

IN THE CUYAHOGA FALLS MUNICIPAL COURT
SUMMIT COUNTY, OHIO

MUNICIPAL COURT
2009 NOV 21 P 3:32

ANITA COSTANZO, et al.

PLAINTIFFS

vs

AMANDA GROSS

DEFENDANT

) CASE NO. 2008 CVG 4234

) MAGISTRATE ROBERT N. WOODSIDE

) MAGISTRATE'S DECISION

This cause came before the Magistrate for hearing on Plaintiff's first cause of action for a writ of restitution on November 18, 2008. Plaintiffs were present with counsel, Attorney John Herrnstein. Defendant was present with counsel, Attorney Joann Sahl.

Plaintiffs' representative testified that the property at 1536 Second Street, Cuyahoga Falls, Ohio is owned by Second Street of Cuyahoga Falls, LTD. and is presently leased to the Defendant.

A review of the lease agreement (Plaintiffs' Exhibit 1) reveals the monthly rental is \$595.00 and that the lease is for a term of one year, beginning August 1, 2008 and ending April 31, 2009. These terms are interesting for two reasons. First, the dates describe a nine (9) month period, not one year. Second, April has only thirty (30) days. Additionally, in a paragraph headed "Amendment to Lease," the language indicates the rent will be \$595.00 for only the first eight (8) months, not nine (9), and then at the tenant's option, a new lease will be signed for four (4) months at \$575.00. Most confusing.

What is actually more confusing, and most unusual, this lease does not contain a day of the month upon which rent is due, which means it could be paid on potentially any one of thirty one (31) days and not be late. Plaintiffs' three day notice was issued and

served on October 16, 2008, citing as grounds "unpaid rent." Without a due date set forth in the lease, it is difficult to understand how Plaintiffs determined that Defendant's rent was late or unpaid. Defendant had paid partial rent (\$395.00) on October 1, 2008, and according to Plaintiffs' own lease terms, was not obliged to pay the balance until October 31, 2008.

Defendant testified she paid the full rent for August, \$595.00, but deducted \$50.00 from September's rent payment due to missing blinds, and moved in September 1, 2008. This deduction was approved by the landlord. Defendant further testified she sent e-mails to Plaintiffs in September that certain items were in need of repair and that, because she had been compelled to clean the apartment when she moved in, she was going to deduct \$200.00 from the October rent payment. This was based upon three estimates she received from cleaning services. Plaintiffs made arrangements to fix some of the items, but instructed Defendant that she was not to deduct money from the rental payment, as it would be a default of the terms of her lease and she would have to vacate the property. She responded that she would do so in any event and promptly mailed a check for \$395.00 dated October 1, 2008 for the October rent.

Plaintiffs' representative testified that upon receiving Defendant's check, the landlord posted a three-day notice to vacate premises document on Defendant's front door on October 16, 2008, (Plaintiffs' Exhibit 5), and then filed this action on October 24. Between these two dates, on October 20, 2008, Defendant testified that she mailed a check for the \$200.00 withheld rent from the October 1, 2008 payment to Plaintiffs and sent a letter to Plaintiffs, pursuant to R.C. 5321.07(A), that they had thirty (30) days to remedy a list of deficiencies that existed at her apartment, or she would seek legal

redress. Defendant then filed a rent deposit case with this Court on October 29, 2008, as case number 2008 CVR 007, escrowing November rent.

Plaintiffs' representative's testimony established that Plaintiffs had not accepted but also had not returned either of Defendant's October rent checks (Plaintiffs' Exhibit 9), nor had they kept them for evidence, but rather had made copies and then destroyed them.

At trial, the Magistrate considered the testimony and credibility of the parties/witnesses and weighed the evidence with reference to the allegations in the complaint, and the defenses. The Magistrate finds the witnesses to be equally credible and finds the case to be controlled by the language of the lease agreement.

Findings of Fact:

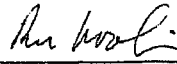
1. The lease agreement does not contain a designation of a day of the month on which the rent is due.
2. The Plaintiffs had no legal ground to reject Defendant's payment of \$395.00 on the first of October. See: Horvath, et al. v. Gorman (1951, Cleve. Muni. Ct.), 45 Ohio Op. 26, 60 Ohio L. Abs 538, 1951 Ohio Misc. LEXIS 426.
3. The Plaintiffs had no legal ground to reject Defendant's payment of \$200.00 on October 20-21, 2008.

Conclusions of Law:

1. The three-day notice issued by Plaintiffs on October 16, 2008 was without legal basis, and is therefore void.
2. A three-day notice is jurisdictional to the issuance of a writ of restitution.

Accordingly, it is the recommendation of the Magistrate that the writ not be issued.

It is further recommended that the second cause be continued, and that a hearing be set within two weeks in Case No. 2008 CVR 007.

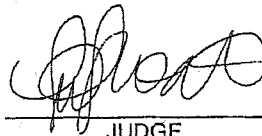


MAGISTRATE

JUDGMENT ENTRY

The Decision of the Magistrate is hereby approved.

It is the Judgment of the Court that a writ of restitution shall not issue. Costs to be paid by Plaintiff.



JUDGE

Cc: John M. Hermstein, Attorney for Plaintiff
Joann Sahl, Attorney for Defendant
File