

DEC 17 2007

CLEVELAND MUNICIPAL COURT
HOUSING DIVISION
CUYAHOGA COUNTY, OHIO
Judge Raymond L. Pianka

EARLE B. TURNER, CLERK

Cuyahoga Metropolitan Housing Authority

DATE: December 12, 2007

Plaintiff

-vs-

CASE NO.: 2007 CVG 25841

Richard Mundy

Defendant

MAGISTRATE'S DECISION

The Court held a hearing November 28, 2007 on Plaintiff's first cause of action. Plaintiff appeared through counsel. Defendant appeared without an attorney. The parties appeared before Magistrate David D. Roberts, Judge Raymond L. Pianka having assigned Magistrate Roberts to take evidence on all issues of law and fact.

The Court concludes that Plaintiff is not entitled a judgment of eviction against Defendant. Plaintiff has proved the elements of its claim, that Defendant had a guest in his apartment who put an illegal drug, marijuana, into a hand-rolled cigarette. But the Court under its equity power concludes that it would be inequitable to terminate Defendant's rights to his publicly subsidized lease when he did not have actual knowledge, or any reason to know, that his guest had put marijuana into the cigarette.

Findings Of Fact

1. Defendant Richard Mundy is a tenant of Plaintiff at 9500 Wade Park, #501, Cleveland, Ohio ("the property") under a written rental agreement. Plaintiff did offer into evidence a complete copy of the agreement into evidence.
2. Plaintiff is a public housing authority that owns and manages the property.
3. On June 11, 2007, two of Plaintiff's police officers came to Defendant's apartment because of a complaint about loud noise.
4. Defendant let the officers into his apartment.
5. Defendant had two guests in the apartment both of whom smoke cigarettes. One guest was his nephew. The other guest was a man named Richard. Defendant does not smoke cigarettes.

6. While they were in the apartment, one of the officers picked up the remains of a hand-rolled cigarette (a "roach") and smelled it and concluded that it was likely marijuana. The other officer could not tell from the smell if the roach contained marijuana. The officers took the roach for testing. The officers testified that they sent the roach for testing using an established procedure under which suspected drugs are sent to a laboratory, tested and retained with the lab sending a written report back to Plaintiff's police department. A copy of the report was introduced into evidence as *Plaintiff's Exhibit C*.
7. Defendant's nephew told the officers that the roach was a "roll-up." Defendant, his guests and the officers all understood that "roll-up" meant a hand-rolled tobacco cigarette.
8. The officers did not observe whether Defendant, his nephew or his guest Richard had been smoking.
9. Defendant also told the officers that the roach was a roll-up.
10. Defendant's nephew began to argue with the officers about whether they should conclude that the roach was his, which conclusion would support a decision to issue notices to the holder of the CMHA lease for a different apartment where the nephew lived.
11. The officers told Defendant that the music was not so loud that they considered it a violation. Defendant also turned the music down further.
12. As the officers were leaving, Defendant asked them to take his nephew with them. The officers escorted the nephew out of the apartment.

Conclusions Of Law

This Court has held in *CMHA v. Harris*, 2006 CVG 22921, that federal law on terminating a public housing lease for drug activity on the part of a guest does not prevent this Court from weighing equitable considerations in determining whether to declare a forfeiture of rights under a residential lease. 66 Fed. Reg. 28776, 28791 (May 24, 2001) ("This final rule does not ... preempt State law within the meaning of Executive Order 13132."). Thus, a court may "weigh all equitable considerations" when determining whether to order a lease forfeiture. *Southern Hotel Co. v. Miscott* (1975), 44 Ohio App. 2d. 217. In *CMHA v. Harris*, this Court held that a tenant who did not know or have reason to know that her guest had drugs in his pocket must be considered an "innocent tenant" entitled to defend against the eviction by asserting her innocence as an equitable defense. In that case, Plaintiff's officers found a rock of crack cocaine in the guest's pocket when they came to arrest him on a warrant. The tenant defendant testified that she did not know that her guest had the cocaine and CMHA did not provide any evidence

contradicting this claim. Defendant also cooperated with police when they came to arrest her guest who was not a member of her household.

