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IN THE CLEVELAND MUNICIPAL COURT
CUYAHOGA COUNTY, OHIO
HOUSING DIVISION

Noemi Morales,	)	Date: November 21, 2000
	)	
Plaintiff	)	Judge Raymond L. Pianka
	)	
vs.	)	Case No.: 2000 CVH 002037
	)	
Windsor Realty & Management, Inc.,	)	
	)	MAGISTRATE'S REPORT
Defendant	)	AND JUDGMENT ENTRY
	)	

This matter is before the Court on both plaintiff's and defendant's motions requesting orders for summary judgment in each of their respective favors. For the following reasons, the plaintiff's motion for summary judgment is granted in part, and the defendant's motion for summary judgment is denied.

Plaintiff's complaint seeks restitution for wrongfully withheld security deposit pursuant to R.C. 5321.16(C) in the amount of Eight Hundred Seventy Dollars ($870.00), damages for the wrongfully withheld security deposit in the amount of Eight Hundred Seventy Dollars ($870.00), costs of this action, and "such other relief" that this court finds just and equitable.

On August 23, 2000, the defendant filed a motion for summary judgment on plaintiff's complaint. The motion was stricken for having been untimely filed without leave of court, pursuant to Ohio Rule of Civil Procedure 56(A). However, defendant's motion to reconsider was granted and the defendant's motion for summary judgment was subsequently permitted to be filed. On September 27, 2000, the plaintiff's motion for summary judgment was filed with the Court.

Ohio Rule of Civil Procedure 56(C) states, in pertinent part:

> "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law...A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor."

Plaintiff and defendant have stipulated to a number of the facts involved in the instant matter. The crux of the disagreement between the plaintiff and the defendant is whether the self-renewing year-to-year periodic lease is valid. For the following reasons, this Court determines that it is not.

Revised Code section 5301.01 is Ohio's Statute of Conveyances. The Statute of Conveyances generally requires all leases of real property to be: 1) in writing, 2) signed by the lessor, 3) attested to by two (2) witnesses, and 4) acknowledged before a notary or other official described in that section. Certain leases, like those for less than three (3) years, are exempt from these formal requirements. R.C. 5301.08. However, leases that are determined to be "perpetual" in nature, i.e., those that automatically renew, remain subject to the requirements of the Statute of Conveyances. Frank v. Flynn, 120 Ohio App. 361; Friedrich v. Matrka, No. 37178 (Ct. App. Cuy. Cty.) 1978. Here, the lease contained an automatic renewal clause. Stipulated Exhibit 1 ¶ 2.

Here, the lease was in writing and was signed by the lessor, the plaintiff in this action. However, the lease contains only one (1) signature of a witness to the lease. Stipulated Exhibit 1. Additionally, the parties stipulated that the lease was neither notarized nor filed at the County Recorder's office. Agree Stipulations ¶¶ 14-15. The lease did not comply with the Statute of Conveyances and is therefore void.

The defendant asserts that the doctrine of part performance applies here, and therefore removes the lease from complying with the requirements of the Statute of Conveyances. In order to be sufficient to remove a lease from the Statute of Conveyances, the part performance must consist of "equivocal acts by the party relying on the agreement if these acts are exclusively referable to the agreement, change the party's position to his detriment, and make it impossible to place the parties in *status quo*." Delfino v. Paul Davies Chevrolet, Inc. (1965), 2 Ohio St.2d 282, at Syllabus ¶ 4. If the performance can be reasonably accounted for in any other manner, or if the lessor has not altered his position in reliance on the agreement, the case remains within the operation of the statute.

The court in Delfino, supra, held that the acts alleged by the lessor, i.e., permitting the lessee to remain in possession of the premises, accepting rent, and crediting the lessee as having prepaid rent in return for new motor vehicles, were not sufficient to remove the agreement from the Statute of Conveyances. Another appellate court, however, has reached a different conclusion on two separate occasions.

In Loveland Properties v. Ten Jays, Inc., the court held that "unequivocal acts exclusively referable to the lease are the installation of the new combined heating and air conditioning unit at the landlord's cost in part, the extension of credit to [the tenant] (for its share of the cost), and the renewal of the lease for another five year term. Those acts change [the landlord's] position to its detriment because they caused an improvement to be made to the premises at its cost in part, additional credit to be extended to the tenant and an extension to be made to the term of the lease." (1988 1st Dist. Hamilton Cty.), 57 Ohio App.3d 79.

