IN THE COUNTY COURT OF DOUGLAS COUNTY, NEBRASKA

STATE OF NEBRASKA Plaintiff v. KAY E. ANDERSON, Defendant	)	CR 19 - 5135 **ORDER ON MOTION TO SUPPRESS**

THIS MATTER comes before the Court on November 1, 2019 for hearing on Defendant's Motion to Suppress. The Plaintiff was represented by Lindsey Bitzes and Kathern Reed of the City Prosecutors Office. The Defendant was represented by Jason Bruno and Robert Sherrets both of Sherrets Bruno & Vogt, LLC. Hearing was had, Defendant numbered Exhibit Nos. 1 through 10 and same were marked; Exhibit Nos. 1 through 5 were received without objection. Exhibit Nos. 6, 7, 8, and 10 were not received. Exhibit No. 9 was received in part. Specifically, the Court received only the portions of the deposition as cited in the Defendant's Motion to Suppress, Defendant's Brief in Support of Motion to Suppress and the testimony contained from Line 1 of page 24 through and including line 14 of page 25. The Plaintiff called Scott Lane and testimony was received. Following offer of evidence, argument was heard. Following argument, Defendant requested time to file a responsive brief to the State's offered case law and argument. Defendant was granted time to file such a brief. At that time the State did not request time to file a brief. The matter was taken under advisement pending receipt of additional briefs. The Court is now in receipt of Defendant's Brief in Support of Motion, Defendant's Reply Brief in Support of Motion, and Plaintiff's Brief in Support of Denying the Motion.

Defendant Kay E. Anderson purportedly is the sole owner of a limited liability company entitled AB Realty, LLC. This entity owns a multifamily residential complex located at 2400 N. 34th Avenue, Omaha, Douglas County, Nebraska. This complex comprises 100 individual residential units. Scott Lane, the Chief City Housing Inspector, received information from third parties, specifically, not the tenants of the complex, that there were numerous concerns regarding the condition of the units. That Scott Lane,

based upon the information learned from non-tenant third parties, prepared Exhibit Nos. 1, 2 and 3 namely an Affidavit and Application for Issuance of an Inspection Warrant, Statement of Facts, and Inspection and Search Warrant.

The Statement of Facts indicates a meeting occurred on August 31, 2018 with the Defendant. The Statement of Facts contains no allegation that consent to any inspection was denied by the Defendant. Mr. Lane states that he received complaints regarding 84 of 100 units. However, during Mr. Lane's testimony before the Court, he acknowledges these complaints came from one individual and that individual was not a tenant of the complex. This distinction is not noted in the Statement of Facts. Mr. Lane also stated in his Statement of Facts: "Due to the severity and amount of the Code violations reported to the Omaha City Planning Housing Enforcement Division, as well as the uncooperative and threatening behavior of the Owner, Kay Anderson . . . ". However, during Mr. Lane's testimony before the Court he acknowledged he had not witnessed any such behavior and admitted under oath in Court, as well as in his deposition, that he had never asked, nor did he have any knowledge of anyone from the City of Omaha requesting consent to any inspection. Based upon Mr. Lane's Affidavit and Application and accompanying Statement of Facts, Judge for the County Court, of Douglas County, Nebraska executed the Inspection and Search Warrant on September 19, 2018. Said document contained the statement "that the City of Omaha has been unable to obtain consent from the owner's representative, Kay Anderson, to enter the grounds on the Property of Inspection purposes." Again Mr. Lane acknowledged in his deposition and before the Court that this statement is not accurate.

VALIDITY OF INSPECTION WARRANT

Plaintiff sought an inspection warrant pursuant to Neb. Rev. Stat. §29 – 832 which states "Inspection warrants shall be issued **only upon showing that consent to entry for inspection purposes has been refused**. In emergency situations neither consent nor a warrant shall be required."(emphasis added) It is undisputed that Mr. Lane acted as a peace officer as defined by Neb.Rev.Stat. § 29 – 831, and in his capacity as such applied for the inspection warrant at issue.

