

CLEVELAND MUNICIPAL COURT
HOUSING DIVISION
CUYAHOGA COUNTY, OHIO

CMHA)	DATE: AUGUST 29, 2002
)	
Plaintiff)	CASE NO. 2002 CVG 5589
)	
-vs-)	JUDGE RAYMOND L. PIANKA
)	
LINNELL BINION)	<u>MAGISTRATE'S DECISION</u>
)	
Defendant)	

This case came for hearing on July 1, 2002, before Magistrate Myra Torain Embry to whom it was referred by Judge Raymond L. Pianka, pursuant to Civ. Rule 53 to take evidence on all issues of law and fact regarding plaintiff's first and second cause of action and defendant's counterclaim. Both plaintiff and defendant were present with counsel.

FINDINGS OF FACT

1. Plaintiff is and at all times relevant to this action, the owner of the property located at 2608 Cedar Avenue, Cleveland, Ohio.
2. Plaintiff and defendant entered into a written lease agreement for the property located at 2608 Cedar Avenue, Cleveland Ohio, #372.
3. On or about September 15, 1999, defendant lost his employment with APCOA/Standard Parking and became unemployed.
4. Defendant remained unemployed and without income from September 15, 1999 through December 21, 1999.
5. On or about September 16, 1999, defendant informed his property manager that he had lost his employment and did not have income.
6. On or about September 17, 1999, defendant provided to his manager written verification from his former employer of his employment loss. Said verification was admitted as defendant's exhibit A.
7. At the time defendant lost his income in September 1999, neither plaintiff nor plaintiff's agent informed defendant of his right to request a hardship exemption from the minimum rent requirement.
8. Defendant testified that in 2000 or 2001, plaintiff sent him a letter notifying him of his rights to request a hardship exemption from the minimum rent requirement.

9. On or about October 1999, defendant paid rent to plaintiff in the amount of \$360.00. Defendant has not paid plaintiff rent since the October 1999 payment.

10. From November 1999 through December 1999, defendant repeatedly contacted his property manager regarding the fact that he was not receiving rent statements. Defendant's property manager informed defendant that his case was in recertification, and he would be receiving a letter in the mail as to his new rental amount.

11. On or about December 22, 1999, defendant provided to his property manager written verification that he was employed effective December 21, 1999.

12. Plaintiff's only witness, Geneva Massingill, a recertification specialist for plaintiff, testified that if defendant went from an income status of zero to employment in 1999, the rent would not increase until after the next recertification.

13. Subsequent to September 1999, defendant's next recertification/review occurred sometime between March and June 2000 to take effect in August 2000.

14. Based on the recertification, which occurred between March and June 2000, defendant's monthly rental amount was adjusted to \$340.00 effective August 2000.

15. In August 2000, defendant attempted to pay his rent in the amount of \$340.00. Defendant's property manager stated that defendant's case was in legal and refused to accept defendant's rent.

16. On or about August 10, 2000, plaintiff filed a complaint in forcible entry and detainer against defendant for nonpayment of rent, case # 2000 CVG 17616. The complaint also alleged a second cause of action.

17. On or about December 1, 2000, plaintiff voluntarily dismissed without prejudice its first cause of action.

18. The parties' counsel thereafter instructed the court to hold the second cause of action for entry, as it was the parties' intent to reach an amicable settlement of the matter.

19. The parties having failed to submit an agreed judgment entry as of June 18, 2001, the court instructed the parties to submit said entry by July 5, 2001.

20. By court order, plaintiff's second cause of action was dismissed when the parties failed to submit an agreed judgment entry by July 5, 2001.

21. Plaintiff continued to not send defendant rent statements or allow defendant to pay his rent after the dismissal of case # 2000 CVG 17616.

22. Plaintiff's exhibit E was admitted into evidence to show the timeline of defendant's work history and calculation of income as constructed by plaintiff. With the exception of the period from October 2001 through March 2002, the testimony of the parties at trial does not appear to conflict as to when and where defendant was employed, as indicated in plaintiff's exhibit E.

