SYLVANIA MUNICIPAL COURT
6700 Monroe Street
Sylvania, Ohio 43560

Lucas Metropolitan Housing Authority : Case: CVG 0501010

Plaintiff(s)
-VS-
Correa, Jessica L.
Defendant(s)

: Judgment Entry
: JUDGMENT

* * * * * * * * * * *

Date of 11/09/2005

JUDGMENT GRANTED IN FAVOR OF THE DEFENDANT.
SEE OPINION.

M. Scott Ramey
Judge

Bonnie Chromik
Clerk of Court
by: Johnna Amborski

Douglas A. Wilkins
P.O. Box 4967
Toledo, Oh 43620

Date Mailed: 11/09/2005

Sarah West
520 Madison, Ste. 640
Toledo, Oh 43604

Jessica L. Correa
435 N. Dorcas Road
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JOURNALIZED

FILED BY
SYLVANIA MUNICIPAL COURT
SYLVANIA, OHIO
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IN THE MUNICIPAL COURT OF SYLVANIA, LUCAS COUNTY, OHIO

Lucas Metropolitan Housing Authority Plaintiff,	*	**CASE NO. CVG0501010**
VS.	*	
Jessica L. Correa	*	
Defendant.	*	**OPINION**

This matter comes before the court after a trial on the merits. The facts of this case are as follows. Jessica Correa (hereinafter "Ms. Correa") has been a resident at the premises located at 435 N. Dorcas Road, Toledo, Ohio since 1995. Lucas Metropolitan Housing Authority (hereinafter "LMHA") is the owner of the premises. On February 22, 2005, Ms. Correa plead guilty to Possession of Marihuana, in violation of Section 481.121 of the Texas Health & Safety Code. Ms. Correa is currently on probation for the conviction. Around July 2005, Ms. Correa applied for a clerical specialist position with LMHA. The application contained the question "[h]ave you been convicted of a felony in the last 7 years?" Ms. Correa checked the corresponding "no" box in response.

The LMHA housing manager learned of the Texas conviction, and, pursuant to the terms of the lease, served Ms. Correa with a Notice of Termination and Invitation to Conference and

Notice to Leave the Premises on August 1, 2005. On August 2, 2005, the housing manager and Ms. Correa had a conference at which nothing was resolved regarding the matter.

On August 22, 2005, LMHA filed a Complaint in Forcible Entry in Detainer alleging that Ms. Correa is in unlawful and forcible possession of the premises. On September 30, 2005, the case was set for trial.

As a public housing authority, LMHA is subject to federal regulations. See generally Youngstown Metro. Hous. Auth. v. Scott (Ohio App. 7 Dist. 2001), 2001 Ohio 3308; Lucas Metro. Hous. Auth. v. Carmony (Ohio App. 6 Dist. 2001), 2001 Ohio App. LEXIS 2658. Pursuant to 24 C.F.R. ¤966.4(l)(2) a public housing authority can terminate a tenancy only for:

> "(i) Serious or repeated violation of material terms of the lease, such as the following:
> "(A) Failure to make payments due under the lease;
> "(B) Failure to fulfill household obligations, as described in paragraph (f) of this section;É
> "(iii) Other good cause. Other good cause includes, but is not limited to, the following:
> "(A) Criminal activity or other alcohol abuse as provided in paragraph (l)(5) of this sectionÉ"

24 C.F.R. ¤ 966.4(l)(5)(vii)(B) provides "Consideration of circumstances. In a manner consistent with such policies, procedures and practices, the PHA may consider all circumstances relevant to a particular case such as the seriousness of the offending action, the extent of participation by the leaseholder in the offending action, the effects that the eviction would have on family members not involved in the offending activity and the extent to which the leaseholder has shown personal responsibility and has taken all reasonable steps to prevent or mitigate the offending action."

A public housing authority is not required to evict a tenant who violates a lease provision. Dep't of Housing v. Rucker (2002), 535 U.S. 125, 133-134. Accordingly, local housing

authorities have the discretion to take into account certain factors including, but not limited to, "the degree to which the housing project suffers from 'rampant drug-related or violent crime,' 42 U.S.C. § 11901(2) (1994 ed. and Supp. V), 'the seriousness of the offending action,' 66 Fed. Reg., at 28803, and 'the extent to which the leaseholder has . . . taken all reasonable steps to prevent or mitigate the offending action.'" Id. at 134.

Rucker allows public housing authorities to consider a wide range of factors in deciding whether to evict. Oakwood Plaza Apts. v. Smith (2002), 352 N.J. Super. 467, 472. Public housing authorities are urged to give consideration to the general welfare of the tenant population and of those unconnected to the wrongdoing that share a household with the wrongdoer. Id. Furthermore, "*Rucker* does not mandate eviction; it permits it after suitable weighing of positive and negative factors such as those enumerated in federal regulations." Id. at 474. Thus, a housing authority must consider all relevant factors and mitigating circumstances under 24 C.F.R. § 966.4(l)(5) in deciding whether or not to evict. Allegheny County Hous. Auth. v. Hibbler (2000), 784 A.2d 786, 790.

24. C.F.R. ¤ 966.4(l)(5) provides that criminal activity includes a "[d]rug crime on or off the premises." It also requires the lease "Éprovide that drug-related criminal activity engaged in on or off the premises by any tenantÉis grounds for the PHA to terminate tenancy." Id. at ¤ 966.4(l)(5)(i)(B). Drug-related criminal activity is "Éthe illegal manufacture, sale, distribution, or use of a drug, or the possession of a drug with intent to manufacture, sell, distribute or use the drug." 24 C.F.R. ¤ 5.100.

