IN THE ALLIANCE MUNICIPAL COURT
STARK COUNTY, OHIO

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ALLIANCE
MUNICIPAL COURT

BRUCE AND PAULA BEZON : CASE NO. 89-CV-G&F-1957

Plaintiffs :

vs. :

JUDGMENT

MARY JAMES :

Defendant :

This matter came before the court for trial on January 19, 1990. Both plaintiffs appeared personally without counsel. The defendant, while not personally appearing, was present and represented in court by her attorney, Ivan L. Redinger, Jr.

The court finds that the defendant was personally served with summons and complaint on December 26, 1989 and that it has jurisdiction of the parties hereto and the subject matter hereof.

The plaintiff, Bruce Bezon, testified that, at various times, the defendant had up to six different people living in the duplex which had been rented to her and that because of the number of seemingly permanent guests at her home, the entire front porch of the duplex was occupied, rendering it impossible for the plaintiffs to rent the other half of the duplex to another party. Further, he testified that the defendant refused to put the heating bills in her name and maintained the thermostat at an extremely high setting, while carelessly leaving doors and windows stand open.

Paragraph 4 of the rental agreement specifically provides that "there will be no other permanent residents or long-term guests other than [defendant] without consent of the

landlord." However, the court can find no specification in the rental agreement as to responsibility for utilities other than paragraph 11 which provides that certain appliances "are not permitted where utilities are paid by the management," which seems inapplicable to the landlord's complaint.

Nonetheless, by virtue of the defendant's representation to landlord that only one person would occupy the apartment (contained in her rental application), and the language of paragraph 4 quoted above, sufficient evidence has been presented to the court, all of it uncontroverted by defendant, to justify the court in granting plaintiff's claim for restitution; however, the defendant, through counsel, has by oral motion raised two other technical defenses to plaintiff's claim, both of which must be addressed.

Defendant, through her counsel, moved the court to dismiss the complaint on the basis that insufficient time had elapsed between the date of service of the notice and the initiation of the eviction action. The plaintiff, Bruce Bezon, testified that a three-day notice was served in person on the defendant on December 11, 1989. The complaint alleges that the notice was served on December 14, 1989.

Civil Rule 1 prescribes "the procedure to be followed in all courts of this state in the exercise of civil jurisdiction at law or in equity, with the exceptions stated in subdivision (C) of this rule."

Subdivision (C) provides as follows:

> **(C) EXCEPTIONS.** These rules, to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure * * * (3) in forcible entry and detainer, * * *.

The preliminary question, then, is whether the Civil Rules, as they relate to computation of time, are "clearly inapplicable." Plaintiffs have cited no law, nor made any argument to that effect and the court, therefore, concludes that the Civil Rules, as they pertain to computation of time, apply to this proceeding.

Defendant is correct in her interpretation of Civil Rule 6 (A) as to computation of time in that, when the time prescribed is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. Therefore, were the court to conclude that the three-day notice was served on December 14, 1989, rather than December 11, 1989, the defendant's motion would necessarily have to be sustained.

However, even before challenged upon cross-examination, the plaintiff's testimony clearly was that the notice was served on December 11, 1989. Defendant would have the court believe that, because plaintiffs were forewarned of this issue by defendant's counsel on the day before trial, plaintiffs may have "tailored" their testimony in this regard. The court, however, finds no reason to disbelieve the testimony of the witness, Bruce Bezon, particularly since defendant chose to present no evidence to the contrary.

Further, the court notes that, pursuant to Civil Rule 15, leave of court for amendments to pleadings is to be freely granted, and pleadings may be amended to conform to the evidence, i.e., the allegation of the complaint may be corrected to recite a service date of December 11, 1989.

Therefore, defendant's motion to dismiss because the forcible entry and detainer was filed prematurely is overruled.

