IN THE DAYTON MUNICIPAL COURT
DAYTON, OHIO
CIVIL DIVISION

DAYTON METROPOLITAN HOUSING AUTHORITY, :

Plaintiff, : CASE NO. 79 CV G 79

- vs - : (Merz, J.)

VIOLA WESTFALL, : DECISION AND ENTRY

Defendant. :

* * * *

This matter is before the Court for decision on the merits after trial and also for decision of Defendant's Motion to Dismiss. Trial on the merits and an evidentiary hearing on the motion to dismiss were combined in the interest of judicial economy, the factual issues being largely identical.

Upon the evidence adduced, the Court finds the facts as follows:

Defendant and three of her sons have been tenants of the Dayton Metropolitan Housing Authority ("DMHA") for about seven or eight months, pursuant to a lease which was introduced into evidence as Exhibit 3. Defendant testified without contradiction that she was on the waiting list for public housing for about two years.

Gary B. Sallee, Sr., lives with his family at 2160 Pompano Circle, adjacent to 2158 Pompano where Ms. Westfal lives. Prior to August 23, 1979, there had been no trouble between these two neighboring families (at least no evidence of any such trouble

was presented to the Court). On that day, Mr. Sallee saw Rickey Erwin, Defendant's son, riding his bicycle on the Sallee property and asked him not to come on the property. Erwin responded by saying that he would abide by that request but asked that Mr. Sallee keep his children off the Westfall premises.

Two days later, a Sallee daughter entered the Westfall yard to retrieve a Frisbee, provoking a request to leave by Ms. Westfall, provoking a sharp retort by Ms. Sallee, provoking Erwin to call her a "bitch." When she reported this to her parents, they decided to take the matter up with Ms. Westfall because, as Mr. Sallee reported, their daughter should not be subjected to that sort of language.

Up to this point the testimony of the parties agrees. Hereafter the stories conflict greatly. At some point after the Sallees entered the Westfall yard, Erwin went out to meet them with a hammer in his hand. His mother took the hammer from him and returned it to the house. There was some exchange of words between the Sallees and Erwin. Then the Sallees oldest son, Gary, Jr., entered the fray. Having been deprived of his hammer, young Erwin got a six-inch locked blade knife. Gary Sallee, Jr., tried to kick Erwin with a "karate type" kick and was cut with the knife. Several people wrestled Erwin to the ground and took the knife, at which point the incident terminated. The Dayton Police Department took statements from a number of people, but no charges were filed,

apparently as a result of Gary Sallee, Jr.'s, decision not to file charges.

Several days later another incident occurred among Erwin and his brothers and Sallee, Jr., the contours of which are very unclear from the testimony. (The only person who witnessed this incident who testified was Rickey Erwin; others who testified saw only part of the incident.)

Sallee, Jr., is slightly over thirty years of age, has a reputation for "flying off the handle," and was residing with his parents in violation, apparently, of their lease with DMHA. There was conflicting testimony about how long he had been there. He moved shortly after the incidents described above and there have been no additional problems between the Sallees and the Westfall family since he left; nor were there any problems before he came there.

DMHA presented no evidence of any other problems with Erwin or Ms. Westfall or any of her other sons. Three days after the incident on August 25, DMHA gave Ms. Westfall "Notice of Termination for Threats to Health and Safety," Exhibit 2, requiring her to leave by August 31, 1979. At the same time they gave her a statutory three-day notice under R.C.Ch. 1923. It is unclear from the testimony whether the decision to evict was made before or after the second incident described in the testimony.

Defendant moved to dismiss on grounds that DMHA's notice to quit did not contain the language set forth in R.C.§ 1923.04 in sufficiently conspicuous language. The Court specifically finds that the language is conspicuous enough to meet the statutory requirement in that it is enclosed in a bright red border and is starred. The motion to dismiss on that ground is OVERRULED.

Two additional grounds for dismissal or finding on the merits are argued by Defendant. She alleges that she was entitled to a thirty-day notice of termination. She also alleges that she was entitled to a hearing pursuant to DMHA's grievance procedures prior to termination.

