintiff a letter dated May 10, 2000 (Plaintiff's Exhibit 3) informing him that Defendant would come and inspect Plaintiff's unit regarding the alleged Code violations on May 11, 2000.

Plaintiff testified that Defendant knew that he was going to be out of town on May 11, 2000, the date of the inspection, and Defendant had scheduled the inspection on that day for that reason.

Defendant testified that on May 11, 2000, Defendant arrived at Plaintiff's unit for the scheduled inspection of the alleged Code violations. However, she had a hard time getting into Plaintiff's unit since Plaintiff had changed the lock on his front door without informing or obtaining permission from Defendant. Failing to gain entry by the front door, Defendant attempted to open the garage door only to find that Plaintiff had unplugged the electricity to the garage door opener.

When Defendant finally managed to get inside Plaintiff's unit, she found that Plaintiff had removed most of his furniture and personal belongings. The only items left in the unit were a cord of wood and a disintegrated Christmas tree.

The Repossession

Defendant testified that she assumed Plaintiff had abandoned the unit on May 11, 2000 when she went in his unit for inspection and observed that he had removed most of his possessions from the unit. Based on her assumption,

Defendant took possession of the unit on or about May 23, 2000, and rented the unit to new tenants.

The Final Inspection

Plaintiff testified that he had no opportunity to do a final inspection of the unit with Defendant, and if he had one, it would have been useless since Defendant had refurbished the entire unit before her new tenants took possession. Defendant testified that she had provided Plaintiff a chance to conduct a final inspection of the unit on June 1, 2000 (See Plaintiff's Exhibit 3), but Plaintiff was not present when she arrived there - a few minutes after the scheduled time of inspection.

The Carpet

Defendant claims that Plaintiff had damaged the carpet inside of his unit during his tenancy there. Defendant testified that she paid $60 for the inspection of damage and estimate of repair for the carpet. However, Defendant was not able to produce any receipt of the claimed carpet service fee paid.

Plaintiff denies having damaged the carpet during his tenancy at the unit. He pointed out that the carpet was ten years old. He testified that he could not verify Defendant's claim of damage since he was not given a chance to do an inspection before Defendant refurbished the entire unit, including replacing of the entire carpet.

The Rent Charges

Defendant testified that Plaintiff owed a late fee for January 2000 since he submitted his payment 28 days after its due date. To this charge, Plaintiff produced no contrary evidence.

Defendant also testified that Plaintiff deducted $200 from his rent payment for February 2000. As an explanation to his rent deduction, Plaintiff told Defendant that there was an agreement between him and another tenant who resided upstairs, that if Plaintiff helped to remove the upstairs trash, he would be reimbursed by that tenant in the form of a rent payment of $200. Based on Plaintiff's request, Defendant contacted the upstairs tenant to collect the $200 Plaintiff owed in rent. However, upon receiving Defendant's request, the upstairs tenant flatly denied having made any agreement with Plaintiff regarding the trash removal or rent subsidy. Plaintiff did not produce any evidence to support his claim that such agreement existed between him and the upstairs tenant.

Defendant also testified that Plaintiff did not pay rent for May 2000. Plaintiff testified that he had initially sent the May 2000 rent check to Defendant with an intention to fulfill his obligation. However, after he found out that he was dispossessed of the unit by Defendant's change of locks, he stopped the payment on the check. There was no evidence placed in the record that Plaintiff actually wrote such a check and sent it to Defendant as alleged.

The Utility Charges

Defendant testified that Plaintiff moved out of the unit without fulfilling his obligation regarding payment of utilities. Defendant explained that she has an

agreement with the utility companies that once a tenant from her rental property terminates the utilities in his or her name, the account automatically reverts back to name of Defendant or her husband. (See Defendant's Exhibits 1 & 2). In May 2000, Defendant received utility bills for Plaintiff's unit for the period of May 1 to May 24. Defendant assumed that Plaintiff did not pay the bills.

Plaintiff testified that he had requested the utility companies to forward the final utility bills to him. However, he could not say specifically when he made that request, and presented no written proof to that effect.

Evidence showed that the May 2000 utility bills, consisting of an electric bill with a designation of "final bill" from Conectiv and a water bill from Artisan Water Company, Inc. were in the name of Defendant's husband, Richard Tambascio as of May 1, 2000.