Similarly, in Menke v. Tessel, the same court held that the addition of a room to the leased premises (by tearing out a wall and installing new vinyl flooring of a selected design) and the extension of the term at an increased rental were sufficient part payment to allow enforcement of a defectively executed lease. (1969 1st Dist. Hamilton Cty.), 18 Ohio App.2d 121.

In its motion for summary judgment, the defendant argues that because it did not attempt to show and re-rent the apartment, the doctrine of part performance removes the lease from the Statute of Conveyances. Those omissions are, in this Court's opinion, more akin to the acts in the Delfino case. The Court of Appeals in Menke and Loveland, supra, allowed the part performance doctrine to be applied in situations where the landlords made physical changes to the leased structures and other monetary expenditures. That is simply not the case here. Accordingly, the doctrine of part performance does not remove this lease from the Statute of Conveyances, and as a result, the lease between the parties remains void.

When a lease is found to be invalid because of a violation of R.C. 5301.01. the lessee has taken possession and pays rent, the Court must determine if the lease is removed form the statute, whether it is an implied lease created by part performance, and if it is not, what the terms of the resulting tenancy are. Ruben v. S.M. & N. (1993 8th Dist. Cuyahoga Cty.), 83 Ohio App.3d 80. Generally, if a lease does not meet the requirements of the Statute of Conveyances, it is invalid as a lease and does not operate to convey the estate or create the leasehold term sought to be created or conveyed. Frank and Delfino, supra. Although an agreement purporting to be a lease, but is void because of having not complied with the Statute of Conveyances, it is settled law that from entry under such agreement, or at least from entry and payment of rent, a tenancy is implied. Wineburgh v. Toledo (1932), 125 Ohio St. 219.

Having determined the written lease between the parties is void, it is now necessary to discuss the type of tenancy that was actually created. Ruben, supra. It is established rule in Ohio that the nature of a tenancy will be determined by the type of rental payments. Delfino, supra. The written rental agreement between the party established a year to year tenancy, payable in monthly installments. Stipulated Exhibit 1, ¶¶ 2, 3.

In Friedrich v. Matrka, supra, the landlord and tenant entered into an agreement in June 1971 for the rental of an apartment for a period of twelve months, at a rental amount of two hundred five dollars ($205.00) per month. The lease stated that unless one of the parties gave notice thirty (30) days in advance of the expiration of the lease, the lease would automatically renew for a like period of twelve months. On November 17, 1971, the tenant announced his intention to vacate by the end of that month. The landlord subsequently brought suit for the remainder of the tenant's term. The Court of Appeals, Eighth District Cuyahoga County, held that while it would appear that this lease may be construed as a year to year, pursuant to Frank v. Flynn, supra, the court instead distinguished the two cases. In Frank, the tenant in that case held over into a third year under a perpetual yearly lease, in which there was no mention of monthly rental payments. Since the tenants paid rent to the landlords on a monthly basis, the Court of Appeals in Friedrich upheld the determination of the trial court that the tenancy created was month to month.

The facts in the case *sub judice* are remarkably similar to those set forth in Friedrich. Here, the defendant and plaintiff entered into a rental agreement for twelve (12) months at a monthly rate. As the Court of Appeals held in Friedrich that the tenancy created was month-to-month, the tenancy here must also be found to be month-to-month. The tenancy having been determined to be month-to-month, the tenant is therefore not liable for rent due for the following year.

The next issue for discussion is the tenant's notice to terminate her tenancy. The parties offer no stipulations as to what date the Plaintiff gave her notice to terminate her tenancy to the Defendant. The lease between the parties required sixty (60) days notice of intention to terminating the tenancy. Stipulated Exhibit 1 ¶ 2. Having found the perpetual nature of the lease to be invalid does not invalidate other provisions of the lease. While a lease is required to comport with the requirements of the Statute of Conveyances, but has failed to do so, is void, the lessee in possession of the premises thereunder is still a tenant subject to all other provisions of the lease excepting duration. Frank, supra. The issue of whether the Plaintiff gave proper notice of her intention to terminate the tenancy is a material issue of fact, which the parties will need to prove at trial.

