

PHILADELPHIA
IN THE NEW PHILADELPHIA MUNICIPAL COURT
COUNT
NEW PHILADELPHIA, OHIO
'89 APR 5 AM 9 21

SUPERIOR MOBILE HOMES, INC., INC. :
PLAINTIFF : CASE NO. 7-89-CVG-100
V. :
DONNA RUSSELL, : JUDGMENT ENTRY
DEFENDANT :

This matter came on for Hearing on March 16, 1989 before Referee David Worth upon the Plaintiff's First Claim for Relief filed on February 23, 1989. Plaintiff Superior Mobile Homes Inc. appeared through its President, Charles Matthews, and was represented in Court by Attorney James Barnhouse. The Defendant appeared in Court, represented by Attorney Richard Renner.

The Court

FINDS from the evidence adduced that Plaintiff and Defendant entered into a rental agreement on January 1, 1988 calling for the Defendant to pay One Hundred Dollars (\$100.00) per month with rent payable by the first. However, pursuant to the agreement, the parties agreed that the Defendant would pay One Dollar (\$1.00) per day as a late charge for any rental payment in arrears more than five (5) days. The parties proceeded from that point on a month to month tenancy.

FINDS that the Defendant has always paid her rent, although she has at times paid her rent late and thus incurred late charges.

FINDS that the Plaintiff desired to terminate the month to month tenancy and serve a Notice upon the Defendant on or about October 10, 1988, indicating that the tenancy would be terminated on November 14, 1988. Obviously, this Notice would not be effective to terminate the tenancy on November 14, 1988, since the Notice given any time in the month of October would only serve to terminate the tenancy by the end of November 1988, assuming contin-

ued payment of rent.

FINDS that the Defendant did not vacate the premises at the end of November 1988, but remained in the premises and continued to pay rent, which was accepted by the Plaintiff.

FINDS that on or about February 16, 1989 the Plaintiff served the Defendant with the Statutory Notice to Vacate the Premises as required by Revised Code Section 1923.04. The Notice alleged that the month to month tenancy had terminated. This Notice was admitted as Plaintiff's Exhibit C.

FINDS that after that Notice was given, the Plaintiff accepted One Hundred Seven Dollars (\$107.00) in rent for the month of February. On March 15, 1989, the Plaintiff accepted One Hundred Five Dollars (\$105.00) from the Defendant towards the rent for March 1989. The Defendant was current in her rent at the time of the Hearing on March 16, 1989.

FINDS that, pursuant to the rule of law pronounced in Associated Estates Corp. v. Bartell, 24 O. App. 3d 6 (1985), a lessor waives the statutory requirement of notice and may not commence a Forcible Entry and Detainer Action based upon such Notice if the lessor accepts future payments of rent after service of the Three (3) Day Notice. The Three Day Notice was served, according to Plaintiff's own exhibit, on February 16, 1989. Plaintiff's own record demonstrates that rent was accepted on February 17 for the month of February and March 15 for the month of March. These are not payments for past due rent, but are payments of current rental periods. The import of the Bartell case and Presidential Park Apts. v. Colston, 17 O. O. 3d 220 is that the landlord is deemed to have waived the Notice to Vacate as a matter of law if he accepts additional rental payments for periods of time covered after the service of the Three Day Notice. Therefore, a landlord must stand upon his Notice to Vacate by refusing any tender of rent after the Notice of Vacation is issued, except for any rent that was due for periods preceeding the period in which the

the Notice to Vacate is served. Instructive in this regard is the Bartell case, where the landlord served the Notice to Vacate on January 27, 1984, but proceeded to accept February and March rental payments from the Defendant/tenant. The Court of Appeals held that such acceptance of rent after service of the Notice was acceptance of future rent (since they came after the Notice to Vacate) and the landlord therefore had waived the statutory requirement of notice and could not commence the eviction proceeding.

FINDS that the Plaintiff's First Claim should be dismissed without prejudice.

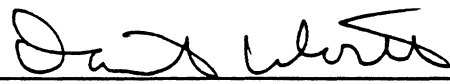
Therefore, it is

ORDERED, ADJUDGED, AND DECREED that the First Claim of the Plaintiff is hereby dismissed without prejudice to refileing. The Plaintiff's Second Claim for Relief is not affected by this decision, even though there may be no current rental arrearages. Therefore, the Second Claim for Relief shall come on for Hearing on Friday, June 16, 1989 at 11:30 A.M.

IT IS SO ORDERED.


Edward Emmett O'Farrell, Judge

APPROVED:


David Worth, Referee

cc: Atty. Barnhouse
Atty. Renner