CLEMM AND ASSOCIATES, LLC
Mark C. Clemm, Esquire, I.D. No. 36665
Katie M. Clemm, Esquire, I.D. No. 320733
488 Norristown Road, Suite 140
Blue Bell, PA 19422
(484) 539-1300
mclemm@clemmlaw.com
kclemm@clemmlaw.com

Attorneys for Respondents

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GERRELL MARTIN and CURTIS SAMPSON	:	CIVIL ACTION
	:	
v.	:	NO.: 2:17-cv-01139-JHS
	:	
BART E. LEVY, ESQUIRE and	:	
LEVY LAW, LLC	:	

DEFENDANTS' BRIEF CONTRA PLAINTIFFS' MOTION IN LIMINE TO EXCLUDE EVIDENCE OF MISTAKE OF LAW AND INDUSTRY PRACTICES FOR DEFENDANTS' LIABILITY

Defendants Bart E. Levy, Esquire and Levy Law, LLC, by and through their attorneys Clemm and Associates, LLC, hereby submit this brief contra Plaintiffs' Motion in Limine to Exclude Evidence of Mistake of Law and Industry Practices for Defendants' Liability.

I. INTRODUCTION

Defendants Bart E. Levy, Esquire and Levy Law, LLC (collectively, "Levy") were retained by a landlord, Argentina Perez Irineo (the "Owner") to file a landlord-tenant complaint against Plaintiffs. The Owner (or her agents) indicated to Levy that the Plaintiffs had not paid rent for three months. Therefore, on November 7, 2016, Levy sent a Notice of Default letter to Plaintiffs. On November 8, 2016, Levy, on behalf of the landlord, filed a landlord-tenant complaint (the "LT Complaint") against Plaintiffs in the Philadelphia Municipal Court (the "LT

Action"). Levy filed the Complaint after having conferred with his client regarding the allegations stated in the LT Complaint.

Other than the Notice of Default and LT Complaint, Levy had no further direct communications with Plaintiffs. Ultimately, the LT Complaint was withdrawn on March 2, 2017.

II. STATEMENT OF PERTINENT FACTS AND PROCEDURAL HISTORY

Mr. Levy began his career as a "tenant lawyer" in landlord-tenant actions, currently represents tenants and landlords, and has represented approximately 7,000 or 8,000 tenants in landlord-tenant matters over his career. Levy files approximately 2,000-3,000 eviction actions per year. Mr. Levy spends almost every weekday in landlord tenant court for two sessions per day representing either landlords or tenants. Because Mr. Levy spends almost every weekday in landlord tenant court, his staff performs a majority of the client intake. Levy's firm consists of Mr. Levy, two well-trained paralegals, a receptionist, and one associate attorney. Either a paralegal or the associate attorney performs client intake if Mr. Levy is not in the office.

Mr. Levy has a standard procedure for his staff regarding landlord-tenant actions where he has trained his staff to ask clients for the components or elements of the Philadelphia Municipal Court landlord-tenant complaint. At all times relevant to the claims being made in this case, Mr. Levy's office procedure included: (1) determining whether there was a landlord-tenant relationship between the parties; (2) determining whether the landlord had a rental license (previously known as a housing inspection license); (3) determining what was owed to the landlord; and (4) obtaining details regarding the lease. Levy created a "Paralegal Training Guide" which includes detail regarding the procedures used by Levy's staff in landlord-tenant matters. Levy also has a "work-flow log" which shows the documents that Levy has obtained and the stage of the litigation in a landlord-tenant action.

Before Levy sends a Notice to Vacate to a tenant, Levy verifies that the landlord has a rental license because a claim will be rejected by the court without a current, valid license. In November 2016, when filing an eviction action, Levy relied on the representations of his clients regarding whether the landlord had a current rental license when the action was filed and for the periods during which the landlord was demanding rent and/or other amounts allegedly owed. In November 2016, when reviewing a demand letter being sent to a delinquent tenant, Mr. Levy

checked for a Certificate of Rental Suitability, and if he did not find one, he would ask the landlord whether they had a Certificate of Rental Suitability.

