IN THE DAYTON MUNICIPAL COURT

CIVIL DIVISION

FEB 3 3 02 PM '84
WILLIAM J. ZELLER

KNOLL GROUP MANAGEMENT CORP., :

Plaintiff, :

CASE NO. 83-CVG-9624

vs. :

STANLEY BROWN, : DECISION & ENTRY

Defendant. :

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This matter came on for trial on December 15, 1983, with Plaintiff appearing by its property manager, Mary Ann Houston, and by its attorney of record, Gary J. Leppla, and Defendant appearing in person and by his attorney of record, K. Stuart Goldberg.

The following stipulations were entered into by the parties on the record:

1. Plaintiff is the owner of the premises located at 4770 Dugger, Road, Apartment G, in the City of Dayton;

2. That a notice to leave the premises and termination of tenancy notice, admitted into evidence as Joint Exhibit 1, was served upon the Defendant on September 2, 1983;

3. That the lease in question is subsidized by the Federal HUD Section 8 Program for existing housing and is governed by 24 CFR 882;

4. Defendant was without utility service from July, 1983, to November, 1983;

5. Defendant had his utility service restored in November, 1983;

6. Defendant was in arrears in his utility payments from July, 1983, to November, 1983;

7. Defendant had his utilties restored on November 14, 1983, and has been current on his obligation to the utility provider since that date;

8. A copy of the lease agreement between the parties was admitted into evidence as Joint Exhibit 2.

As his first defense, Defendant contends that the concurrent service of notice of termination of tenancy and notice to leave the premises was improper. The ground for the termination and eviction upon which the Plaintiff relies is noncompliance with Article VII(a) of lease agreement, ie. nonpayment of utilities. Plaintiff argues that said nonpayment constitutes material noncompliance within the meaning of the term set forth in paragraph XXIII of the lease agreement.

With respect to the manner of providing notice of termination, the lease states at paragraph XXIII(c), in pertinent part, as follows:

"If the Landlord proposes to terminate this Agreement, the Landlord agrees to give the Tenant written notice of the proposed termination. . . . Notices of proposed termination for other reasons must be given in accordance with any time frames set forth in State and local law. Any HUD-required notice period may run concurrently with any notice period required by State or local law. All Termination notices must:
(1) specify the date this Agreement will be terminated;
(2) state the grounds for termination with enough detail for the Tenant to prepare a defense;
(3) advise the Tenant that he/she has 10 days within

which to discuss the proposed termination of tenancy with the Landlord. The 10-day period will begin on the earlier of the date the notice was hand-delivered to the unit or the day after the date the notice is mailed. If the Tenant requests the meeting, the Landlord agrees to discuss the proposed termination with the Tenant; and

(4) advise the Tenant of his/her right to defend the action in court.

The applicable Federal regulation governing the eviction and/or termination process is set forth in 24 CVF-882.215(b) (effective April 1, 1983), which states in pertinent part as follows:

> "For leases entered into on or after October 1, 1981: The Contract and the Assisted Lease shall provide with respect to the unit that the Owner shall neither (i) terminate the tenancy during the term of the Contract and Assisted Lease, nor (ii) refuse to enter into a new Assisted Lease with the Family, unless the Owner decides not to enter into a new Contract with respect to the unit, except for:
> (1) Serious or repeated violation of the terms and condiions of the Lease;
> (2) Violation of applicable Federal, State or local laws; or
> (3) Other good cause."

It is Plaintiff's contention that there has been complete compliance with the manner of notice of termination pursuant to the terms of the lease agreement which specifically provides in paragraph XXIII(c) that "any HUD-required notice period may run concurrently with any notice period required

by State or local law." For reasons which are not apparent to the Court, counsel for both parties are operating under the assumption that concurrent service of the notice is somehow sanctioned under 24 CFR Section 882.215 as amended on April 1, 1983. The Court has reviewed that section and notes that it is silent with respect to the propriety of concurrent service of notices to terminate and to evict.

The Court finds that the notices served upon the Defendant are deficient under two separate principles. First, Section 5321.11 O.R.C. provides as follows:

> "If the tenant fails to fulfill any obligation imposed upon him by section 5321.05 of the Revised Code that materially affects health and safety, the landlord may deliver a written notice of this fact to the tenant specifying the act and omission that constitutes noncompliance with such provisions and that the rental agreement will terminate upon a date specified therein not less than thirty days after receipt of the notice. If the tenant fails to remedy the condition contained in the notice, the rental agreement shall then terminate as provided in the notice."