23. Plaintiff's exhibits A-2, A-3, A-5, A-6, A-7 and A-8 were admitted into evidence to show defendant's employment history from December 21, 1999 through December 14, 2000.

24. Although plaintiff's exhibit E indicates that defendant was employed at Aluminum Precision from February 4, 2002 to February 8, 2002, there was no testimony or evidence presented to support the allegation.

25. The parties stipulated that plaintiff's rent calculations for August 2000 through June 2001 are correct.

26. On or about June 25, 2001 defendant provided to his property manager written verification of his employment with the Sheraton Cleveland City Centre Hotel, hereinafter, the "Sheraton Hotel". A copy of said verification was admitted as defendant's exhibit B.

27. On or about September 19, 2001, defendant provided to his property manager written verification of his loss of employment with the Sheraton Hotel. A copy of said verification was admitted as a part of defendant's exhibit C.

28. As a result of his loss of employment with the Sheraton Hotel, defendant had zero income from September 19, 2001 to at least June 2002.

29. Despite the verifications admitted as defendant's exhibit B and C, plaintiff failed to recertify defendant's income and adjust his rent for the period July 2001 through March 2002.

30. On or about January 30, 2002, plaintiff sent to defendant a letter with attachment, demanding payment of rent from October 1999 through January 2002. A copy of said letter and attachment was admitted as defendant's exhibit D.

31. The rental amounts listed in defendant's exhibit D for the months October 1999 through January 2002 are consistent with the rental amounts listed in plaintiff's exhibit E.

32. Defendant failed and/or refused to pay the rental amount demanded in defendant's exhibit D.

33. On or about February 12, 2002, plaintiff served on defendant a notice of termination and invitation to explain for nonpayment of rent. The notice of termination and invitation to explain was in compliance with Federal Regulation.

34. On or about February 27, 2002, plaintiff served on defendant the requisite notice to vacate premises.

35. At trial, the parties entered into seven stipulations marked parties stipulations exhibit A.

CONCLUSIONS OF LAW

This matter is before the court on the first and second cause of action of plaintiff's complaint in forcible entry and detainer and on defendant's counterclaim. As to its first cause of action, plaintiff alleges that it is entitled to restitution of the premises due to defendant's failure to pay rent. Both parties agree that defendant has not paid plaintiff rent since October 1999. However, defendant argues that his nonpayment situation is a result of plaintiff's failure to timely and accurately recertify defendant's income and adjust his rent pursuant to Federal regulations. Defendant asserts that the calculations of defendant's income are incorrect and until plaintiff properly calculates rent and offer defendant an opportunity to pay the correct amount of rent owed, defendant should not be evicted for nonpayment of rent.

At trial, plaintiff's exhibit E was admitted into evidence to show defendant's employment history, and rent calculation as constructed by plaintiff. With the exception of the period from September 2001, through March 2002, the parties do not appear to disagree as to where and when defendant was employed. However, the parties disagree as to the calculation of defendant's rent for the period October 1999 through July 2000 and July 2001 through March 2002. Plaintiff's only witness, Geneva Massingill, a recertification specialist for plaintiff, testified that the rent calculations under the CMHA column in plaintiff's exhibit E are correct less the \$225.00 defendant has deposited with the Clerk of Courts. Plaintiff further alleges that defendant was receiving income from the Department of Human services. Plaintiff failed to produce a witness or authenticated records from the Department of Human Services to support its allegation.

With regards to the period from October 1999 through December 1999, defendant argues that his property manager and/or plaintiff failed to inform him of his right to request a hardship exemption to the minimum rent requirement. As a consequence of plaintiff's action and/or inaction, defendant argues that he was deprived of his right to request and be evaluated for the exemption. With regards to the period from December 21, 1999 through July 2000, defendant argues that plaintiff violated its own policy by charging defendant increased rent based on income he received from employment obtained between recertification periods. With regards to the period from July 2001 through March 2002, defendant argues that plaintiff failed to recertify his income and adjust his rent despite timely notice of his employment and subsequent loss of employment with the Shereton Hotel. Finally, defendant denies receiving income from the Department of Human Services, and states that the mother of his children, who actually receives the welfare benefits used his address, as she did not have a stable address at that time. Defendant further testified that the mother of his children did/does not live with him.