In November 2016, Levy relied on the representations of his client regarding whether the Department of Licenses and Inspections ("L&I") had issued any violations in connection with the property in question. The website phila.gov/LI allows an individual to check a property in Philadelphia regarding whether there are any outstanding L&I violations. However, this website does not report every L&I violation at a property. Furthermore, entries on the website are often backdated and unreliable. Frequently, the website will show no violations when there are violations and often the website is down and nonfunctional. In November 2016, Mr. Levy would only check the website if his landlord client represented to him that the landlord was unable to get a Certificate of Rental Suitability. If the landlord client made this representation, Mr. Levy suspected that there had to be some reason that the landlord could not get a Certificate of Rental Suitability including but not limited to the fact that there may be violations at the property or that the website did not show that a rental license was renewed when in fact the license was renewed. In November 2016, Levy had to rely on the representation of the landlord regarding whether the property in question was fit for its intended purpose and whether a tenant was actually living in the property.

When Levy sent a Notice to Vacate to a tenant, Levy included a demand for attorney's fees if it was provided for in the lease or if the landlord told Levy that the lease involved was a Pennsylvania Association Realtors Lease (which he knew contained an attorney's fee provision). Levy did not include a demand for attorney's fees in a Notice to Vacate if there was no basis for doing so.

In October or November, 2016, Levy was retained by the Owner who had recently purchased the property located at 1916 Clarence St., Philadelphia PA 19134 (the "Property"). The Owner is Hispanic and spoke little if any English and Mr. Levy and his staff communicated with the Owner through one or more interpreters, some of whom Mr. Levy believes may have been related to the Owner. Levy was retained by the Owner to represent her in connection with certain defaults under a residential lease by Gerrell Martin and Curtis Sampson (the "Tenants"), who at that time were occupying the Property. In this case, the Owner (or her agents) emailed Levy a current rental license for the Property sometime prior to November 8, 2016, the date when the LT Complaint was filed. Based upon Levy's procedures it is likely that the Owner (or

her agent) told Levy that she possessed a Certificate of Rental Suitability prior to November 8, 2016. At some point prior to November 8, 2016, the Owner (or her agent) represented to Levy that the Property was fit for its intended purpose, i.e. habitable as a rental unit. At some point prior to November 8, 2016, the Owner (or her agent) represented to Levy that she was unaware of any open violation notice issued by L&I. Mr. Levy is sure that the Owner (or her agent) actually made these representations to Levy because of Levy's procedures (described above).

Levy verified the information in the LT Complaint verbally with the Owner (or her agent). Levy was unaware of any open L&I violations at the Property prior to filing the LT Complaint. When Levy received notice of the L&I violations, he informed the Owner of the violations.

Unknown to Levy, the Plaintiffs had apparently made complaints to the Fair Housing Commission which issued a final order concerning those complaints on February 7, 2017. The final order did not prevent the Owner from obtaining a Certificate of Rental Suitability and presenting it to the tenant prior to the March 2, 2017 hearing date in the LT Action. The final order did not prevent the Owner from demanding rent for any period of time after which the Owner obtained and presented to the tenants a Certificate of Rental Suitability. Levy, on behalf of the Owner, withdrew the landlord tenant action on March 2, 2017. Levy could not withdraw the landlord-tenant action until the Owner authorized him to do so. Levy was not authorized by his client to withdraw the landlord-tenant action until March 2, 2017.

Plaintiffs received a copy of Levy's Notice to Vacate dated November 7, 2016. The November 7, 2016 letter was the first time that Plaintiffs were ever contacted by Levy. Plaintiffs could not remember contacting or being contacted by Levy other than through the Notice to Vacate. Plaintiffs were never contacted by Levy via telephone. Plaintiff Gerrell Martin is unaware of the substance of conversations between Levy and the Owner (or her agents). Martin does not know whether the Owner ever received a violation notice issued by L&I. All of the foregoing facts were admitted by Plaintiffs in their depositions on November 20, 2017.

Plaintiffs initiated this action on March 15, 2017 by filing a complaint. Defendants filed an answer to the complaint on May 15, 2017. The parties participated in a Pre-Trial Conference on July 13, 2017. The parties participated in a Settlement Conference on October 16, 2017. Discovery has been completed. Plaintiffs filed a Motion for Partial Summary Judgment on March 2, 2018. Defendants filed an Answer to the Motion for Partial Summary Judgment on

March 20, 2018. The parties have exchanged copies of Trial Exhibits and proposed stipulations. Plaintiffs filed a Motion to Exclude Testimony of David Denenberg on June 21, 2018 to which Defendants responded on July 5, 2018. The parties filed their Pre-Trial Memoranda on June 27, 2018. Plaintiffs filed three motions in limine on July 11, 2018 which are currently at issue. There is a Pre-Trial Conference scheduled for July 30, 2018 at 10:00am before the Honorable Joel H. Slomsky. The trial in this case is currently scheduled to commence on September 5, 2018.

