

5) If payment in full including all late fees and posting fees are not received within the three-day notice time period, a "Forcible Entry & Detainer for Personal Judgment" will be filed in the Akron Municipal Court. A Twenty Dollar (\$20.00) filing fee and all court filing fees will be charged to the tenant. (see plaintiff's exhibit B)

Mrs. Myszka further testified that defendant paid her September 2000 rent in full on August 27, 2000, but failed to pay her October 2000 rent, which was allegedly due on October 1, 2000. As a result, Mrs. Myszka testified that on October 2, 2000, she posted a three day notice on defendant's door and also dropped a copy into defendant's mail slot.

On cross-examination, Mrs. Myszka testified that although defendant moved in on October 2, 1999, the parties subsequently entered into an AMHA section 8 lease on November 2, 1999. (see plaintiff's exhibit A). Pursuant to this lease, defendant's total rent was \$617.00 of which defendant paid \$174.00 and AMHA paid \$443.00. Mrs. Myszka further testified that defendant's present portion of the rent is \$26.00 per month and AMHA pays \$591.00. The Magistrate notes that said lease appears to be a standard AMHA section 8 rental agreement but it also contains the following additional typed in provisions:

- 1) Rent is due on the first day of each month.
- 2) Late fee: \$5.00 per day after the fifth day of the month, with \$30.00 maximum.
- 3) No pets allowed.

Mrs. Myszka further testified that if she does not receive the rent in the mail from defendant by the fifth of the month then it is considered late. Concerning prior rental payments Mrs. Myszka testified that sometimes she received defendant's rent before the first of the month and sometimes she received it after the first of the month. Unfortunately, Mrs. Myszka did not have her rental receipt book with her to provide specific rental payment dates. However, concerning the payment of defendant's October 2000 rent, Mrs. Myszka testified that she did receive a money order in the amount

of \$77.00 from defendant on October 13, 2000, but she returned it to defendant on October 18, 2000. Mrs. Myszka testified that the money order represented defendant's \$26.00 October rent together with August's water bill payment. In response, Ms. Bledsoe testified that she originally mailed her rent to plaintiff on October 4, 2000, but it was returned to her on October 7, 2000, because it contained an insufficient address. Ms. Bledsoe further testified that she re-mailed her rent to plaintiff on October 8, 2000, and subsequently received it back from plaintiff on October 20, 2000.

On re-direct, Mrs. Myszka testified that she returned the aforementioned money order because she had already filed a forcible entry detainer complaint against defendant and her expenses were beyond the amount of defendant's money order. Specifically, Mrs. Myszka testified that defendant's money order did not include the eviction filing fees (\$86.00); applicable monthly late fees (\$30.00); or payment for September's water bill, which was now due. In addition, Mrs. Myszka testified that pursuant to the original lease (plaintiff's exhibit B) that defendant also owed her \$20.00 for serving a three day notice and \$20.00 for filing a forcible entry and detainer complaint. Mrs. Myszka further testified that on October 2, 2000, she returned AMHA's portion of the October 2000 rent (\$591.00) to AMHA. (see plaintiff's exhibit C)

At the conclusion of plaintiff's case, defendant's attorney, Joann Sahl, made an oral motion to dismiss plaintiff's complaint on the basis that pursuant to the aforementioned two rental leases, defendant's rent was not due until the fifth of each month. Attorney Sahl argued that plaintiff's three day notice which was served on October 2, 2000, was premature because the rent was not yet due and the law provides that you can't serve a three day notice until expiration of the tenancy or until a cause for eviction has arisen. As a result attorney Sahl argued that the court lacks jurisdiction to hear plaintiff's eviction case.

In addition, attorney Sahl argued that by plaintiff's own admission, the parties had established a course of conduct under which the rent was paid and received after the first day of the month. Attorney Sahl further argued that on October 2, 2000, when plaintiff served her three day notice to vacate plaintiff was still within the time period in which defendant was permitted to pay her rent based on the parties prior course of conduct. As a result, attorney Sahl argued that the court lacked jurisdiction to hear plaintiff's eviction case.

Finally, attorney Sahl argued that since October 1, 2000, fell on a Sunday that defendant was permitted under the law to pay her rent on the next legal business day or on Monday, October 2, 2000. As such, attorney Sahl argued that plaintiff had prematurely served her three day notice to vacate and that the court lacked jurisdiction to hear plaintiff's eviction case. In support of her motion, attorney Sahl provide the court with approximately ten court case opinions for the court's review.

