IN THE MUNICIPAL COURT OF CUYAHOGA FALLS
SUMMIT COUNTY, OHIO

MT. OLIVE-METRO HOUSING, INC.	)	CASE NO. 93 G 2858
	)	
Plaintiff	)	JUDGE BIERCE
	)	
vs.	)	REFEREE SCHWARTZ
	)	
DALE B. CRAFT	)	**JUDGMENT ENTRY**
	)	
Defendant	)	

Upon due consideration, the Report of the Referee filed February 7, 1994 is hereby approved and adopted and incorporated herein.

It is the judgment of the Court that the Defendant's motion for new trial is granted; the within matter having been tried without a jury, and the sole issue being strictly a matter of law, therefore, the judgment of December 14, 1993, is hereby vacated; a judgment of restitution is not to be awarded the plaintiff; and the costs of this action are to be taxed to the plaintiff.

SO ORDERED.

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JUDGE BIERCE

MUNICIPAL COURT
OF
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CUYAHOGA FALLS

IN THE CUYAHOGA FALLS MUNICIPAL COURT

SUMMIT COUNTY, OHIO

MT. OLIVE-METRO HOUSING, INC.	)	CASE NO. 93 CVG 2858
PLAINTIFF	)	
vs	)	
DALE B. CRAFT	)	
DEFENDANT	)	REFEREE'S REPORT

* * * * * *

The within matter came on for hearing on January 24, 1994, on the defendant's motion for a new trial, pursuant to Civ. R. 59.

The subject complaint in forcible entry and detainer was filed by the plaintiff, Mt. Olive-Metro Housing, Inc., against its tenant, defendant Dale Craft, on November 30, 1993. A full hearing was conducted on December 14, 1993, with Craft being represented by counsel. At the conclusion of the same, it was recommended that the plaintiff be awarded a judgment of restitution on the ground of Craft's "failure to make payments pursuant to agreement to make up rental arrearage (agreement of 12-7-92)." It was further indicated in the Referee's Report that the balance of the grounds in the notice of termination previously given Craft by the landlord could not be relied upon because the same were not set forth with enough detail to allow the tenant to prepare a defense; the subject

tenancy being subject to regulations of the Department of Housing and Urban Development. The recommendation was made the judgment of the court on December 14, 1993. The subject motion for a new trial was filed on December 29, 1993, with a writ of execution of the judgment of restitution being issued on January 6, 1994. The writ was returned to the court on January 18, 1994, with a notation that the defendant had vacated the premises.

At the within hearing, the plaintiff objected to the defendant's motion on the ground that the same was not applicable to actions in forcible entry and detainer by virtue of Civ. R. 1(C). Actions in forcible entry and detainer pursuant to R. C. §1923.01 et seq. are designed to provide for the summary and immediate recovery of possession of property. State ex rel Carpenter v. Court, 61 Ohio St. 2d 208, 210, 15 Ohio Op. 3d 225 (1980). To the extent that, by their very nature, the Civil Rules would be inapplicable, the same do not apply to procedures in forcible entry and detainer actions. Civ. R. 1(C)(3). Such rules have been held to be inapplicable when the proceeding is established by statute setting forth a specific procedure to be followed, or when the application of such rules would frustrate the purpose of the proceeding. Siegler v. Batdorff, 63 Ohio App. 2d 76, 80, 17 Ohio Op. 3d 260 (Ct. App. Cuyahoga County 1979). No blanket prohibition against the application of the Civil Rules to

actions in forcible entry and detainer obtains, however. It has been held that, insofar as the landlord's speedy recovery of possession of property was frustrated by the 14 day period provided for objecting to Referee's Reports pursuant to former Civ. R. 53(E), the same did not apply to actions in forcible entry and detainer when it was recommended that the landlord recover possession. Cuyahoga Metropolitan Housing Authority v. Jackson, 67 Ohio St. 2d 129, 131-32, 21 Ohio Op. 3d 81 (1981). A similar result obtained with respect to the adoption of Civ. R. 53(E)(7), and the automatic stay provision of the same, an apparent attempt to address the Jackson decision. Colonial American Development Company v. Griffith, 48 Ohio St. 3d 72, 73 (1990). Similarly, Civ. R. 52 has been held inapplicable to such actions for the same reason. State ex rel GMS Management Co. v. Callahan, 45 Ohio St. 3d 51 (1989). The above decisions involved instances wherein the application of the affected rule would delay the landlord's recovery of his property. In this case, the plaintiff has obtained recovery of the same. Although it is true that an action to set aside a judgment by which a landlord has recovered possession of his property can be construed as disrupting the statutory purpose for eviction actions by creating uncertainty about possession after the property has been transferred to a landlord or a new tenant, such circumstance does not, necessarily, preclude the application