The lease provisions relative to termination are, in pertinent part:

> The Management shall not terminate or refuse to renew this Lease except for serious or repeated violation of material terms of this Lease ....
>
> In the event the Management terminates this Lease, the Tenant shall be given a Notice of Termination: (1) fourteen (14) days prior to the termination date in cases of failure to pay rent; (2) a reasonable time commensurate with the exigencies of the situation in cases of creation or maintenance of a threat to the health or safety of other tenants or Management employees; or (3) thirty (30) days in all other cases. The Notice of Termination shall state, in addition to all other legal requirements, the reason(s) for the termination, the right of the Tenant to make a reply, and the right of the Tenant to a hearing in accordance with the Management's Grievance Procedures.

The terms of the lease and of the referenced grievance procedure are highly regulated by the Department of Housing and Urban Development. The parties have agreed that the relevant binding regulations are Part 866 of Title 24, Code of Federal Regulations.

The issues to be decided by the Court are quite interrelated. DMHA asserts that Ms. Westfall's failure to prevent her son from assaulting Gary Sallee, Jr., with a knife constituted a breach of her tenant obligations, specifically to "cause other persons who are on the premises with his consent to conduct themselves in a manner which will not disturb his neighbors' peaceful enjoyment of their accommodations and will be conducive to maintaining the Project in a decent, safe and sanitary condition." They further assert that this breach created a threat to the safety of other tenants and that under the circumstances three days was a reasonable notice time "commensurate with the exigencies of the situation." Defendant argues that what she did or failed to do was a breach or that three days was not a sufficient notice time or that at least she should have been given an opportunity to go through the grievance procedures before eviction. The Court cannot decide whether the grievance procedures are applicable or what sort of notice was required without evaluating the quality of the alleged breach and its threat to safety.

The grievance procedures regularly made available by DMHA to its tenants are not in evidence in the case, but DMHA asserts that they are not relevant in the case because of the provisions of 24 C.F.R.§866.51 which provides in part:

> ... in those jurisdictions which require that, prior to eviction, a tenant be given a hearing in court containing the elements of due process, as defined in §866.53(d), the PHA [public housing authority] may exclude from its procedure any grievance concerning an eviction or termination of tenancy based upon a tenant's creation or maintenance of a threat to the health or safety of other tenants or PHA employees.

DMHA apparently contends that the Ohio eviction procedures under Revised Code Chapter 1923 comport with the H.U.D. definition of due process, for in its form notice of termination for threats to health and safety (Exhibit 2), it does not mention the grievance procedure and refers to a right to reply only in court. Unless the Ohio eviction procedures are adequate, the notice of termination would clearly be insufficient under federal law.

24 C.F.R.§866.53(c) provides:

> "Elements of due process" shall mean an eviction action or a termination of tenancy in a State or local court in which the following procedural safeguards are required:
> (1) Adequate notice to the tenant of the grounds for terminating the tenancy and for eviction;
> (2) Opportunity for the tenant to examine all relevant documents, records and regulations of the PHA prior to the trial for the purpose of preparing a defense;
> (3) Right of the tenant to be represented by counsel;
> (4) Opportunity for the tenant to refute the

evidence presented by the PHA including the right to confront and cross-examine witnesses and to present any affirmative legal or equitable defense which the tenant may have;

(5) A decision on the merits.

The Court has concluded that by virtue of this proviso, DMHA need not make its grievance procedure applicable to cases of eviction or termination of tenancy based upon a tenant's alleged creation or maintenance of a threat to the health of safety of other tenants or DMHA employees. This is because the Ohio eviction procedure clearly embraces all of the due process elements specified by the Code of Federal Regulations and more. No summons may issue in an eviction action without prior filing of a complaint which must state a claim for relief, R.C.§1923.05 and Ohio R. Civ. P. 12(B)(6). If the complaint alleges breach of a written rental agreement, a copy must be attached, Ohio Civ. R. 10(D). Both the statutory three-day notice to vacate and the summons in forcible entry cases advise the tenant of his or her right to be represented by counsel and in fact refer them to the Legal Aid Society. All relevant documents are available to a tenant under Ohio Civ. R. 34. Of course the trial is conducted pursuant to the usual civil procedure, so that there is proper opportunity to present defenses and even counterclaims. A tenant threatened with eviction has as much due process as any civil defendant in the Ohio courts and is the only such defendant whom the Court must by statute remind of his or her right to be represented by counsel.