In this case, Defendant testified that he did not know that the hand-rolled cigarette that his nephew or other guest had smoked contained marijuana and not just tobacco. Plaintiff did not provide any evidence contradicting this statement. Plaintiff's officers themselves testified that there was no odor of marijuana in the room. One of the officers could not tell by smell that the roach had marijuana and not just tobacco. Plaintiff therefore failed to show that Defendant had actual knowledge of the marijuana.

The Court must also consider whether Defendant should have known that the cigarette contained marijuana, not just tobacco. Unlike the crack cocaine in *Harris*, which the tenant could not know about as it was concealed from view, Defendant in this case could have seen and smelled the marijuana which was in an ashtray. One of Plaintiff's officers suspected from the smell that the roach had marijuana in it. But it is part of the duties of a police officer to look for evidence of crime and to be suspicious about conduct that might or might not be illegal. The Court does not conclude that an uncle needs to reject his nephew's explanation that a cigarette is a "roll-up" with tobacco and no marijuana. One of Plaintiff's officers testified that he could not tell from the smell that the roach had marijuana but relied instead on his partner's sense of smell. Defendant testified that his other guest, Richard, does smoke hand-rolled tobacco cigarettes.

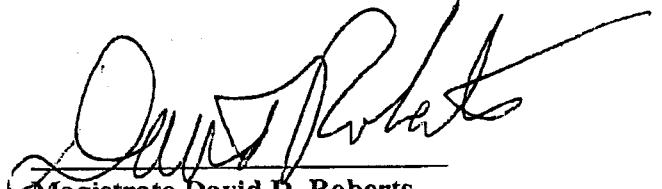
Plaintiff argued that the more likely explanation is that the three men were sharing the marijuana cigarette and only called it a roll-up to cover up what they were doing. But Plaintiff's burden of proof includes the burden of production of evidence on this issue. It is not enough to say that most of the time, marijuana users share the drug. Plaintiff must prove that this Defendant was sharing the drug or knew that the other men were.

Part of the Court's reasoning in *Harris* was that it was not equitable to require tenants in public housing to conduct a thorough search of their guests or face eviction for drugs that their guests might conceal. The Court reaches the same conclusion concerning a tenant's duty to investigate a guest's habits. It strains credulity to suppose that Defendant is unaware that cigarette papers are often used to smoke marijuana. So it may be that Defendant had some suspicion that either his nephew or other guest might be marijuana smokers. But just as it is not equitable to require tenants of public housing to search their guests, so it is not equitable to make the tenants of public housing subject their own guests to the same level of suspicion to which the police might subject them. An uncle is entitled to maintain his faith in his nephew until he knows or has some particular reason to doubt that the nephew deserves that faith.

In this case, it appears that Defendant reached that point after the police visited and confiscated the roach suspected to have marijuana in it. Defendant did not stand with his nephew then but asked the officers to escort him out of the building, suggesting that he had lost some measure of faith in his nephew and now doubted him. But Plaintiff did

not show that Defendant had any cause to doubt his nephew before his nephew came to visit, claiming to smoke only roll-ups.

The Court concludes that it would be inequitable to order Defendant to forfeit his lease under these circumstances and therefore under its state equity powers grants judgment to Defendant on Plaintiff's first cause of action.



Magistrate David D. Roberts

ATTENTION: A PARTY MAY NOT ASSIGN AS ERROR ON APPEAL ANY MAGISTRATE'S FINDING OF FACT OR CONCLUSION OF LAW UNLESS THE PARTY TIMELY AND SPECIFICALLY OBJECTS TO THAT FINDING OR CONCLUSION AS REQUIRED BY CIV. R. 53(E)(3). ALL OBJECTIONS TO THE MAGISTRATE'S DECISION MUST BE FILED IN WRITING WITHIN FOURTEEN DAYS OF THE JOURNALIZATION OF THIS DECISION. OBJECTIONS MUST BE FILED EVEN IF THE TRIAL COURT HAS PROVISIONALLY ADOPTED THE MAGISTRATE'S DECISION BEFORE THE FOURTEEN DAYS FOR FILING OBJECTIONS HAS PASSED. OBJECTIONS MUST COMPLY WITH THE OHIO RULES OF CIVIL PROCEDURE, AND THE LOCAL RULES OF THIS COURT. FOR FURTHER INFORMATION, CONSULT THE ABOVE RULES OR SEEK LEGAL COUNSEL.

SERVICE

A copy of this Magistrate's Decision was sent via regular U.S. Mail to the following on 12/14/07 mcg.

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