It is well settled that the Court must apply statutory language with its plain and ordinary meaning. *Variano v. Dial Corp.*, 256 Neb. 318, 326, 589 N.W.2d 845, 851 (1999).

Further, courts will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Rodgers v. Nebraska State Fair*, 288 Neb. 92, 01, 846 N.W.2d 195, 202 (2014), citing *Robertson v. Jacobs Cattle Co.*, 285 Neb. 859, 830 N.W.2d 191 (2013).

This Court finds that the language of Neb. Rev. Stat. § 29 – 832 is clear and unambiguous in that before any such inspection warrant is issued, consent to entry must be denied. Whether the attempt to obtain consent was to be from the individual tenants or the Defendant is not at issue as the evidence provided and specifically the documents authored by Mr. Lane made no reference to any attempt or denial of consent from any tenant. Further, given the testimony contained in Mr. Lane's deposition and his testimony under oath before this Court, it is clear that no attempt was made to obtain consent before the issuance of the sought inspection warrant. Therefore, at no point prior to the issuance of the inspection warrant at issue was consent actually denied. As such, this Court finds that the inspection warrant executed on September 9, 2018 is invalid.

GOOD FAITH EXCEPTION

Plaintiff argues that this Court should apply the good faith exception as provided in *U.S. v Leon* 468 U.S. 897 (1984). *In Leon,* the Court stated the exclusionary rule should be applied by "weighing the costs and benefits of preventing the use in the prosecution's case in chief of inherently trustworthy tangible evidence obtained in reliance on a search warrant issued by a neutral and detached magistrate that ultimately is found to be defective." *U.S. v. Leon*, 468 U.S. 897, 907 (1984). However, the Supreme Court also stated "Suppression remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth, or if the issuing magistrate wholly abandoned his detached and neutral judicial role." *Leon*, 104 S.Ct. 3405, 468 U.S. 897, 82 L.Ed.2d 677, (1984).

Further, the Supreme Court states "the deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the

rights of an accused. *Id.* "Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." *Franks v. Delaware*, 438 U.S. 154 (1978).

In *Leon*, the Court further stated:

> "the exception we (the Court) recognize today will also not apply in cases where the issuing magistrate wholly abandoned his judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979); in such circumstances, no reasonably well-trained officer should rely on the warrant. Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' *Brown v. Illinois*, 422 U.S. at 610-611 (POWELL, J., concurring in part); see *Illinois v. Gates*, supra, at 263-264 (WHITE, J., concurring in judgment). Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient -- i.e., in failing to particularize the place to be searched or the things to be seized -- that the executing officers cannot reasonably presume it to be valid. *Cf. Massachusetts v. Sheppard*, post at 988-991." *United States v. Leon*, 104 S.Ct. 3405, 468 U.S. 897, 82 L.Ed.2d 677, (1984).

Taking the Supreme Court's analysis in totality, the exclusionary rule still applies in various situations, and Courts must view each scenario on a case by case basis. But it appears clear to this Court that the exclusionary rule still applies where a judge is misled by information in an affidavit that the affiant knew was false, would have known was false except for a reckless disregard of the truth, or the police has engaged in a willful or at the very least negligent conduct which has deprived the defendant of some right.

Here, Neb. Rev. Stat. § 29-832 clearly provides a protection to the Defendant in that entry for purposes of inspection must be requested or sought, and that effort on behalf of the peace officer who ultimately seeks an inspection warrant must have been denied. In the matter before the Court, from the Affiant, no request was made of the Defendant, the Defendant never denied access to the property and as such Affiant's statement was false and without said false statement the search warrant could not properly be issued.

In addition, Affiant's Statement of Facts contains additional misstatements and implication that this Court considers as negligent. The Court notes a reference to civil lawsuit, of which the actual occurrence could have happened as many as two years prior to the issuance of the affidavit. Additionally, there is reference to the Defendant's

demeanor as uncooperative and threatening by the Affiant, but during Affiant's testimony before the Court he acknowledges witnessing no such behavior. Further, Affiant reports in his documents that he received 84 complaints, but fails to recognize in the documents provided that the complaints were received from one individual and no foundation was laid as to that individual's ability or knowledge to correctly identify any alleged code defects.