Based on that analysis, the Court finds that Defendant here was not entitled to the grievance procedures of DMHA. This is not to say that DMHA can deprive any tenant of the grievance procedure merely by characterizing their alleged breach as one which threatens health or safety. Rather, the Court finds that the initial characterization of Ms. Westfall's alleged breach as one that threatened health and safety was not unreasonable and so DMHA was entitled to proceed without going through the grievance procedure.

The Court likewise concludes that Ms. Westfall was not entitled to a thirty-day notice of termination of tenancy. The cause for termination was prima facie a matter involving health and safety. In such an instance the public housing authority is not bound to a rigid thirty-day notice; it is only required to give notice of "a reasonable time commensurate with the exigencies of the situation." It would make no sense at all to interpret this language as requiring the dismissal of PHA cases, whenever it was later determined that there was not a breach, on the threshold ground that the notice was insufficient. The Court holds that whenever DMHA gives notice of termination upon an alleged breach which purports to threaten health or safety, it may give notice of such length as is reasonable from its view of the situation. This Court is always available to a tenant to show there was no threat to health or safety or that a reasonable person, viewing the cir-

cumstances from DMHA's perspective, would have concluded that a longer notice time was required.

We come, then, to the merits of the case: did Viola Westfall breach her lease? On this question the Court has concluded that DMHA failed to sustain its burden of proof. The standard for termination is "serious" or "repeated" violations of material terms of the lease. The tenant obligation to protect other tenants from health and safety hazards which he or she creates or maintains is obviously as material term of the lease; 24 C.F.R.§866.4(f)(11) requires the PHA to impose this obligation on its tenants. There is no allegation that Ms. Westfall was guilty of any repeated violations of the lease or indeed that Rickey Erwin had been guilty of any other improprieties besides the incident of August 25, 1979. DMHA's position must be, then, that Ms. Westfall's behavior with respect to the one incident is sufficiently serious to deprive her of public housing. With that position the Court cannot concur.

Certainly felonious assault is a serious matter. But what is characterized as felonious assault under one view of the events might be characterized as self-defense under another view. The testimony is indeterminate in that there was no disinterested witness to the entire incident. All witnesses are agreed that Gary Sallee, Jr., and Rickey Erwin escalated the incident, the former by aiming a "karate" kick, the latter by getting a knife.

after his mother had once disarmed him. Neither Erwin nor Sallee, Jr., used good judgment, but Sallee, Jr., was nearly twice Erwin's age. The character testimony indicated Sallee, Jr., was hot tempered, while all character testimony regarding Erwin was favorable., A well-aimed "karate" kick may do as much harm as a knife, although it is not as likely. Sallee, Jr., was apparently on the premises in violation of his parents' lease: his family was living there while waiting for a new apartment. DMHA might just as reasonably have concluded that Mr. Sallee had threatened the health and safety of the complex by allowing his hot-tempered son to live there and evicted the Sallees.

The purpose of public housing is to provide adequate housing for those unable to obtain it in the private market. As a corollary, private landlords may be permitted more latitude in their choice of tenants and perhaps a private landlord might be permitted to evict Ms. Westfall under these circumstances. But I cannot believe it is consonant with the intent of Congress to punish Ms. Westfall and her other two sons so severely for the momentary bad judgment of Rickey Erwin.

In accordance with the foregoing opinion, judgment is hereby entered in favor of the Defendant and against the Plaintiff, dismissing the Complaint in the above-captioned action with prejudice.

MRM:mxm
Dayton, Ohio
October 13, 1979.

Michael R. Merz, Judge

Copies of the foregoing were served on the date of filing on Thomas Whelley II, Esq., and John Poley, Esq.