The Plaintiff contends that she gave "proper" and "due" notice, but fails to give an actual date. Plaintiff's Motion for Summary Judgment, pp. 4, 8. The Plaintiff also states that she "gave proper notice of her intent to vacate" and cites to Stipulated Exhibit 3. Id. p. 9. The Stipulated Exhibit 3 is a letter from the Plaintiff to the Defendant. The Plaintiff wrote, "I...gave you notice months in advance that I would be moving at the end of my lease term, at the end of September 1999." This Court is not persuaded that this statement demonstrates that the Plaintiff gave proper notice to terminate her tenancy.

The next issue for discussion is that of the withholding of the security deposit. The parties stipulate that the Plaintiff gave the predecessor landlord a security deposit in the amount of Eight Hundred Seventy Dollars ($870.00). Agreed Stipulations ¶ 6. The parties also stipulate that the landlord mailed a letter on October 24, 2000 itemizing the deductions and reason for withholding the entire security deposit. Agreed Stipulations ¶ 11. The parties additionally stipulate to the fact that the defendant paid to plaintiff the interest due on the security deposit in the sum of Forty-Three Dollars and Fifty Cents ($43.50) on October 24, 2000, pursuant to R.C. 5321.16(A). Agreed Stipulations ¶ 10.

When a tenancy is terminated, a landlord may apply the security deposit "to the payment of any past due rent and to payment of the amount of damages that the landlord has suffered by reason of the tenant's non-compliance with R.C. 5321.05 or of the rental agreement. R.C. 5321.16(B). Revised Code 5321.16(B) requires that, within thirty (30) days of the termination of the rental agreement and tenant's delivery of possession of premises to the landlord, the landlord is required to return the security deposit to the tenant and/or provide the tenant with a written itemization of any portion of the security deposit that the landlord retains. The tenant must supply the landlord with a forwarding address.

If a landlord wrongfully withholds all or a portion of the security deposit and the tenant has provided the landlord with a forwarding address, the tenant may sue to recover the withheld security deposit, statutory damages (equal to the amount wrongfully withheld), and reasonable attorney fees. R.C. 5321.16(C). If any portion of the security deposit is wrongfully withheld, the landlord's liability to the tenant for statutory damages and attorney fees is mandatory. Smith v. Padgett, 32 Ohio St.3d 344.

Here, the plaintiff paid Eight Hundred Seventy Dollars ($870.00) as a security deposit. Agreed Stipulations ¶ 6. The plaintiff supplied the defendant with her new address. Agreed Stipulations ¶ 9. The defendant has withheld the entire security deposit. Stipulated Exhibit 2. However, since the parties have failed to establish when the tenant gave notice, it is possible that the landlord has properly withheld a portion, or all, of the security deposit. If the landlord has properly withheld all of the security deposit, the tenant will recover nothing. If the landlord has properly withheld a portion of the security deposit, the Plaintiff will be entitled to double damages for that wrongfully withheld portion, as well as attorney fees.

Generally, the tenant's failure to plead attorney's fees pursuant to 5321.16(C) does not waive the tenant's right to recover. See, e.g., Ohio Rule of Civil Procedure 54(C), and Zimmerman v. Elmore, No. 47724 Ct. App. Cuy. Cty. 1984. Rule 54(C) states in pertinent part," every final judgment should grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded the relief in the pleadings." Despite the fact that the plaintiff did not specifically seek attorney fees in her complaint, she is still able to recover for them. Accordingly, attorney's fees will be addressed at trial.

As a result of the foregoing discussion, the plaintiff's motion for summary judgment is granted in part, and defendant's motion for summary judgment is denied. This matter is set for trial on **January 25, 2001** at **1:30 p.m.** on the Thirteenth Floor regarding the issues of when the Plaintiff gave her Notice to Terminate tenancy, what amount, if any, the Plaintiff is entitled to for return of security deposit, and attorneys fees, if applicable.

Recommended:

Magistrate Ruben E. Pope

IN ORDER TO BE CONSIDERED, ALL OBJECTIONS TO THE MAGISTRATE'S REPORT MUST BE FILED WITHIN FOURTEEN (14) DAYS OF JOURNALIZATION AND 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.

JUDGMENT

Upon review, the Magistrate's Report is approved and confirmed. Partial summary judgment is granted in favor of the plaintiff; the defendant's motion for summary judgment is denied. This matter is set for trial on **January 25, 2001** at **1:30 p.m.** on the Thirteenth Floor regarding the issues of notice to terminate tenancy, security deposit, and attorney fees.

Judge Raymond L. Pianka

SERVICE

A copy of this Judgment Entry was sent via regular U.S. Mail to:

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this 22nd day of November, 2000.

DRodriguez