of Civ. R. 60(B), one providing for relief from judgments. Larson v. Umoh, 33 Ohio App. 3d 14, 17 (Ct. App. Cuyahoga County 1986). Similarly, motions for new trial pursuant to Civ. R. 59 are not necessarily rendered inapplicable to actions in forcible entry and detainer, even in those circumstances wherein the landlord has been restored to possession of the property. Accordingly, motions made pursuant to Civ. R. 59 and 60(B) have been entertained by the Courts of Appeals for Franklin and Summit Counties in circumstances wherein judgments of restitution have been awarded and a tenant has actually relinquished possession of the property, Agler Green Cooperative v. Rivers, No. 87 AP-915 (Ct. App. Franklin County, March 29, 1988), and wherein a Civ. R. 60(B) motion was filed prior to the execution of a writ, with the trial court having granted the tenant's stay of execution of the same. Norris v. Red Barn Restaurants, Inc., C. A. No. 13652 (Ct. App. Summit County, January 11, 1989). Although it is true that, if such motion is entertained and granted, there is a potential for inconvenience to the landlord and/or new tenant occupying the affected premises, such circumstance could also exist upon appeal following the issuance of a judgment of restitution and execution of a writ accompanying the same. In conjunction with such appeal, a tenant could post a required bond, a process sanctioned by statute, R. C. §1923.14, with it being especially directed that, if the tenant is out of

possession, he be returned to possession of the premises; a condition which could well occur due to the ten day period within which such a writ must be executed, and the 30 day period provided for filing a notice of appeal. Further, if execution is not stayed pending appeal, it could well be that, if successfully prosecuted, a judgment of restitution would be vacated well after the landlord's recovery of possession. Accordingly, it cannot be found that, just because a landlord has regained possession of the premises, motions made pursuant to Civ. R. 59 and/or Civ. R. 60(B) are not applicable to actions in forcible entry and detainer. Indeed, recovery of possession by the landlord would not seem to have been a factor in the determination as to the applicability of such motions in the above two cases by the Courts of Appeals for Franklin and Summit Counties; such factor not even being discussed by the courts in such determination. The record revealing that the within motion was filed on December 29, 1993, with the writ not even being issued until January 6, 1994, it is found that the subject motion is not precluded from consideration; this being an appropriate case for the application of Civ. R. 59 to actions in forcible entry and detainer.

After due deliberation, it is found that the defendant's motion is well taken. At trial, evidence revealed that the parties had entered into an agreement on December 7, 1992, whereby Craft

agreed to make $50.00 monthly payments (over and above his normal monthly rental) to satisfy a rental arrearage. Evidence further revealed that the defendant never made payments in such amount, always paying a lesser sum. On July 12, 1993, a notice was sent to Craft by the plaintiff informing him of such fact. Subsequent to such letter, Craft continued to make arrearage payments, if at all, in amounts less than the required $50.00, and also made his regular monthly rental payments, all of which were accepted by the plaintiff. Plaintiff's Exhibit "C", admitted in evidence at the trial of the cause, revealed that Craft paid his monthly rentals, and the plaintiff accepted the same, through October of 1993. A notice of the termination of his tenancy, required by the lease and Department of Housing and Urban Development regulations, was served upon Craft on October 15, 1993, with a three day notice to leave being served on November 15, 1993.

Craft has argued that, by accepting rental payments subsequent to its knowledge of his breach of the agreement to pay off the arrearage, Mt. Olive waived its right to declare a forfeiture of the lease for such breach. It is found that the defendant's argument is well taken. A lessor who accepts rent from a lessee, prior to acting to forfeit a lease and with full knowledge of the alleged breach constituting a ground for such forfeiture, waives the right of forfeiture. Quinn v. Cardinal Foods, Inc., 20 Ohio

App. 3d 194 (Ct. App. Shelby County 1984).