Given the forgoing, this Court finds the "good faith" exception to the exclusionary rule should not and does not apply in this matter.

STANDING OF THE DEFENDANT

Plaintiff next contends Defendant does not have standing to challenge the Inspection Warrant. Plaintiff relies in part upon *U.S. v. Salvucci*, 448 U.S. 83 (1980) and *Rakas v. Illinois*, 439 U.S. 128 (1978). However, *Salvucci* stands more for the elimination of automatic standing as articulated in *Jones v. United States*, 362 U.S.257 (1960), than any determination that a landlord does not have a reasonable expectation of privacy in its property. *Salvucci* cites *Rakas v. Illinois*, 430 U.S. 128 (1978) for the premise "it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the exclusionary rule's protections." However, *Salvucci* clearly indicates property ownership is significant in the determination whether a Fourth Amendment right has been violated. Specifically, "while property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated, property rights are neither the beginning nor the end of the Court's inquiry.: *Salvucci* at 91. Based on the Supreme Court's ruling, it is a requirement that one who seeks to raise a Fourth Amendment violation must first have standing to do so.

Plaintiff cites *State v Waechter*, 189 Neb. 433, 435 (1972) in support of its contention that the Defendant lacks standing. In *Waechter*, the Court held a property owner did not have standing to challenge a search warrant issued for an adjacent property. In addition Plaintiff offers *State v. Holloway*, 187 Neb. 1 (1971), wherein the Court held an individual that had never lived in a residence but only had infrequently visited the residence – and had no ownership or tenant interest in the premise, lacked standing to challenge the search warrant. *Holloway*, 187 Neb. 1, at 7. However, these cases can be distinguished in that neither of these cases addresses a situation where the

Defendant maintains an ownership interest in the property alleged to have been infringed upon.

In *Mancusi v. DeForte*, 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154, the Supreme Court held that standing depends upon whether the area was one in which there was a reasonable expectation of **freedom from governmental intrusion**. (emphasis added) *Mancusi* citing *Katz v. United States*, 389 U.S. 347, 352 ( ) In *Katz v. United States*, 389 U.S. 347, the Supreme Court makes it clear that capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place, but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion. *See Katz* at 352. Thus, the analysis is greater than just if there is an expectation of privacy, but in addition whether there is an expectation of freedom from governmental intrusion.

This Court has held that the word "houses", as it appears in the Fourth Amendment, is not to be taken literally, and that the protection of the Amendment may extend to commercial premises. *See, e.g., See v. Seattle*, 387 U.S. 541; *Go-Bart Importing Co. v. United States*, 282 U.S. 344; *Silverthorne Lumber Co. v. United States*, 251 U.S. 385. Clearly the complex at issue here is a commercial facility containing 100 separate residential housing units of which the Defendant had access to, albeit somewhat constrained by a tenant's right to possession pursuant to a lease.

Given the specific issue as to whether a landlord in Nebraska has standing to challenge invalid search warrants appears to have not been addressed as of yet by the Nebraska Supreme Court or Court of Appeals, as such this Court has looked to other jurisdictions for guidance on this matter.

Both Plaintiff and Defendant have provided case law from other jurisdictions. Plaintiff provides *State of New York v. Santuilli*, 29 Misc.3d 54, 910 N.Y.S.2d 336, (2010) wherein the New York appellate court held that a landlord did not have standing to challenge based on the premise that only the tenant had an expectancy of privacy. *Santuilli*, 29 Misc.3d 54, 57-8, 910 N.Y.S.2d 336. This opinion did not address any expectation of freedom from governmental intrusion.

