

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

MICHAEL BERGMAN, in his capacity as)	
Agent/Attorney-in-Fact for HAROLD and)	
FRANCES BERGMAN,)	CASE NO. _____
)	
Plaintiff,)	
)	
v.)	
)	
THE RESERVE, A NONPROFIT)	PETITION AT LAW AND JURY
CORPORATION d/b/a THE RESERVE ON)	DEMAND
WALNUT CREEK,)	
)	
Defendant,)	
)	
)	

Plaintiff Michael Bergman, as agent and attorney-in-fact for Harold and Frances Bergman, for his Petition at Law, states as follows:

PARTIES

1. Plaintiff is, and was at all times material hereto, a resident of Marshall County, Iowa.
2. Plaintiff is the son of Harold and Frances Bergman, residents of Unit 225 of Defendant The Reserve, an Iowa Nonprofit Corporation, d/b/a The Reserve on Walnut Creek in Urbandale, Polk County, Iowa, from May 2006 until November of 2016.
3. Defendant The Reserve, a Nonprofit Corporation d/b/a The Reserve on Walnut Creek (hereafter “The Reserve”) is a nonprofit corporation organized under the laws of the state of Iowa. The Reserve is located at and its principal place of business is 2727 82nd Place, Urbandale, Polk County, Iowa. The Reserve is a “senior adult congregate living facility” as defined under Iowa Code Chapter 523D. The Reserve is also a “Dwelling unit” as defined under

Iowa Code § 562A.6(3). Residents of The Reserve are “Tenant[s]” as defined under Iowa Code § 562A.6(16). The Reserve primarily provides residences to seniors that are capable of living independently. The Reserve does not primarily provide “geriatric services.” Any services provided by The Reserve are incidental to the housing provided to the residents.

JURISDICTION

4. The amount in controversy exceeds the jurisdictional limit of Small Claims Court.

VENUE

5. Pursuant to Iowa Code sections 616.7 and 616.17, venue is proper in Polk County as the county where the parties’ contract was to be performed and the county of The Reserve’s residence.

FACTS

6. The Reserve is an Iowa nonprofit corporation organized for the purpose of providing independent living residential facilities for residents age sixty (60) or older. To meet this purpose, The Reserve owns and operates a “senior adult congregate living facility” as defined under Iowa Code Chapter 523D in Urbandale, Polk County, Iowa.

7. The Reserve, and/or Unit 225 at The Reserve, is also a “Dwelling unit” as defined under Iowa Code § 562A.6(3). Residents of The Reserve, including the Bergmans during their residence at The Reserve, are “Tenant[s]” as defined under Iowa Code § 562A.6(16).

8. The Reserve primarily provides residences to seniors that are capable of living independently. The Reserve does not primarily provide “geriatric services.” Any such services provided by The Reserve are incidental to the housing provided to the residents, including the Bergmans.

9. Section 2.2 of The Reserve's Bylaws sets forth the qualifications for residential membership for a Unit at The Reserve. This includes attaining the age of sixty (60) years of age or above and "hav[ing] the financial resources or sources of income" to meet the financial obligations of The Reserve.

10. The Reserve maintains sole control over the sale and transfer of residential memberships. To receive a residential membership interest, a member must execute an "Application Agreement" with The Reserve designating a particular unit. The "Application Agreement" incorporates The Reserve's Covenants of Occupancy (the "Covenants").

11. Qualifying individuals can receive a residential membership in The Reserve as a transferee of a previous resident's membership.

12. On or about May 25, 2006, the Bergmans entered into a contract called "Application Agreement" ("Agreement") with The Reserve for what was described as "Apartment No. 225." The Agreement provides that Mr. and Mrs. Bergman would be "entitled to occupancy of the above numbered Apartment under the terms and provisions of the 'Covenants of Occupancy' ..., which covenants shall constitute the agreement under which the Applicant shall occupy the Apartment." A copy of the Agreement and the then-existing Covenants of Occupancy are attached hereto and marked as Exhibit 1 and incorporated herein by reference.

13. In accordance with the Agreement, Mr. and Mrs. Bergman paid an "Entrance Fee" of \$97,892.00 and a "Supplemental Amount" of \$97,892.00, a total of \$195,784.00, for "Residential Membership in The Reserve."

14. In addition to the Entrance Fee and Supplemental Amount, the Agreement also required the Bergmans to pay a monthly exclusive occupancy fee. The amount of the monthly occupancy fee was originally set at \$1,593.00.

15. Mr. and Mrs. Bergman's primary and dominant purpose for entering into the Agreement and corresponding covenants was to secure housing, a residence, and not for geriatric services.

16. In late 2016, the Bergmans' deteriorating health condition prevented them from continuing to live independently and required them to move out of The Reserve to a facility that offered assisted care.

17. On November 29, 2016, the Bergmans provided 30-days written notice of their intent to terminate the lease effective December 31, 2016. The notice provided the Bergmans' forwarding address for return of their rental deposit.