The Court notes that while the language of the section appears to be permissive by virtue of the use of the word "may", the section has been interpreted to be mandatory. Yutzy v. Huebner, 14 O. O. 3d 440 (MC) (1979). Thus, by virtue of the language at paragraph XXIII(c) of the lease which requires the notice of proposed termination to be given in accordance with any time frames

set forth in State law, the notice to terminate was required to be given by Plaintiff at least thirty days prior to the termination date. In making this finding, the Court recognizes that the ground upon which Plaintiff relies in seeking the termination is the "creation of a physical hazard" which is in essence an alleged health and safety violation.

The second principle upon which the Court relies in determining that the notices were deficient is that a three-day notice to evict under State law may not be served until the expiration of the time set forth on the notice to terminate. The court in Cincinnati Metropolitan Housing Auth. v. McCollum, 45 O. App. 2d 197, 74 O. O. 2d 273(1975) recognized the distinction between a notice of termination and an eviction notice wherein it stated "termination and eviction are not always synonymous." Further, the court in Ewert v. Basinger, 11 O. O. 3d 171 (MC) (1978), in the context of a termination of a periodic tenancy pursuant to Section 5321.17 O.R.C., determined that the three-day notice required by Section 1923.04 may not be served on a tenant until expiration of the thirty-day notice of termination. The rationale underlying these decisions is that a tenant who has been served with a notice to terminate is not forcibly detaining the premise

until the termination period has expired. In other words, by virtue of State statute or Federal regulation, the expiration of the termination period is a precondition to forcible detention. In the context of Federal subsidies, such an interpretation gives meaning to the grievance procedure with which a tenant may avail himself prior to a final determination that his tenancy has been terminated. The Court is not unmindful of the holding in the recently decided case of Sandefur Co. v. Jones, 9 O. App. 3d 85, 9 OBR 135 (1982), a decision of the Franklin County Court of Appeals, wherein it held that "there is nothing in the Federal regulations, the lease agreement or in State law which precludes a single notice from accomplishing the requisite notice under all requirements, so long as all requirements are met by the notice." The Court is of the opinion that the court in Sandefur Co. gave insufficient consideration to the holding in McCollum, supra, and Ewert, supra, and further failed to recognize the fundamental distinction between a notice to terminate and a notice to evict.

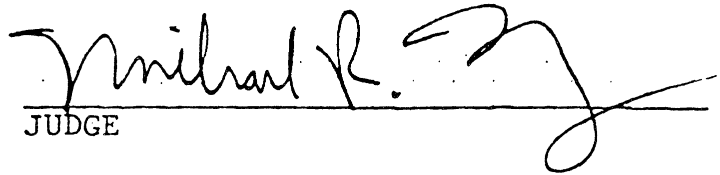
Defendant further contends that neither having utilities disconnected nor accruing an arrearage in utility payments to a third party constitute material noncompliance with the lease. It is Plaintiff's position that nonpayment

of utilities for an extended period of time creates a "physical hazard" due to the unavailability of heat, light, hot water, electricity to operate appliances such as vacuum cleaners and refrigerators, et cetera. There can be no question that the failure to make the utility payments constitutes a breach of the specific provisions of the lease. However, the Court is not satisfied that the utility discontinuance during the summer months created a physical hazard. Rather, the utility discontinuance only had the effect of subjecting the tenant to inconvenience. The Court can envision no particular physical hazard to the landlord as a result of the discontinuance.

Because the Court has made its decision based upon legal principles, it need not reach the Defendant's third defense which is based upon matters of equity. The Court finding improper service of the notice required by Federal regulations and further failing to find material noncompliance with the terms of the lease, it is therefore ordered, adjuged and decreed that Plaintiff's complaint be dismissed at its costs.

APPROVED:

JEFFREY R. McQUISTON, Referee



JUDGE

Copies to: Gary J. Leppla, Attorney for Plaintiff, 1820 One First National Plaza, Dayton, Ohio, 45402.

K. Stuart Goldberg, Attorney for Defendant, Legal Aid Society of Dayton, Rm. 525, 117 South Main Street, Dayton, Ohio, 45402.