Defendant offered *Pund v. City of Bedford*, 339 F.Supp.3d 701 (2018), a matter before the United States District Court for the N.D. Ohio Eastern Division opined "because

landlords, absent tenant intervention, have a constitutional right to privacy in both their occupied and unoccupied rental units . . ." *Id* at 716. Further Defendant offered, *Dearmore v. City of Garland*, 400 F.Supp.2d 894, 904 (N.D. Tex. 2005) wherein the United States District Court, N.D. Texas, Dallas Division opined "because the Ordinance does not allow the landlord an opportunity to refuse consent . . . the Ordinance is likely to be held unconstitutional. To hold otherwise would give the City carte blanche authority to conduct searches and inspections with impunity and without any type of safeguards on property in which the owner clearly has an expectation of privacy." In *Dearmore*, the Plaintiff owned four separate properties that he rented to various tenants and he was allowed to challenge a mandatory inspection ordinance.

Defendant also cites *Crook v. City of Madison*, 168 So.3d.930, 939 (Miss. 2015), wherein the Supreme Court of Mississippi found that a landlord has standing when he faces criminal prosecution. That court defined standing as having a colorable interest in the subject matter of the litigation or experience an adverse effect from the conduct of the defendant (City of Madison), or as otherwise provided by law. *Id.* At 935. In *United States v. Hamilton*, 538 F.3d 162, 169 (2d Cir. 2008) the court opined "there is no authority for the proposition that one need live in the premises . . . in order to enjoy a privacy interest in those premises. Privacy interests have been found with respect to business premises and storage lockers."

As stated in *State v. Harms*, 233 Neb. 882 (1989), the Nebraska Supreme Court held an occupant of a pickup which was detained by the State Patrol, had a legitimate expectation to be free of unreasonable governmental intrusion and therefore had standing to assert a Fourth Amendment challenge.

Additionally, in *Harms*, the Court found the defendant has standing to challenge a search warrant upon a portable shed that was not located on the defendant's property and access was shared with another individual and was secured by a lock. *Harms*, at 888.

In *State v. Cemper*, 209 Neb 376, 307 N.W.2d 820 (1981) the Court stated "the fourth amendment protects persons but it does not protect them in every circumstance and in every place, public or private. Ownership and possessory rights in 'places' are still

important in determining whether or not a particular person has a legitimate expectation of privacy in a particular place." *State v. Cemper*, 209 Neb. 376, 307 N.W.2d 820, (1981).

This Court notes that landlords enter agreements for temporary possession of specific units whether the unit is an individual house or part of a multifamily complex. During the temporary possession, landlords remain the rightful and proper ownership of all aspects of the infrastructure of the units. The tenants maintain no ownership interest in the hot water heater, furnace, air conditioning units, plumbing, electrical fixtures, appliances including refrigerators and stoves. In fact, landlords under terms of typical leases are responsible for the maintenance and repair of all of these areas of infrastructure and appliances. Units are supplied with locks that landlords maintain either duplicate keys and/or master keys for use to access units. Of particular note, the allegations in this matter stem from a claim that the Defendant has failed to maintain the interior of the units. Additionally in the present matter, the Defendant occupies one of the units in the complex.

To determine that a city could file an Affidavit and Application with false and unfounded allegations to gain access to a landlord's property without the property owner having any ability to resist or challenge the allegation appears to be a de facto warrantless search. Warrantless searches have been met with specific disfavor by our courts as a violation of the Fourth Amendment.

To accept the preposition that a property owner has no ability to challenge an inspection warrant leaves open the risk that a municipality can seek entry and re-entry on numerous occasions until the point where the tenant becomes so bothered and inconvenienced by the repetitive inspections that the tenant vacates the premises. This is not to say the a municipality does not have an interest in ensuring minimum housing standards are maintained, but that process must allow for the property owner to be able to challenge any warrant or entry onto and into its property.

The Court finds that a property owner of a multi-residential unit complex wherein the property owner is actively managing the premises, including maintenance of same, and resides in one of the units, has standing to challenge an invalid inspection warrant. Specifically, Defendant Anderson whether as an individual or the sole owner of the LLC

has standing by either expectancy against government interference and by adverse effect of invalid inspection warrants.

As such, Defendant's Motion to Suppress all information, evidence, photos, notes, and the like shall be suppressed and excluded from trial.

IT IS THEREFORE ORDERED THAT Defendant's Motion to Suppress is hereby granted.

DATED this 18th day of November, 2019.

BY THE COURT:

Grant A. Forsberg
County Court Judge