DISCUSSION

On Plaintiff's Motion to Dismiss Count VI of Defendant's Counterclaim

A motion to dismiss a counterclaim pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted "will not be granted unless the plaintiff will not be able to recover under any circumstances given the allegations raised" in that counterclaim. *Dow Chemical Co. v. MG Industries, Inc.,* Del. Super., *available on Westlaw at 2003 WL 77009 (Decided on Jan. 6, 2003)*. Applying this standard, the Court feels that based on the allegations contained in Defendant's reply pleadings regarding the counterclaim of defamation, it is possible that Defendant may recover against Plaintiff provided that she

establishes a *prima facie* case in defamation. Therefore, Plaintiff's Motion to Dismiss the defamation counterclaim is hereby DENIED.

On Plaintiff's Summary Judgment Motion at the Conclusion of All Evidence

Pursuant to Rule 56(b), motion for summary judgment on a counterclaim is appropriate at any time prior to trial. Since Defendant had moved for summary judgment on the counterclaim of defamation after close of all evidence, the Court finds the motion is inappropriate and it cannot be considered.

CONCLUSIONS

In an attempt to provide a clear understanding of the Court's ruling in the case, the Court will state its reasoning and analysis of the facts and the applicable law in a Count-by-Count manner

Regarding Count I – Plaintiff's entitlement to refund of security deposit, plus interest and penalty: The Court finds that Plaintiff is entitled to recover $1,500 plus interest earned as stipulated by parties (See Plaintiff's Exhibit 6).

The Residential Landlord-Tenant Code, 25 Del. C. §5514 (g)(2), requires landlord to disclose certain information regarding security deposit held within 20 days of tenant's written request for disclosure of such information. Tenant is entitled a refund of his security deposit under §5514(g)(2) if the landlord failed to comply with the mandatory disclosure of certain security deposit information within the allotted time. Furthermore, pursuant to §5514(g)(2) Tenant may recover double the amount of the security deposit if landlord failed "to return the full security deposit to the tenant within 20 days from the effective date of forfeiture."

Trial testimony showed that Defendant did not reply to any of Plaintiff's request regarding either the disclosure or refund of his security deposit. Defendant claimed that her attorney had advised her to do so. Defendant is presumed to know the law or should obtain accurate legal advice. The Court finds Defendant's argument regarding her non-response to Plaintiff's request for statutory mandated disclosure of certain security deposit information unconvincing, and thus finds for the Plaintiff on this Count.

Regarding Count II – Plaintiff's entitlement to three times the per diem rent for the part of May when he was allegedly ousted by Defendant, plus recovery for the value of the cord of wood unlawfully removed from his possession: The Court finds that Plaintiff was unlawfully ousted by the Defendant, and is entitled to recover statutory damages pursuant to the Residential Landlord-Tenant Code, 25 Del. C. §5313.

Pursuant to 25 Del. C. §5106(d), landlord or tenant may terminate the rental agreement by giving the other party 60 days written notice, which notice shall begin on the first day of the month following the day of actual notice, if the term of the lease agreement was, at the time of notice, a month-to-month tenancy. Based on the testimony, the Court finds that Plaintiff's tenancy at the time of the disputed termination notice was a month-to-month tenancy, and Plaintiff had until May 31, 2000 to vacate the rental property. Defendant's attempt to give Plaintiff 30 days written notice was in violation of the statute.

Since Plaintiff's tenancy would have lasted until May 31, 2000, Defendant's act of changing the locks on Plaintiff's unit without providing a key to

the Plaintiff had amounted to an exclusion of the Plaintiff from accessing the unit, and thus, an unlawful ouster under §5313.

The damage amount recoverable by Plaintiff as result of his unlawful ouster depends on when the Plaintiff was actually excluded from possession of the rental unit. Testimony showed that Plaintiff realized that he was unable to access his unit upon his return from a business trip on May 20, 2000. Therefore, the Court finds that Plaintiff was wrongfully excluded from possession of his unit, for 11 days from the 20th of May to the 31st of May, the last date of his legal tenancy.