III. QUESTIONS PRESENTED

1. Should Plaintiffs' Motion in Limine to Exclude Evidence of Mistake of Law and Industry Practices for Defendants' Liability be denied because evidence of industry practices is admissible to support Defendants' bona fide error defense?

Suggested Answer: Yes.

IV. ARGUMENT

Under the bona fide error defense to the FDCPA, a debt collector may not be held liable under the FDCPA if the debt collector shows by a preponderance of evidence that the *violation* was not intentional and resulted from a bona fide *error* notwithstanding the maintenance of procedures reasonably adapted to avoid any such *error*. Kort v. Diversified Collection Servs., Inc., 394 F.3d 530, 536 (7th Cir. 2005)(citing 15 U.S.C. §1692k(c). To qualify for the bona fide error defense, a debt collector must show that: (1) the presumed FDCPA violation was not intentional; (2) the presumed FDCPA violation resulted from a bona fide error; and (3) that the debt collector maintained procedures reasonably adapted to avoid any such error. Id. at 537 (citing Jenkins v. Heintz, 124 F.3d 824, 834 (7th Cir. 1997)). In Kort, a debt collector was sued by the plaintiff for violating the FDCPA and specifically for not complying with the Higher Education Act ("HEA"). Id. at 532. The HEA permits guarantors to administratively garnish a debtor's wages. Id. at 533. However, there is an exception from wage garnishment under the HEA's unemployment exemption. Id. A debtor who successfully invokes this exemption can avert wage garnishment during the first twelve months on the job. Id. The Department of Education amplified this point in a regulation stating: "The guaranty agency may not garnish the wages of a [debtor] whom it *knows* has been involuntarily separated from employment until the

[debtor] has been reemployed continuously for at least 12 months." Id. (citing 34 C.F.R. §682.410(b)(9)(i)(G). To ensure compliance with the HEA and the corresponding regulations, the DOE drafted a form notice for debt collectors to use in initiating garnishment proceedings. Id. The form handles the HEA unemployment exemption as follows:

> If you document that you have been involuntarily separated from employment, [fill in name of guaranty agency] will not garnish your wages until you have been re-employed continuously for twelve (12) months. If you wish to claim this exemption from wage garnishment, you will need to complete Part II of the enclosed Request for Hearing form and send us written proof that you qualify for the exemption by MM?DD?YYY. . . . Failure to provide written proof may result in your claim of exemption being rejected as unsubstantiated. Id. at 533-34.

The DOE forms were not optional suggestions, they were mandatory. Id. at 534. Therefore, the debt collector used the government forms as directed. Id. The notice and the response form that the debt collector sent to the plaintiff followed the DOE forms verbatim adding only the plaintiff's specific information. Id.

The plaintiff sued the debt collector for violating the FDCPA because the text of the HEA contained no documentation or deadline requirement and the debt collector wrongfully required her to come forward with documentation of her eligibility for the exemption and to do so by a certain date. Id. at 535. The debt collector asserted the bona fide error defense because it relied on the governmental form which resulted in a potential mistake of law under the HEA. Id. at 537. As for the first prong of the bona fide error defense, The Court found that the debt collector's presumed violation was not intentional because it followed the DOE form verbatim which showed that the debt collector did not intend for its notice to be false or unfair and instead showed that the debt collector intended to provide accurate information taken from the relevant regulatory agency. Id. The Court noted that the debt collector's actions differed little from debt collectors who follow safe-harbor language drafted by the court. Id. As for the second prong of the bona fide error test, the Court found that if the debt collector did in fact erroneously apply the HEA in its garnishment notice, it did so because the governmental agency invested with regulatory authority under the HEA misinterpreted the HEA. Id. at 538. This showed that any error by the debt collector in this regard was a good faith, genuine, bona fide error. Id. The Court also noted that because the debt collector followed the DOE form verbatim and did not exercise any "legal judgment" of its own, any mistake by the debt collector in the case was not a mistake of law because the misinterpretation of the HEA was done by DOE, not the debt

collector. Id. at FN 9. As for the third prong of the bona fide error defense, the Court found that the debt collector employed a procedure reasonably adapted to avoid the assumed error because an entirely reasonably procedure to avoid misinterpreting and misapplying a federal statute is to adopt the legal interpretation of the federal agency charged with regulating under the statute in question. Id. at 538. The FDCPA does not require debt collectors to take every conceivable precaution to avoid errors; rather, it only required reasonable precaution. Id. at 539. Because the DOE form was mandatory and the DOE was the governmental agency charged with regulating under the HEA, it was reasonable for the debt collector to act as it did. Id. The Court found that as a matter of law, the debt collector was entitled to the bona fide error defense and was insulated from FDCPA liability on this issue. Id.