In response, concerning the parties alleged past course of conduct regarding rental payments, Mrs. Myszka testified that on August 18, 2000, she wrote defendant a letter specifically stating that "I do not want to carry any balances forward." In addition, Mrs. Myszka testified that on September 1, 2000, she wrote defendant a second letter advising her that defendant's October 2000 rent would be due on October 1, 2000. (see plaintiff's exhibit E) As such, Mrs. Myszka testified that said letter demonstrates that plaintiff required the rent to be paid in full on the first day of the month and abolished any prior rental payment course of conduct between the parties. Said letter also contained a thirty day notice of termination of tenancy dated October 1, 2000, to be effective on October 31, 2000, which was the last day of defendant's tenancy pursuant to the aforementioned written rental leases.

In response, attorney Sahl argued that neither plaintiff's exhibit D or E qualify as a notice of

strict compliance under the law with regard to the future payment of rent on the first day of each month. In other words, attorney Sahl argued that neither letter served to modify or abolish the parties prior course of conduct under which defendant paid and plaintiff received rent after the first day of each month. At that point in the proceedings the Magistrate advised the parties that he was taking defendant's oral motion under advisement, over defendant's objections, and proceeded to hear defendant's defense to plaintiff's eviction action. Concerning defendant's oral motion to dismiss, the Magistrate now makes the following findings of fact and conclusions of law:

First, based on the testimony and evidence presented it is the opinion of the Magistrate that although the rent was due on the first of each month there was a five day grace period for defendant to pay her rent before late charges would apply. At least one court in Ohio has previously held that when a tenancy is terminated for nonpayment of rent, the notice to vacate may not be served until the expiration of any grace period. See *Williams v. Mentzer*, No. 94-CVG-238 (Mun. Ct. Marietta, May 17, 1994) In the instant case the Magistrate finds that plaintiff's October 2, 2000, three day notice to vacate was prematurely served during the aforementioned five day grace period. As such, it is the opinion of the Magistrate that the court does not have jurisdiction to proceed.

Second, even assuming arguendo that the rent was due on the first of each month, based on the testimony and evidence presented it is the opinion of the Magistrate that by continually accepting late rental payments over a period of time that the plaintiff has waived the right of timely payment. Although a landlord is never under a continuing obligation to accept late rental payments, once he or she has done so, it is incumbent upon the landlord to advise the tenant in a reasonable and timely manner that the original deadline for the payment of rent will be strictly enforced. As the court stated in *Bates & Springer, Inc. v. Nay* (1963), 91 Ohio Law Abs. 425, 187 N.E. 2d 415:

“[I]n order to establish a right to forfeiture where payments have been made for a period of time substantially beyond the due date, the landlord is required to give notice in writing in advance of his intention to require strict compliance of the lease. Such written notice must be given not less than three days prior to the due date of the rent in order to give the lessee the opportunity to comply strictly with the terms of the lease.” Id.

In the instant case, it is the opinion of the Magistrate that plaintiff's August 18, 2000, letter (plaintiff's exhibit D) fails to reasonably advise defendant that the original rent deadline, (i.e. the first of each month) was to be strictly enforced. Rather, plaintiff's letter merely states that the plaintiff does not want to carry any balances forward. As such, it is the opinion of the Magistrate that the language employed in plaintiff's letter is insufficient to have reasonably advised defendant that her future rent was due on the first of the month and that any rent payment made after that day would not be accepted in accordance with the parties prior course of conduct. Wherefore, it is the opinion of the Magistrate that plaintiff's October 2, 2000, three day notice to vacate was premature given the parties prior course of conduct and that the court does not have jurisdiction to proceed.

Third, it is well established in many Ohio jurisdictions, that if the date on which rent is payable falls on a Sunday then under the law the time for payment is extended to the following Monday. Specifically, Ohio Revised Code section 1.14 provides that:

“The time within which an act is required by law to be done shall be computed by excluding the first and including the last day; except that when the last day falls on a Sunday or a legal holiday, then the act may be done on the next succeeding day which is not Sunday or a legal holiday.”

See also, *Rea v. Helsley* (Franklin 1949) 86 Ohio App. 114, 90 N.E. 2d 168.

Wherefore, based on the testimony and evidence presented, it is the opinion of the Magistrate that given the parties established practice of paying the rent by mail that under ORC section 1.14 defendant's rent for October 2000 was due on Monday, October 2, 2000. As such, it is the opinion of the Magistrate that defendant's three day notice served on October 2, 2000, was premature and the

court does not have jurisdiction to proceed.

In summary, for the aforementioned reasons it is the opinion of the Magistrate that defendant's three day notice to vacate served on October 2, 2000, was filed prematurely. Therefore, the court does not have jurisdiction to proceed. It is the decision of the Magistrate that a writ not be allowed. It is my further decision that the second cause of action be continued.

James K Reed 11-8-2000
MAGISTRATE JAMES K. REED

JUDGMENT ENTRY

The decision of the Magistrate is approved. It is the judgment of the Court that a writ of restitution may not issue. Costs to be paid by plaintiff.

[Signature]
JUDGE

cc: Elizabeth Myszka (plaintiff)
Joann Sahl (Attorney for defendant)

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CLERK