As to Plaintiff's claim for recovery of the value of the cord of wood removed by the Defendant from Plaintiff's unit, the Court granted Defendant's motion for summary judgment pursuant to Rule 56(b). Thus, this claim is disposed without the need to going into any facts relevant thereto.

Regarding Count III – Plaintiff's claim for damages as result of Defendant's denial of his use and enjoyment of the basement area in the rental unit: The Court finds that based on the record, Plaintiff has no factual or legal basis on which to recover, and finds in favor of the Defendant on Count III of the Complaint.

Based on the record, Plaintiff had no contractual right to use the basement. The lease was silent with respect to tenants' use of basement. In addition, Defendant testified that she had made it clear to all the tenants residing at her property that the basement use was limited to one area and for storage of wardrobe type boxes only. She testified that all the tenants had a key, which can

be used to open the basement as well as the front door. Evidence shows that Plaintiff had not only used the basement but had also put a padlock on part of it to secure his possessions there. To that extent, Plaintiff's use of the basement went beyond the terms of the rental agreement. Thus, Plaintiff's claim that he was "deprived" of use of basement is without legal basis and is therefore denied.

Defendant's Counterclaims

Count I - As to Defendant's claimed 5% late fee for January 2000 rent, undisputed facts show that Plaintiff paid rent on the 28th of the month. Because the lease did not provide an exact due date for the monthly rent, the Residential Landlord-Tenant Code, 25 Del. C. §5501(b), mandates that the due date for monthly rent shall be "at the beginning of each month." §5501(d) allows the landlord to recover 5% of rent due in late fees if tenant's rent payment was received more than five days after its due date. Thus, Court finds that Defendant is entitled to recover 5% of January rent in the amount of $37.50.

Count II – As to Defendant's claim for back rent in the amount of $200 for February 2000, the Court finds Defendant is entitled to that amount since there is nothing in evidence supporting Plaintiff's claim of right to rent rebate for gratuitous services performed for other tenants and upstairs tenant denied agreeing to subsidize Plaintiff's February 2000 rent payment.

Count III – As to Defendant's claim for outstanding May 2000 rent, the Court finds that Defendant is entitled to the rent plus 5% late fees since Plaintiff failed to establish that he in fact sent the rent check.

Count IV – With regard to Defendant's carpet damage claim in the amount of $60, Court finds Defendant is not entitled to recover this amount. The testimony did not establish by a preponderance of the evidence that the $60 in alleged "damage" was caused by anything beyond normal "wear and tear" over a 3 year tenancy. In fact, the Defendant admitted that the carpet "probably" dated back to 1990.

With regard to Defendant's damage claim for replacement of the locks, the Court finds that Defendant is entitled to recover the costs for replacing the locks. The Landlord-Tenant Code, 25 Del. C. §5509 provides that the tenant has an obligation to permit reasonable access to the rental unit by the landlord for purposes of inspection, repair, maintenance, or to exhibit the rental unit to prospective tenants. 25 Del. C. §5510 makes tenant liable to the landlord for any harm proximately caused by tenant's unreasonable refusal of landlord's access to the rental unit.

Defendant testified that because Plaintiff's change of locks and failure to provide her a key, she was denied access to the rental unit on May 11, 2000 when she attempted to enter unit for inspection of the alleged County Code violations. Additionally, testimony showed that Plaintiff had unreasonably denied Defendant access of the basement area where he allegedly stored confidential papers.

Based on Plaintiff's unreasonable denial of Defendant's access to the aforementioned areas of the rental property, the Court finds that Defendant is

entitled to damages resulting therefrom in the amount of $118.97 representing the costs for replacement of locks as established in Plaintiff's Exhibit 6.

With regard to Defendant's damage claim for costs incurred in removing the cord of wood from Plaintiff's unit, the Court denies the claim.

The Lease clearly prohibited storage of fire wood in rental units. (See Plaintiff Exhibit 4, paragraph 2) However, the Residential Landlord-Tenant Code, 25 Del. C. §5513 requires the landlord to notify tenant of any breach of the lease and allow at least 7 days, after such notice, for tenant to remedy or correct the alleged breach.

After Defendant found out that Plaintiff had breached the lease by storing firewood in his unit, she did not make any attempt to notify him and give him time to remedy the breach. Instead, Defendant took upon herself to remove the firewood from the unit, and informed Plaintiff, only after the fact, that the wood was removed from his unit.