The trend in case law appears to allow the bona fide error defense to insulate a debt collector from liability under the FDCPA where the law is unclear regarding a statute or law at issue. See Gray v. Suttell & Assocs., 123 F.Supp. 3d 1283, 1289 (E.D. Wash. 2015); McCorriston v. L.W.T., Inc. 536 F.Supp. 2d 1268 (M.D. Fl. 2008). Finally, when a debt collector reasonably relies on inaccurate information provided to the debt collector by his client the creditor and uses that information in an attempt to collect a debt, the debt collector is entitled to the FDCPA's bona fide error defense and is insulated from liability under the FDCPA. Edwards v. McCormick, 136 F.Supp.2d 795, 804 (S.D. Ohio 2001).

Levy has asserted the bona fide error defense regarding any alleged violation of the FDCPA and asserts that it is insulated from liability pursuant to this defense. Evidence regarding industry practice and the bona fide error are certainly relevant and admissible. In 2016, the Philadelphia Municipal Court required landlords to use a Philadelphia Municipal Court complaint form which included elements from the Philadelphia Property Maintenance Code and/or Administrative Code and was essentially the Philadelphia Municipal Court's interpretation of the Philadelphia Property Maintenance Code and/or Administrative Code. The form required in pertinent part that the landlord attach a copy of a valid housing inspection license at the time of filing, state whether the subject premises was fit for its intended purpose, and state that the landlord was unaware of any open notice issued by the Department of Licenses and Inspections. The Court did not require that a landlord attach of copy of a valid housing inspection license that was valid for all periods of time for which the landlord was demanding rent and did not require that the landlord attach a certificate of rental suitability. The law was

also unclear regarding whether a landlord could collect rent during time periods when the landlord did not have a valid housing inspection license. The Philadelphia Property Maintenance Code states that "no person shall collect rent with respect to any property that is required to be licensed pursuant to this code unless a valid license has been issued for said property." PM-102.6.4. The Philadelphia Property Maintenance Code provides that landlords must obtain housing inspection licenses, landlords may not collect rent unless a valid license is issued for the property, landlords must provide tenants with certificates of rental suitability and the partners for good housing handbook, and tenants may bring action against a landlord to compel compliance with the code. Richetti v. Ellis, 2017 WL 2782001 at *4 (Pa. Super. Ct. 2017)(referencing Philadelphia Code, PM-102.6.4, 102.7.4). The Code also states that a landlord shall be denied the right to recover possession of the premises or to collect rent during or for the period of noncompliance . . . PM-102.7.4. The Code does not provide a means for recovery by tenants for rents paid or damages made while the landlord was not in compliance with the Code, nor does it prohibit landlords from collecting back rent after returning to compliance. Richetti, 2017 WL 2782001 at *4. In 2016, a landlord in Philadelphia could file a complaint in the Philadelphia Municipal Court seeking a judgment for money, possession, or both against an alleged defaulting tenant even if the landlord did not possess a Certificate of Rental Suitability at the time of filing. City Ordinances Place Additional Burdens on Phila. Landlords, Alan Nochumson, Legal Intelligencer, June 13, 2016 © 2016 ALM Media Properties, LLC, <http://www.nochumson.com/articles/judge-tenants-entitled-return-rent-money>. Therefore, while it is clear that a landlord cannot collect rent during the time that the landlord does not possess a valid housing license, the law is unclear regarding whether a landlord can collect back rent after the landlord obtains a valid housing license.