18. On December 5, 2016, The Reserve sent a letter to Plaintiff confirming that the Bergmans would be unable to return to The Reserve.

19. The Bergmans vacated Unit 225 prior to December 31, 2016.

20. The Reserve did not, within 30 days of December 31, 2016, refund the Bergmans' Entrance Fee and Supplemental Amount or provide the written statement contemplated by Iowa Code § 562A.12(3)(a).

21. On April 21, 2017, Plaintiff received a notice of default for his parents' unit at The Reserve. The Notice stated that there was a total of \$7,956.00 in outstanding charges for Unit 225. The Notice stated that if the outstanding charges were not paid to The Reserve, the

Entrance Fee and Supplemental Amount paid by the Bergmans would be forfeited to The Reserve (an amount of \$195,784.00).

COUNT I
VIOLATIONS OF THE IOWA UNIFORM RESIDENTIAL
LANDLORD AND TENANT ACT

22. Plaintiff incorporates by reference all preceding paragraphs.

23. The Bergmans' Agreement with The Reserve was and is a "rental agreement" within the meaning of Iowa Code § 562A.6(11).

24. The Bergmans' Entrance Fee and Supplemental Amount constituted and remains a "rental deposit" within the meaning of Iowa Code § 562A.6(12). The amount of the rental deposit grossly exceeded the maximum amount allowed under Iowa Code § 562A.12(1).

24. The Bergmans are entitled to return of their Entrance Fee and Supplemental Amount because it grossly exceeded the amount The Reserve was authorized by law to charge and because The Reserve forfeited its right to withhold any amount of the deposit based on its failure to provide the written statement contemplated by Iowa Code § 562A.12(4).

25. The Application Agreement contains provisions prohibited and/or made unlawful by Iowa's Uniform Residential Landlord and Tenant Act, including:

- a. An agreement to pay The Reserve's attorneys' fees for disputes arising out of the rental arrangement;
- b. Charging a rental deposit of a value grossly exceeding the maximum amount allowed under Iowa Code § 562A.12(1); and
- c. Withholding rental deposits in amounts not "reasonably necessary" to remedy a tenant's default or other funds.

26. Because the Bergmans' Agreement was of indefinite duration, and because the Bergmans were required to pay their occupancy fee on a monthly basis, the Bergmans' tenancy at The Reserve was considered month to month. *See* Iowa Code § 562A.9(4).

27. Plaintiff provided notice to The Reserve of his parents' intent to vacate Unit 225 and the Bergmans subsequently vacated the apartment.

28. Despite the Bergmans' termination of the rental, The Reserve continued to charge them monthly rent.

29. The Reserve's rental agreement with the Bergmans as described above is unconscionable and contains terms prohibited by Iowa Code § 562A.11. Pursuant to Iowa Code § 562A.7, the Court should declare the Agreement unenforceable.

COUNT II
CONSUMER FRAUD
IOWA CODE CHAPTER 714H

30. Plaintiff incorporates by reference all preceding paragraphs.

31. The Reserve engaged in unfair and deceptive practices, and made omissions of material fact, in connection with the advertisement and sale of consumer "merchandise" as defined in Iowa Code Chapter 714H, including, but not limited to, by representing to the Bergmans that their Entrance Fee and Supplemental Amount was, among other things, an investment which would increase in value while they occupied their Apartment.

32. The Reserve's consumer fraud caused damages to the Bergmans and Plaintiff.

COUNT III
DECLARATORY JUDGMENT
UNCONSCIONABILITY

33. Plaintiff incorporates by reference all preceding paragraphs.

34. The Reserve's agreements with the Bergmans is unconscionable in, among others, the following ways:

- a. By purporting to allow The Reserve to continue charging monthly occupancy fees after the resident is required to vacate their apartment;
- b. By contracting for payment of attorney fees on behalf of The Reserve;
- c. By purporting to bind a resident to pay monthly occupancy fee into perpetuity; and
- d. By purporting to allow The Reserve to forfeit the resident's entire Entrance Fee and Supplemental Amount for any breach of the Agreement.

35. The Reserve's agreement should be declared unconscionable and unenforceable.

COUNT IV
BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

36. Plaintiff incorporates by reference all preceding paragraphs.

37. Every contract in Iowa implies a covenant of good faith and fair dealing.

38. The Reserve breached its good faith obligation and implied covenant of good faith and fair dealing owed under both the Agreement and Agency Agreement, including one or more of the following particulars:

- a. In requiring execution of a new Agency Agreement with The Reserve, including payment of new fees and several months of "remodeling" after the Bergmans were forced to vacate the Unit;
- b. In failing to reasonably market and/or assist with transfer of the Bergmans' residential membership of the Unit; and

c. In deflating the market and residents' ability to transfer a unit and causing perpetual payment of monthly occupancy fees and forfeiture of Entrance/Supplemental Fees by taking actions including, but not limited to:

i. By renting forfeited units at rental fees different from the monthly occupancy fees paid by the Bergmans;

ii. By selling and/or transferring forfeited units at prices below the fees paid by the Bergmans for similar apartments;

iii. By advising other similarly situated residents to sell and/or transfer their memberships/investments at lower prices for similar apartments;

iv. By advising some former residents to forfeit their investments/apartments rather than continuing to pay monthly occupancy fees while no longer occupying their apartments;

39. The Reserve's breach of its implied covenant of good faith and fair dealing was a proximate cause of the Bergmans' damages and injury.