With regard to Defendant's claim of unpaid utilities, the Court finds that Plaintiff is obligated to pay utilities that occurred within his legal tenancy period.

Paragraph 17 of the lease obligates the tenant to pay for all utilities for the premises rented when utilities become due during the term of the tenancy. In the event that tenant failed to pay utilities incurred during term of the tenancy, landlord had the right to seek remedies for the collection of such charges. (See Plaintiff's Exhibit 4). Under the same paragraph, tenant agrees to forward a receipted water bill for their rental units to the landlord at the termination of the lease.

Testimony showed that, based on Defendant's arrangement with the utility companies, Plaintiff's utility account automatically reverted back to name of Defendant's husband as of May 1, 2000, on which date the Court found, by implication, Plaintiff had terminated his utilities service. (Defendant's Exhibit 1).

Based on the testimony, the Court finds that Plaintiff's month-to-month tenancy under the lease and pursuant to the Statute was not terminated until May 31, 2000. Plaintiff was responsible for the utility charges until the end of his tenancy at Defendant's premises. Plaintiff cannot, on the one hand, claim that he was entitled to a tenancy until the end of May 2000 while, on the other hand, avoid responsibility for costs of maintaining his tenancy. Thus, the Court finds that Defendant is entitled to a reimbursement of utilities paid for Plaintiff in the amount of $33.09.

Count V – Defendant withdrew her claim related to Plaintiff's alleged interruption of the other tenant's enjoyment of property and causing the other tenant's premature termination of the lease and loss to the landlord.

Count VI – As to Defendant's claim that Plaintiff slandered her by telling her employer false information regarding Plaintiff's mortgage refinancing activities related to her property, the Court renders judgment in favor of the Plaintiff for Defendant's failure to establish a *prima facie* case of defamation.

Elements for a cause of action in *defamation* generally consist of:

"(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either action ability of the statement irrespective of

special harm or the existence of special harm caused by the publication." Restatement (Second) of Torts §558 (1977).

As to the first element, there is a two-pronged inquiry: 1) whether the statement made by Plaintiff to Defendant's supervisor was false, and if it was, 2) whether it was defamatory on its face.

Plaintiff claims that his statement about Defendant's attempt to defraud her mortgage company was true. He put in evidence a copy of a website captured by print screen which he purported to be the cable company's record of Defendant's cable service order. (See Plaintiff's Exhibit 5). Even though admitted into evidence, the Court finds that the print out document lacks materiality, since the Court cannot determine, on the face of the document alone, whether it was what the Plaintiff purported to be. Without further supporting evidence for the truth of Plaintiff's statement, the Court finds that the statement made by Plaintiff to Defendant's supervisor was false for purpose of analysis at this stage.

"[A] statement is not defamatory unless it 'tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'" *Ramunno v. Cawley*, Del. Supr. 705 A.2d 1029, 1035 (1998). "When considering defamatory meaning, the court must determine what effect the statement is fairly calculated to produce and the impression it would naturally engender in the minds of average persons among whom it is intended to circulate." *Walker v. Grand Central Sanitation, Inc.,* 634 A.2d 237, 243 (Pa. Super. 1993). " A statement which ascribed to another conduct, character, or a condition which would adversely affect her fitness for the

proper conduct of her lawful business, trade or profession is defamatory . . . however, that a statement which is a mere expression of opinion is not." Id.

In his phone call to Defendant's supervisor, Lewis Heck, Plaintiff referred to Defendant as a person of "poor character" and said that Defendant "is not a worthy person . . . and should not to be trusted." Plaintiff told Heck that the reason for his call was to let Heck know "what kind of person was working for him." The Court finds that, while these statements were aimed to influence Heck's professional opinion of Defendant – especially the statement "I wanted you to know what kind of person was working for you", they are merely opinions. However, the statement that Defendant had "violated the law in a mortgage application" alleges specific conduct. That statement could and would arouse, in a person of average sensibilities and intelligence, an impression of Plaintiff being dishonest and untrustworthy. Thus, the Court finds that Plaintiff's total statement was more than just a simple expression of opinion, and was defamatory on its face.