At the outset, O.R.C. §1923.01(B) establishes a two-year statute of limitations for eviction actions. Therefore, the court will not address any nonpayment issues as it pertains to the first cause of action for any period prior to March 2000. As to the period March 2000 through July 2000, plaintiff adjusted defendant's rent to take into consideration employment income plaintiff received for this period. Defendant states that he went from a status of zero income to earned income between the 1999 and 2000 recertification period. Defendant argues that pursuant to plaintiff's 1999 policy regarding increases in earned income between recertification periods, defendant's rental amount for this period should not have reflected any income defendant received for the period March 2000 through July 2000.

Ms. Massingill testified that if defendant's income went from zero to employment in 1999, defendant's rent would not increase until the next recertification. Ms. Massingill further testified that subsequent to September 1999, defendant's next rent recertification was sometime between March and June 2000, effective August 2000. Besides corroborating defendant's understanding of plaintiff's earned income policy in 1999, Ms. Massingill did not offer any testimony or evidence regarding the above-mentioned policy. Nor did plaintiff offer testimony or argument as to why this policy would not apply in the instant case. Therefore, based on the testimony of plaintiff's witness and defendant, it appears that any adjustments to defendant's rent based on income prior to the 2000 recertification should not have taken effect until August 2000, and plaintiff is not entitled to receive the rental amount it seeks for the period March 2000 through July 2000.

With regards to the period from July 2001 through March 2002 defendant testified that he provided to his property manager written verification of his employment and subsequent loss of employment with the Sheraton Hotel. Defendant asserts that despite said verification, plaintiff failed to recertify his income and adjust his rent. Defendant roughly estimates his rental amount to be \$300.00 for the period July 2002 through September 2001. Defendant further asserts that plaintiff failed to recertify his income and adjust his rent when he lost his employment with the Sheraton. Therefore, with regards to the period from October 2001 through March 2002, defendant argues his rent should be adjusted to reflect his zero income status. Ms. Massingill testified that defendant failed to report his employment and income with the Sheraton Hotel. Therefore, on or about the end of September 27, 2001, she sent defendant a notice denying his request for an interim recertification of his income. Ms. Massingill testified that after she sent to defendant the notice marked defendant's exhibit C, she did not conduct further inquiry as to defendant's income status. Defendant's income remained at \$135.00 per month through March 2002.

The jury or trial court where there is no jury is the sole judge of the credibility of the witnesses and of what weight is to be given their testimony. In re Disbarment of Lieberman (1955), 163 Ohio St. 35. In the instant matter, the court finds the defendant credible that he placed plaintiff on notice of his employment with the Sheraton Hotel at the beginning and end of his employment, and has not had income since on or about June 2002. However, assuming arguendo that defendant failed to inform plaintiff of his employment with the Sheraton Hotel, plaintiff's remedy was not to refuse to adjust defendant's rent and recertify his income, but pursuant to Section C(1)(d) of the lease, to apply the rental increase retroactively to the effective date of the initial rent change or if fraud is determined, to terminate the lease agreement. Therefore, the court finds that plaintiff is not entitled to receive the rental amount it seeks for the period October 2001 through March 2001. Furthermore, plaintiff having failed to produce a witness and/or authenticated records from the Department of Human Services to rebut defendant's testimony that he was not receiving welfare benefits, the court finds that plaintiff has failed to meet its burden of showing defendant's receipt of said benefits.

The testimony and evidence at trial indicates that as of September 2001, plaintiff had in its possession all information regarding defendant's work history, and yet his rent was not adjusted nor a demand for payment made until January 2002. Although it is not clear to this court that defendant timely reported his income for the period June 30, 2000 to December 2000, it is clear from the documents provided by plaintiff and defendant that plaintiff had in its possession the information for the above mentioned employments as far back as a year ago, and yet no

adjustments or demand for rent was made at that time. Nor did plaintiff allow defendant to pay his rent. Furthermore, plaintiff did not offer any explanation as to why it took nearly three years to adjust defendant's rent so that defendant could make rent payments. Therefore, it is this court's belief that defendant's nonpayment situation was created due to plaintiff's failure to timely recertify his income and/or follow its own procedures in adjusting defendant's rental obligation. When plaintiff finally made a demand for rent, it was for an amount defendant was not obligated to pay pursuant to Federal regulation and/or plaintiff's own policy. Therefore, plaintiff's first cause of action is denied.

