

IN THE EAST CLEVELAND MUNICIPAL COURT
EAST CLEVELAND, OHIO

JUALINE GREEN :
Plaintiff : CASE NO. 90CVG1768-38
-vs- : REFEREE'S REPORT
MONIQUE SEPHUS :
Defendant :

HEARING DATE: November 30, 1990 - All parties present.

This cause came on for hearing upon plaintiff's complaint in forcible entry and detainer. After a trial and consideration of all the evidence, the Referee finds:

Plaintiff and defendant are parties to a written rental agreement involving property located at 1226 Eddy Road, East Cleveland, Ohio.

Plaintiff is owner of the subject premises and the defendant is the tenant in possession. Defendant took possession on March 18, 1990.

Defendant paid to plaintiff a security deposit in the amount of \$225.00.

Defendant is the beneficiary of a housing assistance payment contract entered into between Cuyahoga Metropolitan Housing Authority (hereinafter CMHA) and plaintiff. CMHA pays to plaintiff the entire contract rent of \$310.00 per month.

The term of the contract is for one year, commencing June 1, 1990.

Prior to the written rental agreement between plaintiff and CMHA, plaintiff and defendant were parties to an oral rental contract.

Plaintiff did not hold defendant liable for rent due in March, 1990.

Defendant failed to pay May, 1990 rent. Defendant admits that a balance is due plaintiff for May rent.

Plaintiff received her first rent subsidy payment from CMHA in August, 1990. The payment was retroactive to June, 1990.

On September 9, 1990, plaintiff served upon the defendant a notice to leave premises for the following reasons:

- "(1) non payment of back rent (May, 1990) which was due by no later than September 7, 1990.
(2) excessive and unnecessary property damage.
(3) failure to make damage repairs as stated on the previous letter dated on or about July 11th, 1990 and damages occurring since July 11, 1990."

Plaintiff failed to notify CMHA in writing, even up until the time of trial, of plaintiff's commencement of procedures for termination of defendant's tenancy.

A rent check in the amount of \$310.00 was issued by CMHA to plaintiff representing November, 1990 rent on November 1, 1990 (Check No. 419688).

Plaintiff has not returned any checks to CMHA since the commencement of eviction proceedings.

Defendant had the front entrance door lock and jam repaired, and a window pane replaced. Defendant's Exhibit "B".

Defendant offered to repair the bricks knocked out of the side of the subject house by defendant's auto but plaintiff refused to allow defendant to make arrangements for same.

Defendant took the door screen to Alexander Hardware on 55th and Quincy, but has not as yet picked up same. The cost for repair is \$7.00 plus tax.

Restitution is denied for the following reasons:

1. The plaintiff failed to notify the public housing authority in writing of the commencement of procedures for termination of defendant's tenancy, pursuant to Section (H)(3) of the parties' Assisted Lease Agreement executed on February 28, 1990 and Section 9(A) of plaintiff's Housing Assistance Payments contract governing termination of tenancy, signed by plaintiff on August 1, 1990.

2. Section (H)(1) (iii) and (2) (ii) of the parties Assisted Lease Agreement executed on February 28, 1990, provides in pertinent part:

(H)(1) the Landlord shall not terminate the tenancy except for:

(iii) Other good cause. However, during the first year of the term of the lease, the owner may not terminate the tenancy for "other good cause" unless the termination is based on malfeasance or nonfeasance of the Tenant Family. (Emphasis Added).

(2) the following are some examples of "other good cause" for termination of tenancy by the Landlord:

....

(ii) a Tenant Family history of ... destruction of property, or of living or housekeeping habits resulting in damage to the unit or property; "

Malfeasance is "the doing of an act which is positively unlawful or wrong. "Ballentine's Law Dictionary, Third Edition, page 767 (citations omitted).

Nonfeasance is "the failure to act where duty requires an act. Ibid. page 858.

There was no evidence of any malfeasance or nonfeasance on the part of the defendant. In fact, the evidence adduced at trial revealed that defendant corrected the conditions complained of by plaintiff.

Assuming, arguendo, that plaintiff was entitled to evict defendant during the first year of defendant's tenancy for "other good cause" involving "excessive and unnecessary property damage" as cited by plaintiff in the notice to leave premises, failed to first serve defendant with a thirty-day (30) notice as required by ORC 5321.11. It provides:

"Non compliance by tenant terminates agreement."

If the tenant fails to fulfill any obligation imposed upon him by Section 5321.05 of the Revised Code that materially affects health and safety, the landlord may deliver a written notice of this fact to the tenant specifying the act and omission that constitutes noncompliance with such provisions and that the rental agreement will terminate upon a date specified therein not less than thirty days after receipt of the notice. If the tenant fails to remedy the condition contained in the notice, the rental agreement shall then terminate as provided in the notice.

On July 9, 1990, plaintiff mailed to defendant a letter "RE: property damages, neglect, and misuse of property". again assuming arguendo, plaintiff intended this letter to serve as a 30 day notice, said letter does not compost with the requirements of ORC 5321.11. Firstly, except for the compliance date given by plaintiff for payment by defendant of the back rent due, all other compliance dates for acts enumerated by plaintiff fall short of the "not less than thirty (30) days after receipt of the notice" as mandated by ORC 5321.11.

Secondly, plaintiff's July 9th letter fails to specify that "the rental agreement will terminate upon a date specified therein." ORC 5321.11. In fact, plaintiff used conditional language such as "may lead to"; "may result in"; "could result in" your eviction, if defendant failed to comply or repeated a particular act in the future.

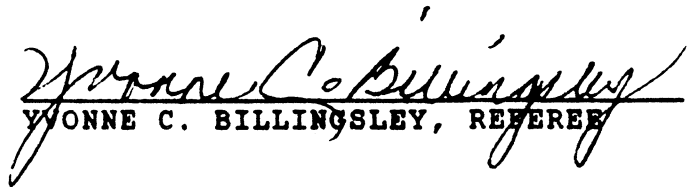
3. Plaintiff waived her right to restitution of the premises for non-payment of May rent due to plaintiff's inordinate lapse

of time in seeking relief and plaintiff's subsequent entry into a housing assistance payment contract with CMHA on behalf of plaintiff. The latter act by plaintiff is inconsistent with an attempt to eject defendant for nonpayment of rent. Plaintiff is entitled, however, and laches would not apply, to a money judgment for the amount of the back rent due.

4. Where a Landlord accepts a tender of the rent for a period beyond the time within which she has notified the tenant to leave the premises, the right to maintain an action in forcible entry and detainer pursuant to such notice is waived. Plaintiff received the full contract rent from CMHA for the months of October and November.

RECOMMENDATION

First cause dismissed. Costs to plaintiff.


YVONNE C. BILLINGSLEY, REFEREE

cc: Jualine Green
Personal Service

Barbara Reitzloff
Personal Service

IN ORDER TO BE CONSIDERED, ALL OBJECTIONS TO THE REFEREE'S REPORT MUST BE FILED WITHIN FOURTEEN (14) DAYS OF MAILING AND MUST COMPLY WITH THE REQUIREMENTS OF THE OHIO RULES OF CIVIL PROCEDURE AND THE LOCAL RULES OF THIS COURT. FOR FURTHER INFORMATION, CONSULT THE ABOVE RULES OR SEEK LEGAL COUNSEL.

CONFIRMATION

Referee's report of January 8, 1991 is hereby approved and confirmed and first cause dismissed. Costs to plaintiff.

JUDGE UNA H. R. KEENON

DAVE W. HANSTON
ADMINISTRATIVE CLERK
EAST CLEVELAND MUNICIPAL COURT

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FILED