As to the second element, there is no issue that Plaintiff disclosed Defendant's personal mortgage refinancing activities to Defendant's supervisor, Lewis Heck, at Defendant's place of employment, without any legal or contractual privilege to do so.

As to the third element, Plaintiff did not provide sufficient evidence other than a website screen print out of an unknown and unverifiable source, regarding Defendant's alleged fraudulent mortgage application. Plaintiff testified that Defendant had denied his access to her records indicating her fraudulent

mortgage activity. However, since Plaintiff did not raise the issue during discovery and/or attempt to compel Defendant's records at the appropriate time, the Court is now without power to compel Defendant's disclosure of such record.

As to the fourth and last element, the issue arises is whether Plaintiff's statement constituted *slander per se* so that no special damages need to be proven?

"[For] spoken defamation to be *actionable per se* [, it] must impute to the plaintiff the commission of a *punishable crime*, the having of an infectious disorder such as would tend to injure a person in his office, trade or business, or *produce special damage*." (Emphasis added). *Klein v. Sunbeam Corp.*, Del. Supr. 94 A.2d 385, 390 (1952). "To constitute slander or defamation actionable per se the nature of the charge must be such that the Court can legally presume that the person defamed *has been injured* in his reputation or business and occupation." (Emphasis added). *Danias v. Fakis*, Del. Super. 261 A.2d 529, 531(1969).

Statements made by Plaintiff to Defendant's supervisor were concerning Defendant's conduct or actions with respect to handling of her personal affairs, not regarding her conduct or actions in her professional capacity as a real estate agent. Furthermore, Defendant did not show that her professional reputation was actually injured in any way by Plaintiff's words. Defendant's supervisor, Lewis Heck, testified that after Plaintiff's phone call, he immediately contacted Defendant and gave her an account of what Plaintiff had said about her over the phone. Heck testified that to his knowledge, no one else in Defendant's office

knew about the content of Plaintiff's phone call, or that Plaintiff's phone call has caused any financial loss for the Defendant. In Heck's opinion, Defendant is a good real estate agent of solid reputation.

By the testimony, the Court finds that Plaintiff's statement, even though *on it's face* defamatory, was not of a kind that is *actionable per se*. Whether Plaintiff's statement is actionable at all depends on whether Defendant has proven the existence of any special harm, that is, "harm of a material and generally of a pecuniary nature . . . [resulted] from conduct of a person other than the defamer or the one defamed which conduct is itself the result of the publication or repetition of the slander." *Danias*, Del. Super., 261 A.2d at 531-532. "Loss of reputation of the person defamed is not sufficient to make the defamer liable . . . unless it is reflected in material harm." *Id.*

Defendant testified that she was "shocked, upset, and offended" by Plaintiff's statement to her employer. She felt "embarrassed" among her colleagues and has "lost sleep" as result of her distress. However, Defendant presented no evidence of actual pecuniary loss in terms of wages or income. Since "[t]he emotional distress caused to the person slandered by his [or her] knowledge that he [or she] has been defamed is not special harm," the Court finds that Defendant has not establish a prima facie case of defamation for failing to prove any special harm done.

AWARDS

Based on the foregoing facts and analysis, the Court awards damages to each party with respect to each of their claim as follows:

Plaintiff's damages

- As to Count I: double the security deposit ($750) plus interest earned for 34 months totaling of $1,585.
- As to Count II: the amount of the statutory damage award, i.e. $798.27 (representing the per diem rate of $24.19, multiplied by 11 days, multiplied by 3).

Defendant's damages

- Count I: $37.50 (5% late fee for January 2000)
- Count II: $200 (back rent for February 2000)
- Count III: $787.50 (May 2000 rent, $750., plus 5% late fee)
- Count IV: $118.97 (for lock replacement) plus $33.09 (for unpaid utilities).

The Clerk of the Court is hereby directed to enter: (1) Judgment in favor of Plaintiff in the amount of $2,383.27, plus post judgment interest at the legal rate, and; (2) Judgment on the Counterclaim in favor of Defendant in the amount of $1,177.06, plus interest at the legal rate.

Each party shall bear their own costs. No attorney's fees are awarded pursuant to 25 Del. C. § 5111.

IT IS SO ORDERED.

Joseph F. Flickinger III
Associate Judge