Consistent with the findings in the first cause of action, the court makes the following order as to plaintiff's second cause of action: plaintiff is entitled to rent in the amount of \$25.00 per month for the period October 1999 through July 2000; \$300.00 per month for the period July 2001 through September 2001; \$25.00 per month for the period October 2001 through March 2002; there being no dispute as to the amount of rent owed for August 2000 through June 2001, total judgment for plaintiff is \$3,120.00.

With regards to defendant's counterclaim, defendant alleges that: 1) he is entitled to an award of \$25.00 per month for the period October 1999 through July 2000 and October 2001 through March 2002, the months defendant's rent could have been reduced to zero had plaintiff informed him of his right to request a hardship exemption and 2) an award of \$1,400.00, for the amount Cleveland Mediation would have contributed to defendant's rent arrearage had plaintiff agreed to accept said amount as part of a settlement agreement. As to defendant's request for an award due to plaintiff's failure to notify him of a hardship exemption, there was no testimony or evidence produced at trial to show that defendant would have received or been eligible for a hardship exemption even if he had been on notice of said exemption and requested it. Therefore, judgment is entered for plaintiff on defendant's first counterclaim.


As to plaintiff's second counterclaim, the fact that defendant's nonpayment situation is due in part to plaintiff's action and/or inaction will not absolve defendant of his obligation to pay his rent in accordance with Federal regulations for the period he has lived on the property without paying rent. The fact that plaintiff refused to enter into an agreement with a third party to assist defendant with the payment of his rent does not absolve defendant of this obligation. Nor is this court persuaded that plaintiff had an obligation to contract with a third party for the partial payment of defendant's rent. Even if plaintiff was obligated to contract with a third party, defendant has failed to produce evidence or testimony that funds from Cleveland Mediation are no longer available to him should he again apply for said funds. Therefore, judgment is entered for plaintiff on defendant's counterclaim. Plaintiff may make a demand for rent in accordance with this decision and Ohio law. Although not obligated to, given the amount of rent that has accrued, the parties may want to consider entering into a repayment of rent plan that allows defendant to remain on the premises while becoming current with rent in a time frame and manner determined by the parties.

RECOMMENDED JUDGMENT

Based upon the evidence presented, judgment for defendant on the first cause of action. With regards to the second cause of action, judgment is for plaintiff in the amount of \$3,120.00. Defendant's counterclaim is denied. There is currently \$225.00 on deposit with the court. The Clerk is ordered to release the money on deposit to plaintiff in partial satisfaction of plaintiff's judgment.

Release of money on deposit may occur on or after September 23, 2002.

Recommended:

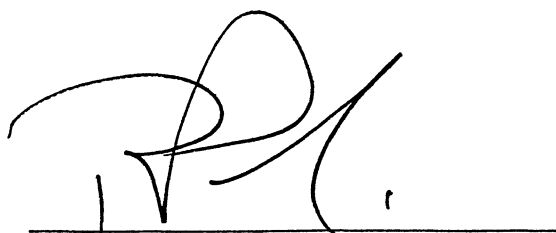


MAG. MYRA TORAIN EMBRY

JUDGMENT

Based upon the evidence presented, judgment for defendant on the first cause of action. With regards to the second cause of action, judgment is for plaintiff in the amount of \$3,120.00. Defendant's counterclaim is denied. There is currently \$225.00 on deposit with the court. The Clerk is ordered to release the money on deposit to plaintiff in partial satisfaction of plaintiff's judgment.

Release of money on deposit may occur on or after September 23, 2002.



JUDGE RAYMOND L. PIANKA

A copy of this judgment entry was mailed to parties/counsel by regular U.S. mail on 9/3/02.