40. The Reserve's breach of its implied covenant of good faith and fair dealing was willful and wanton and in reckless disregard of the rights and economic well-being of the Bergmans, entitling Plaintiff to punitive damages.

COUNT V
IMPOSSIBILITY/FRUSTRATION OF PERFORMANCE

41. Plaintiff incorporates by reference all preceding paragraphs.

42. The Reserve has previously taken the position that the dominant or primary purpose of The Reserve is to provide the Bergmans and other residents with geriatric or similar services.

43. Plaintiff disputes this position because the primary purpose of The Reserve is to provide housing, and any services are incidental thereto. However, to the extent The Reserve claims that its services are the primary purpose of the parties' contract, then such contract would constitute a personal services contract.

44. The Bergmans' inability to live independently resulted in impossibility of performance and/or frustration of purpose of the Agreement.

45. As of the date of the Bergmans' inability to perform the Agreement by living independently in Unit 225 at The Reserve, their duty to perform the Agreement was discharged.

COUNT VI
BREACH OF FIDUCIARY DUTIES

46. Plaintiff incorporates by reference all preceding paragraphs.

47. The Reserve, its Board of Directors and the company it hired to manage The Reserve, doing business as Newbury, as active manager of the Bergmans' investment, owe fiduciary duties to the Bergmans.

48. The Reserve has breached its fiduciary duties by failing or refusing to act pursuant to Iowa law in its dealings with the Bergmans and Plaintiff as outlined in this Petition.

49. The Reserve has breached its fiduciary duties of care by failing to act with the care that a manager in a like position would reasonably exercise under the same or similar circumstances or in a manner that the manager reasonably believes to be in the best interests of the investors.

50. The Reserve has breached its fiduciary duties of loyalty by its self-dealing, failing to act in good faith and in the best interests of the Bergmans, lack of honesty and advancing its own interests as outlined in this Petition at the expense of the Bergmans.

51. The Reserve has breached its fiduciary duties in failing to furnish information concerning the Bergmans' prospective return on investment.

52. The Reserve through its Board of Directors and the company it hired to manage The Reserve, Newbury, breached their fiduciary duties by taking actions detrimental to the Bergmans and their respective investment, Entrance Fee and Supplemental Amount, in The Reserve, by among other things:

- a. Failing to deal with the Bergmans in an open and honest manner;
- b. Failing to disclose to the Bergmans how their investment in The Reserve was adversely affected by certain actions of the Board and Newbury;
- c. Selling and/or transferring memberships/apartments of former residents at prices below the investments of the Bergmans;
- d. By renting forfeited units at rental fees different from the monthly occupancy fees paid by the Bergmans;
- e. By selling and/or transferring forfeited units at prices below the investments of the Bergmans for similar apartments;
- f. By advising other similarly situated residents to sell and/or transfer their memberships/investments at prices lower than the investments of the Bergmans for similar apartments;
- g. By advising some former residents to forfeit their investments/apartments rather than continuing to pay monthly occupancy fees while no longer occupying their apartments;

53. The Reserve's breach of fiduciary duties has damaged and continues to damage the Bergmans' investments in The Reserve. As a direct and proximate result of the Reserve's breach of fiduciary duties, the Bergmans and Plaintiff have suffered damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, in his capacity as Agent/Attorney-in-Fact of Harold and Frances Bergman, prays that the Court enter judgment in his favor against The Reserve as follows:

1. Declare the Agreement terminated pursuant to Iowa Code Chapter 562A;
2. Declare the Agreement unconscionable and unenforceable;
3. Declare the Agreement void for violations of Iowa Code Chapters 523D and 562A;
4. Declare the Bergmans' performance under the Agreement discharged;
5. Award damages and/or restitution equal to the Entrance Fee and Supplemental Amount paid to The Reserve by the Bergmans.
6. Award statutory damages pursuant to Iowa Code §§ 562A.11(2) and 562A.12(7);
7. Award such other damages in an amount to compensate Plaintiff for the damages incurred;
8. Award attorney fees incurred by Plaintiff in pursuing this relief; and
9. Award costs and interest as allowed by law.

JURY DEMAND

Plaintiff hereby demands trial by jury.

/s/ Jason M. Craig

Jason M. Craig (AT0001707)

/s/ Emily A. Kolbe

Emily A. Kolbe (AT0012313)

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ATTORNEYS FOR PLAINTIFF

Original filed.

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