The Philadelphia Municipal Court adopted an amendment to Rule 109(c) on January 2, 2018 which set forth additional requirements contained in the Philadelphia Municipal Court complaint form. These additional requirements include setting forth "[t]hat, if applicable, the landlord is in compliance with the requirements of those sections of the Philadelphia Code that relate to Certificates of Rental Suitability, the City of Philadelphia Partners for Good Housing and Rental Licenses," and attaching to the complaint "[a] copy of the Rental License which was in force during any time that the plaintiff is seeking to collect rent and is in force at the time of filing . . . [and a] copy of the Certificate of Rental Suitability that was provided to the

defendant." Philadelphia Municipal Court Local Rule 109(c)(3)-(4). The amendment to this Rule suggests that prior to its adoption on January 2, 2018, it was acceptable for lawyers to rely on the representations of their clients regarding the habitability of a property, existence of L&I violations, and whether the landlord possessed a Certificate of Rental Suitability. The amendment of the Rule shows that beginning in 2018, the Philadelphia Municipal Court determined that those representations were not sufficient, and landlords are now required to attach a Certificate of Rental Suitability in order to initiate a landlord-tenant action. Landlords are now also required to attach a Rental License (or housing inspection license) which was in force during any time that the landlord is seeking to collect rent. Under the Richetti decision, it remains unclear whether a landlord-tenant complaint will be rejected should a landlord not have a valid Rental License (or housing inspection license) which was in force during any time that the landlord is seeking to collect rent. However, none of these requirements were in effect during the time when Levy initiated the LT Action on behalf of his client. In fact, the procedure followed by Levy when he filed the LT Action on behalf of the landlord was standard, acceptable operating procedure in Landlord/Tenant Court in Philadelphia and was followed by Levy as well as multiple other attorneys in Philadelphia who did similar work and was accepted by the Municipal Court judges.

Levy's client, the landlord, apparently supplied inaccurate and/or incomplete information to Levy regarding the landlord-tenant action. Levy reasonably relied on the information provided by his client, as the Philadelphia Municipal Court deemed it acceptable for the landlord to make certain statements regarding compliance with the Philadelphia Property Maintenance Code and/or Administrative Code and to attach only a copy of a valid Rental License (or housing inspection license) at the time of filing a landlord-tenant complaint. The law was, and still is, unclear regarding whether a landlord can collect back rent after coming into compliance with the Property Maintenance Code and/or Administrative code and specifically the Rental License (or housing inspection license) requirements. Therefore, evidence of industry practice is relevant and admissible regarding Levy's bona fide error defense. In 2016, landlord-tenant attorneys who practices in the Philadelphia Municipal Court would follow the Philadelphia Municipal Court form, rely on the representations of their clients, and file landlord-tenant complaints without attaching a copy of a Certificate of Rental Suitability and only attaching a copy of a valid Rental License (or housing inspection license) at the time of filing. The Philadelphia Municipal Court

would accept these filings, and Philadelphia Municipal Court judges would frequently award damages of back rent to landlords who were not in compliance with the Philadelphia Property Maintenance Code and/or Administrative Code license requirements during the times when the landlords were demanding rent, but were currently in compliance with the Philadelphia Property Maintenance Code and/or Administrative Code. Therefore, the precedent in Philadelphia Municipal Court was for landlords to demand back rent, even if the landlords were not in compliance with the Philadelphia Property Maintenance Code and/or Administrative Code for the time periods during which the landlords were demanding back rent, and the Philadelphia Municipal Court judge may have or may not have awarded back rent to the landlord. Because the law was unclear and the industry practice followed this practice in 2016, it was certainly not a violation of the Philadelphia Property Maintenance Code, Philadelphia Administrative Code, Philadelphia Municipal Court Rules, or FDCPA for Levy to act as it did in the LT Action. Levy did not commit a mistake of law in relying on the representations of his client and attaching a copy of a valid Rental License (or housing inspection license) at the time of filing, but rather followed legal precedent, the Philadelphia Municipal Court Rules verbatim, and industry practice regarding policies and procedures to avoid errors in attempting to collect this debt. Evidence regarding how the Philadelphia Municipal Court interpreted the Philadelphia Property Maintenance Code and/or Administrative Code, legal precedent, and industry practice in 2016 is relevant and admissible regarding Levy's bona fide error defense and Plaintiffs' Motion in Limine regarding this issue should be denied.

V. CONCLUSION

For the reasons stated above, defendants Bart E. Levy and Levy Law, LLC respectfully request that this Honorable Court deny the Motion in Limine to Exclude Evidence of Mistake of Law and Industry Practices for Defendants' Liability and enter the attached Order.

CLEMM AND ASSOCIATES, LLC

Dated: July 24, 2018

By: */s/ Mark C. Clemm*
Mark C. Clemm, Esquire
Katie M. Clemm, Esquire
Attorneys for Respondents