Additionally, a question is posed as to the adequacy of the notice of termination given Craft. Although not raised by such party in the subject motion, the issue was raised by the defendant at trial, and argued by both parties. Pursuant to paragraph 23(c)(2) of the lease, such notice of termination was required to "state the grounds for termination with enough detail for the tenant to prepare a defense". The subject notice, insofar as the within ground is concerned, states only "failure to comply with agreement to pay rental arrearages (nonpayment of rent)". Pursuant to the above lease provision, and applicable regulations of the Department of Housing and Urban Development (the within tenancy being subsidized), the termination notice must set forth a factual statement of the conduct involved, with vague or conclusory language being insufficient. Housing Authority v. Saylors, 578 P. 2d 76 (Wash. 1978). Such notice is required to detail the reasons for the termination. Caulder v. Durham Housing Authority, 433 F. 2d 998 (4th Cir. 1970). Language in such a notice which is blanketed in broad terms, and does not refer to specific instances, is inadequate. Associated Estates Corp. v. Bartell, 24 Ohio App. 3d 6 (Ct. App. Cuyahoga County 1985). Compliance with such notice requirement is required, and is essential to support an award of restitution. Ivywood Apartments v. Bennett, 51 Ohio App. 2d 209,

5 Ohio Op. 3d 351 (Ct. App. Franklin County 1976); Sandefur Co. v. Jones, 9 Ohio App. 3d 85 (Ct. App. Franklin County 1982). At trial, the plaintiff presented evidence that Craft, subject to receipt of such notice, requested and was afforded a meeting with the plaintiff. At such meeting, the reasons for the termination were explained in detail. It is found that the same is ineffective to correct the deficiency in the notice. The notice, standing alone, must set forth a factual statement of the conduct giving rise to the termination of tenancy, with the same being in sufficient detail that the tenant can know the nature of the breach and the specific instances of conduct constituting the same. If the notice were absent as to a reason for termination, or if it merely stated "a breach of the lease", would the same be deemed compliance with the above notice requirement so long as a tenant had a meeting with the landlord during which the reasons were explained? It is believed that such course of conduct would be improper. The requirement that notice be given, and that the same be in enough detail to allow the tenant to prepare a defense, is explicit, and must be satisfied in order to support a judgment of restitution. With respect to non-payment of rent allegations, notices which specified the amount due as of a certain date, and the months for which the rent was not paid, have been found to comply with the above requirement. See, Crossroads Somerset LTD v.

Newland, 40 Ohio App. 3d 20 (Ct. App. Franklin County 1987). To similar effect, see, Kimberly West Company v. Smith, Case No. M8710CVG 33507 (Franklin County Mun. Ct., December 1, 1987). Language that states a failure to comply with an agreement to pay arrearages is broad and conclusory, and is no different than that which merely says that a tenant disturbed peace and order, committed a theft or committed an assault. All fail to set forth the actual incident involved, and fail to inform the tenant of the nature of his failure to comply with the agreement to pay arrearage, or the circumstances concerning the disturbance, theft or assault. Craft was not informed, in such notice, of how he failed to comply with the agreement, the dates of his failure(s) or the amount owed. Such deficient notice of termination is fatally defective to the landlord's maintenance of an action in forcible entry and detainer.

It is found that Craft's motion predicated upon the ground of newly discovered evidence is without merit. The evidence adduced at the within hearing clearly revealed that, well before the trial of the matter, Craft, his father, and others were well aware of his alleged intellectual problems and mental capacity. Indeed, evidence at the within hearing revealed that he was receiving support services due to such condition since 1980. Accordingly, such evidence could, with reasonable diligence, have been produced

at trial.

For all of the above, it is recommended that the motion for a new trial be granted; the within matter having been tried without a jury, and the sole issue being strictly a matter of law, it is, therefore, recommended that the judgment of December 14, 1993, be vacated; that a judgment of restitution not be awarded the plaintiff; and that the costs of this action be taxed to the plaintiff.

STEVEN J. SCHWARTZ, Referee

cc: Robert Hunt, Attorney for Plaintiff
George Ramos, Attorney for Defendant
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