Thus, LMHA is permitted to terminate Ms. Correa's lease for "drug-related criminal activity," as defined by federal regulations, or for a "serious or repeated violation of material

terms of the lease" after considering the relevant mitigating factors. Section 10(a)(2) of the lease provides "LMHA will immediately terminate the Lease if it determines that:É(2) Any household member or guest has engaged in drug-related criminal activity on or off the premisesÉ" The lease defines "drug-related criminal activity" as "[i]llegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute or use, of a controlled substance, or substances commonly known as, but not limited to, cocaine, heroin, marijuana, and opiumÉ"

The activity prohibited by Ms. Correa's lease and as defined by 24 C.F.R. ¤5.100 covers nearly identical conduct. Therefore, we must determine whether Ms. Correa's Texas conviction for Possession of Marihuana is "drug-related criminal activity" that warrants termination of her lease.

LMHA argues that the statute itself specifically references use, and Ms. Correa's conviction is "drug-related criminal activity" under the terms of the lease. Ms. Correa argues that there is no inference of "use" when determining "usable quantity" under the statute. Resolution of this issue requires a brief analysis of the Texas statute under which Ms. Correa was convicted.

Texas Health & Safety Code ¤ 481.121(a) provides a person commits the offense of Possession of Marihuana "Éif that person knowingly or intentionally possesses a usable quantity of marihuana." Ms. Correa was convicted of felony of the second degree under the statute for possessing an amount that is "É2,000 pounds or less but more than 50 pounds." Tex. Health & Safety Code Ann. ¤ 481.121(b)(5) (2005).

The elements of Possession of Marihuana are "(1) a person (2) did knowingly or intentionally (3) possess (4) a usable quantity of (5) marihuana (6) amount possessed in ounces

as set forth in statute." State v. Perez (Tex. Crim. App. 1997), 947 S.W.2d 268, 272. The element of "usable quantity" is intended ensure the amount in possession is more than a trace amount. Id.

Under the statute, possession is defined as "actual care, custody, control, or management." Morales v. State (2000), 2000 Tex. App. LEXIS 6032, at *36. To prove the element of possession, affirmative links between the defendant and the drug must be shown by proving defendant is aware of his connection with the drug and knew what it was. Id. To prove possession, the court can consider the following factors:

"(1) the defendant's presence when the search warrant was executed; (2) whether the contraband was in plain view; (3) the defendant's proximity to and the accessibility of the narcotic; (4) whether the defendant was under the influence of narcotics when arrested; (5) whether the defendant possessed other contraband when arrested; (6) whether the defendant made incriminating statements when arrested; (7) whether the defendant attempted to flee; (8) whether the defendant made furtive gestures; (9) whether there was an odor of the contraband; (10) whether other contraband or drug paraphernalia was present; (11) whether defendant owned or had the right to possess the place where the drugs were found; and (12) whether the place the drugs were found was enclosed." Id. at *37-38; See also Buckman v. State (Tex. App. 2004), 2004 Tex. App. LEXIS 1165, at *5.

Under the Buckman court's interpretation, use or "whether the defendant was under the influence" is a factor to consider in whether there are adequate affirmative links to constitute possession. Id. However, there is no element or requirement of intent to use explicit in the statute. Hence, no showing of use or intent to use is required under Texas law.

At least one Texas court has also found that unlawful possession can be established by marihuana in a urine test. Brown v. State (Tex. App. 1988), 760 S.W.2d 748, 749-750. Thus, the court is implying the intent to possess through use or presence of the substance in the defendant's urine. See Id. However, the court does not go so far as to imply the intent to use from possession itself. Similarly, we are not inclined to imply the element of "intent to use" into the statute.

In addition, interpreting the scope of "drug-related criminal activity," the South Dakota Supreme Court found that possession of drug paraphernalia does not precisely fit within the definition of 24 C.F.R. ¤ 5.100. Lakota Cmty. Homes v. Randall (2004), 674 N.W.2d 437, 442. However, the court found that federal regulations do not "prohibit termination of a lease where an individual possesses drug paraphernalia, participates in criminal activity, and demonstrates a destructive pattern of alcohol abuse." Id. Thus, the court was willing to consider a drug-related crime that does not fall within the definition of drug-related criminal activity, yet only in combination with other factors that would also warrant eviction.

Therefore, Ms. Correa's conviction for possession of marihuana does not violate the terms of the lease, which requires possession with specific intent to manufacture, sell, distribute or use. LMHA does not assert that Ms. Correa engaged in any further conduct in violation of the lease.

Furthermore, if Ms. Correa's conduct did fall within the definition of drug-related criminal activity as defined by the lease, LMHA failed to consider any mitigating circumstances when deciding whether or not to evict. The LMHA housing manager testified that the eviction notice was served on Ms. Correa because the attorneys sent it to her for processing. LMHA does not assert that it considered any other factors other than the conviction itself.

Ms. Correa's conviction arose out of events that occurred approximately six years ago, and it has not been alleged that Ms. Correa has since been charged with any criminal activity nor that has she violated her probation. LMHA does not assert that she engaged in any criminal activity on the premises. LMHA also did not consider the effect of an eviction on the innocent tenants, Ms. Correa's children.

Accordingly, the court does not have to consider Ms. Correa's contention that LMHA's actions constituted a waiver.

For the foregoing reasons, the court finds in favor of Defendant.

M. Scott Ramey, Judge
Sylvania Municipal Court