

HAMILTON COUNTY MUNICIPAL COURT

HAMILTON COUNTY, OHIO

MORRIS INVESTMENT CO., INC., : Case No. 80CV10735
Plaintiff :
-vs- :
JUDITH KETTMAN :
and :
MARILYN MAJIKES : RULING ON MOTION FOR SUMMARY JUDGMENT
and : AND MOTIONS TO DISMISS
STATE OF OHIO :
c/o William J. Brown :
Attorney General, :
Defendants :

The plaintiff, Morris Investment Co., Inc., entered into a lease agreement with defendants Majikes and Kettman, whereby defendants were to lease apartment 1 of the Chateau Gardens Apartments for a term of two years beginning May 1, 1978 through April 30, 1980.

On November 30, 1979, the defendants applied to the Clerk of Courts to deposit their rent in escrow pursuant to Ohio Revised Code Sections 5321.07 and 5321.08. (See Application No. 704, Book 1). Defendants have deposited their rent with the Clerk of Courts each month since that time and the amount in escrow now totals \$1848.00.

The plaintiff brings this action to terminate the rental escrow. Plaintiff also requests that this court find Sections 5321.07 and 5321.08 of the Ohio Revised Code to be unconstitutional. Since plaintiff is attacking the validity of an Ohio statute, the State of Ohio has also been named as a defendant in compliance with O.R.C. 2721.12.

The State of Ohio moves to dismiss on the ground that this court lacks jurisdiction over the subject matter. However, since this is not a civil action against the State, (see O.R.C. 2743.03(A)), but rather a private action in which the constitutionality of a State statute is being questioned, this motion is denied.

By way of counterclaim, defendants Majikes and Kettman seek damages for the decrease in rental value of the premises based as a result of defects not remedied by the plaintiff. Defendants claim that plaintiff was notified of such defects and that plaintiff's failure to correct them is what prompted defendants to deposit their rent in escrow. This claim, if proved, is the type of occurrence for which Section 5321.07 was intended to provide tenant redress. (See O.R.C. 5321.04).

However, the plaintiff now moves for Summary Judgment on the basis that Sections 5321.07 and 5321.08 are contrary to the Fourteenth Amendment of the Constitution insofar as the statutes permit a deprivation of property without the procedural safeguard of due process. Defendants Majikes and Kettman, on the other hand, move to dismiss on the ground that plaintiff has failed to state a claim upon which relief can be granted in that plaintiff failed to plead the specifics of Ohio Revised Code Section 5321.09.

It is apparent that plaintiff did not refer to the specifics of Section 5321.09 for fear of being estopped to question the validity of the law after invoking the provisions of the law. Defendants argue, however, that since there is no comparable common law remedy for termination of escrow, plaintiff would not have been estopped and therefore should have referred to the requirements of Section 5321.09.

In this court's opinion, the "use and occupancy" claim pleaded by plaintiff in the alternative is a comparable common law remedy upon which to seek termination of the rental escrow. Thus, plaintiff may have been estopped if the statute had been utilized and the failure to do so is not defective. Defendants' motion to dismiss is denied.

The only motion remaining upon which this court must rule is plaintiff's motion for summary judgment on the ground that Sections 5321.07 and

5321.08 are contrary to the Fourteenth Amendment. In support of this motion, plaintiff argues that to allow tenants to deposit their rent into escrow without first having a hearing to determine whether such action is warranted is a deprivation of property without due process of law.

It is well established in Ohio that the right to receive rent is a property right. Sutliff v. Atwood, 15 Ohio St. 186 (1864). In addition, as was established in Shelley v. Kramer, 334 U.S. 1 (1948), the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment.

Procedural due process includes the right to notice and an opportunity to be heard before being deprived of property. Fuentes v. Shevin, 407 U.S. 67 (1972). Ohio Revised Code Section 5321.07, however, allows the tenant to deposit his rent in escrow with the Clerk of Courts by simply filling out an application; the landlord is not given an opportunity to contest such action until after the rent has already been deposited in escrow. As the Supreme Court stated in Fuentes, 407 U.S. 67, 81, "if the right to notice and a hearing is to serve its full purpose, then it is clear that it must be granted at a time when the deprivation can still be prevented."

Relying upon Fuentes, supra, the United States District Court for the Northern District of Ohio, Eastern Division, invalidated the Ohio replevin statutes in Turner v. Block, Civil No. C72-242 (1973). The court found the replevin statutes to be in violation of the due process clause of the Fourteenth Amendment to the extent that they permitted replevin of a chattel prior to notice and an opportunity to be heard.

It is clear to this court that the philosophy of Fuentes must also be applied in examining Ohio's rental escrow provision. Thus, it is the opinion of

this court that Sections 5321.07 and 5321.08 of the Ohio Revised Code are unconstitutional insofar as these statutes permit a deprivation of property without a prior hearing.

The plaintiff's motion for summary judgment is granted and defendants' counterclaim is dismissed without prejudice.

The Clerk of Hamilton County Municipal Court is ordered to terminate the rent escrow established under Application No. 704, Book 1, and the proceeds thereof are to be paid over to the defendants, with the plaintiff free to seek his remaining remedies of law in the circumstances.

Deidra L. Hair
Judge, Hamilton County Municipal Court