Secondly, defendant's counsel moved the court to dismiss for the reason that plaintiff's acceptance of January rent waived the service of the three-day notice. In the context of this case, this particular issue is more troublesome to the court than that of the time computation.

Firstly, it is clear that we are speaking of the alleged acceptance of advance rentals, not rent for a past-due period of the tenancy. As argued by defendant, it is, in fact, inconsistent for a landlord to accept such advance rentals after having served a notice to vacate. It does send "mixed signals" to the tenant.

The further issue in this case is whether plaintiffs did, indeed, accept the payment since the money order for $175.00, dated January 3, 1990, was endorsed by the plaintiff, Paula Bezon, but never cashed. Finally, the issue is clouded by the statement of the plaintiff, Paula Bezon, that "when I accepted the check, I said [the defendant] would get part back."

The court has carefully reviewed the Briefs of both parties and, beyond that, investigated the caselaw cited in each's Brief.

The fact that the cases cited by the plaintiffs are, generally speaking, older cases and, with one exception, decisions of courts of inferior jurisdiction, does not necessarily diminish their precedential value; however, given a choice between those types of cases and those cited by defendant which are, generally speaking, of more recent vintage and decisions of higher courts, this court would obviously favor the latter.

The more fundamental problem, however, with plaintiff's cases is that the propositions for which they are cited are either inapplicable to the case at bar or have otherwise been misconstrued by plaintiffs.

By way of example, in Kinkopf, decided by the Cuyahoga County Common Pleas Court in 1942, a clear finding of fact was made that the landlord refused to accept the rent payment. Therefore, the case sheds little light in the instant situation. Most of the court's discussion in Kinkopf centered upon what constitutes legal tender.

Wilcke v. Smith, decided by the Dayton Municipal Court in 1946, actually supports defendant's position. Indeed, the case was decided in favor of the tenant in that case for the reason that the landlord did not clearly reject the tender. Specifically, the court stated that it was

> * * * not impressed by the fact that the [money] orders were not endorsed nor cashed. It is insufficient that plaintiff failed to reject and redeliver and still maintains his right to possession and control of these valuable instruments. 34 O. Ops. 255 at p. 257.

Further, the court recalls no testimony in the case at bar that the money order had been retained for "evidentiary purposes," although the plaintiffs make such a contention in their Brief. It seems to the court that the only evidentiary value of retaining money orders tendered by the tenant would be in the event past-due rent is owed. Such money orders would then be the best evidence of the delinquency as a ground for eviction. However, aside from the fact that the instant case deals with advance rental payments, the Wilcke case further states at page 257 that "it is encumbent upon [the landlord] to establish that said orders were not accepted as rent and that this fact was communicated to the defendant."

Thus, the case cited by plaintiffs also answers the question as to whether their retention of the endorsed but uncashed money order was accepted. It was. The caselaw is clear that the burden of rejection is upon the landlord.

Finally, Schmidt v. Hummel, decided by the Franklin County Court of Appeals in 1947, also cited by plaintiffs, actually supports defendant's position. Again, in that case, judgment was for the tenant. The court's discussion again made clear that the burden was upon the landlord to reject the tender.

For the foregoing reasons, defendant's motion to dismiss on the basis that plaintiffs' acceptance of January rent waived the service of the three-day notice will be sustained. There being no second cause of action, other than simple factual elaboration of the first cause of action, the entire complaint will be dismissed.

IT IS THEREFORE ORDERED that plaintiffs' complaint be and the same hereby is dismissed at plaintiff's costs.

FURTHER ORDERED, however, that, in view of the disposition above, Midland Buckeye Federal Savings and Loan Money Order 158495, dated January 3, 1990, payable to Paula Bezon in the amount of $175.00, shall be released to plaintiffs forthwith.

SO ORDERED.

D. Stephen Stone, Jr.
Acting Judge

xc: Bruce and Paula Bezon
Attorney Ivan L. Redinger, Jr.
Xerox copy mailed 2-20-90