IN THE CUYAHOGA FALLS MUNICIPAL COURT

SUMMIT COUNTY, OHIO

OWNER'S MANAGEMENT COMPANY	)	CASE NO. 01 CVG 1693
	)	
PLAINTIFF	)	
	)	
vs	)	
	)	
CHERYL BRENT	)	
	)	
DEFENDANT	)	MAGISTRATE'S DECISION

* * * * * * * * * * * *

The within matter came on for hearing on July 27, 2001, on the plaintiff's complaint in forcible entry and detainer.

The plaintiff, Owner's Management Company, is the lessor of residential premises at 265 North Thomas Road in the City of Tallmadge. By residential apartment lease of January 22, 1999, Unit K-103 at such address was leased to the defendant, Cheryl Brent; the tenancy being from month-to-month with automatic monthly renewals unless terminated for cause as set forth in the lease. Brent resided at the premises with her three-year-old son.

Brent has two neighbors, one living on either side of her, with each neighbor sharing a common wall with Brent. Beginning in July of 2000, such neighbors began to complain about loud music emanating from Brent's apartment. Repeated complaints were sent to the plaintiff by such persons, and the Tallmadge Police Department, on occasion, was called. Each neighbor suffers from anxiety and panic disorder and

stress, with such conditions being aggravated by the music. The music causes serious discomfort and interference with the well being of such neighbors. According to such persons, Brent's music is very loud, occurs throughout the course of the day, and interferes with their ability to eat, sleep, and engage in regular daily activity. In August of 2000, Brent was called out of town on a family emergency and was gone for three days. Her radio, newly purchased by her and the source of much of the music, automatically came on at a certain time of day. Brent was unfamiliar with the operation of the radio and did not know how to turn such feature off. Accordingly, the music came on and remained on during the three days that Brent was absent.

In November of 2000, in response to the complaints, the plaintiff held a meeting among Brent and her two neighbors. At such time, the plaintiff instructed Brent as to an allowable volume level which was acceptable. According to Brent, she has not exceeded such level since such meeting. The defendant's evidence also indicates that, on numerous occasions, the plaintiff's investigation into the complaints of the neighbors resulted in findings that Brent's music was not unreasonably loud. According to the defendant's neighbors, the volume established by the plaintiff was, in their opinion, too loud. Although Brent did lower her music subsequent to such meeting, it has since increased to its previous level; a proposition denied by Brent.

Due to the complaints, the plaintiff, on April 13, 2001, served Brent with a notice of termination of her lease. Two meetings were held with the plaintiff in April of 2001, with Brent variously requesting a meeting with her neighbors and/or transfer to another unit in the affected development. Neither request was honored, and the defendant was served, on June 6, 2001, with a notice to leave the premises.

A tenant who breaches an obligation imposed by R.C. §5321.05(A) materially affecting health and safety is subject to an action in forcible entry and detainer. R.C. §1923.02(A)(8). A tenant is obligated to "conduct himself... in a manner that will not disturb his neighbors' peaceful enjoyment of the premises." R.C. §5321.05(A)(8). The instant action was brought due to Brent's alleged violation of item 13E of her lease, with the same providing that a tenant will not "make or permit noise or acts that will disturb the rights or comfort of neighbors...". Such provision comes within the purview of R.C. §5321.05(A)(8). See, Parker v. Fischer, 17 Ohio App. 3d 103 (Ct. App. Summit County 1984). Accordingly, if the defendant's alleged conduct is deemed to have materially affected health or safety, compliance with the notice requirement of R.C. §5321.11 is mandatory. Lorain Metro. Housing Auth. v. Fonseca, 110 Ohio App. 3d 292, 295 (Ct. App. Lorain County 1996). It is found that the acts complained of in this matter materially affect health and safety; both of the defendant's neighbors testifying to the aggravation of their medical conditions caused by Brent's music.

By document entitled "Notice of Termination of Lease Notice to Leave Premises", served upon Brent on April 13, 2001, the defendant was advised that her interest in her apartment was terminated as of May 31, 2001. It was further indicated that, "if you have not vacated your unit by that date, an action in forcible entry and detainer (eviction) will be initiated." Also contained in the notice is the language required by R.C. §1923.04(A) and that required by paragraph 23(C) of the lease. After due deliberation, it is found that such document does not satisfy the notice requirement of R.C. §5321.11. After requiring that notice of the material health and safety violation be given a tenant, and that the tenant be informed of the date of the termination of the tenancy due to the

same, such section provides that, "If the tenant fails to remedy the condition specified in the notice, the rental agreement shall terminate as provided in the notice." It is apparent that, subsequent to service of the notice required by R.C. §5321.11, the tenant has an opportunity to remedy the complained of condition. It is only if such condition is not remedied that an eviction action can be maintained. By virtue of the language contained in the notice delivered to Brent on April 13, 2001, no such opportunity was afforded her; the notice indicating, in explicit terms, that, if she did not vacate by May 31, 2001, an action in forcible entry and detainer would be initiated. Similarly, inclusion of the language required by R.C. §1923.04(A) indicates to the tenant that she is being evicted. It is believed that the above-indicated language is not mere surplusage. Similarly, it is believed that the defendant's meetings with the plaintiff subsequent to her receipt of the notice of termination of tenancy (the efficacy of such meetings being a subject of debate) did not cure the notice problem, nor did the subsequent service of a ten day notice to leave the premises, in accordance with the lease, effect such cure. Absent a proper notice of termination of tenancy pursuant to R.C. §5321.11, a notice to leave premises pursuant to R.C. §1923.04(A) is premature, and a court lacks jurisdiction to proceed. Gibbes v. Freeman, No. 52745 (Ct. App. Cuyahoga County September 3,1987).

Accordingly, it is recommended that a judgment of restitution not be awarded the plaintiff with the complaint to be dismissed at such party's cost.

STEVEN J. SCHWARTZ, Magistrate

JUDGMENT ENTRY

The Decision of the Magistrate is hereby approved. It is the Judgment of the Court that a writ of restitution may not issue. Costs to be paid by (plaintiff)(defendant).

(may) (may not)

JUDGE

cc: Ted S. Friedman, Attorney for Plaintiff
Gregory R. Sain, Attorney for Defendant
File