

IN THE CLEVELAND MUNICIPAL COURT
CUYAHOGA COUNTY, OHIO
HOUSING DIVISION

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|------------------------------|---|-----------------------------|
| GLORIA MAZZARELLA, EXECUTRIX |) | CASE NUMBER 91 CVG 30291 |
| 12020 AMBER DRIVE |) | |
| CLEVELAND, OHIO |) | |
| |) | |
| PLAINTIFF |) | |
| |) | |
| VS. |) | <u>LANDLORD-TENANT</u> |
| |) | |
| FORESTINE MCGINNES |) | |
| 2026 FORESTDALE AVENUE |) | |
| CLEVELAND, OHIO 44109 |) | <u>REFEREE'S REPORT AND</u> |
| |) | <u>RECOMMENDATION</u> |
| DEFENDANT |) | |

Plaintiff's first cause of action came to be heard on November 29, 1991 before Referee Barbara A. Reitzloff, to whom this case was assigned by Judge William H. Corrigan pursuant to Ohio Civil Rule 53, to take evidence on all issues of law and fact, regarding plaintiff's first cause of action.

Plaintiff in court with counsel.

Defendant in court without counsel.

FINDINGS OF FACT

The majority of the facts in this case are undisputed:

1. Plaintiff is the executrix of the estate of Rita Ann Kladar, deceased, who is the owner of the premises located at 2026 Forestdale Avenue, Cleveland, Ohio.

2. Defendant occupies the upper unit of the premises as a tenant of the plaintiff pursuant to an oral, month to month

rental agreement, at the rate of Two Hundred Fifty Dollars (\$250.00) per month.

3. Defendant last paid plaintiff rent in September 1991. The payment was a partial payment, and was credited toward September 1991 rent.

4. On or about September 22, 1991, plaintiff served defendant with a Revised Code 1923.04 notice to vacate for nonpayment of rent. On October 9, 1991, plaintiff filed an action in forcible entry and detainer against defendant (Case Number 91 CVG 27418), based upon the September 22, 1991 notice to vacate.

5. A hearing was held on Plaintiff's first cause of action in Case Number 91 CVG 27418 on October 30, 1991. At the hearing the referee announced that he would recommend judgment for the defendant based upon plaintiff's acceptance of the partial payment of September, 1991 rent.

6. The court approved and adopted the referee's recommendation in a judgment entry journalized on October 31, 1991.

7. On October 30, 1991, after the hearing before the referee, plaintiff served defendant with a second Revised Code 1923.04 notice to vacate for nonpayment of rent.

8. On November 7, 1991, plaintiff filed this action in forcible entry and detainer, based upon the October 30, 1991 notice to vacate.

In addition to these undisputed facts, defendant testified at the November 29, 1991 hearing that she remained ready to pay plaintiff the unpaid rent.

CONCLUSIONS OF LAW AND FACT

The question before the court is whether a tenant must be afforded a reasonable opportunity to bring her rent current after dismissal of a prior action in forcible entry and detainer, before the landlord can institute a new action based upon nonpayment of rent.

During the pendency of an action in forcible entry and detainer a landlord cannot accept from the tenant rent payments for a future period for which liability has not yet been incurred ("future rent payments"), as acceptance of future rent payments is inconsistent with the landlord's Revised Code 1923.04 notice to vacate. Associated Estates Corp. v. Bartell (1985) 24 Ohio App.3d 6; Presidential Park Apts., v. Colstor (1980) 17 Ohio Ops.3d 220. Acceptance of such future rent payments therefore results in the waiver of the Revised Code 1923.04 notice to vacate, and dismissal of the action. Associated Estates Corp v. Bartell, supra.

As a landlord cannot accept future rent payments from the tenant during the pendency of the action, it is neither reasonable nor practical to require the tenant to tender the rent each month during the pendency of the action, knowing that the tender will be futile. The summary nature of forcible entry detainer proceedings usually does makes this issue moot.

The question then remains, what is the tenant's obligation to tender rent upon dismissal of, or judgment in favor of the tenant in, the pending case? Certainly, the tenant has an obligation to tender the rent and bring herself current. She must, however, be afforded a reasonable opportunity to do so.

Absent a reasonable opportunity for a tenant to offer her landlord rent which accrued during the dismissed action, any dismissal of a complaint in forcible entry and detainer and any judgment entered for a tenant in such a case is rendered meaningless, as immediately following the dismissal or entry of judgment in the favor of the tenant, virtually every landlord could serve the tenant a new Revised Code 1923.04 notice to vacate based upon nonpayment of rent for the month in which the action was commenced. The landlord would be virtually assured judgment on this second case, rendering the first judgment meaningless. Indeed, absent a reasonable opportunity for the tenant to offer the rent accrued during the pendency of a case, to evict a tenant for any reason, even in retaliation, a landlord could simply file a baseless action in forcible entry detainer and then, upon its dismissal, commence an action for nonpayment of rent during the pendency of the first case. To permit such a result would be a mockery of the judicial system.

In the instant case, the plaintiff served the defendant with the Revised Code 1923.04 notice to vacate on the same day that the previous case, 91 CVG 24718, was heard by the referee and judgment was recommended for the defendant. The Referee's recommendation had not been approved by the judge and journalized until the next day. The service of this notice on the day of that hearing, prior even to the judge's approval of the referee's recommendation and journalization of the judgment entry, denied defendant the reasonable opportunity to tender the rent which accrued during the pendency of the first action.

This result is not affected by defendant's failure to pay the balance of September 1991 rent, as by accepting a partial payment, plaintiff gave up her right to evict defendant for nonpayment of that month's rent. FMJ Properties v. Hinton, No. 50314 (Ct. App. Cuyahoga Cty. April 10, 1986).

Plaintiff failed to afford defendant a reasonable opportunity to offer the rent accrued during the pendency of the prior case before serving the Revised Code 1923.04 notice which served as a basis for this action. As a result, judgment is entered for defendant on plaintiff's first cause of action.

JUDGMENT

For the foregoing reasons, judgment for defendant on plaintiff's first cause of action. Costs to be paid by plaintiff.

RECOMMENDED: Barbara A. Reitzloff

BARBARA A. REITZLOFF
HOUSING COURT REFEREE
CLEVELAND MUNICIPAL COURT

APPROVED: William H. Corrigan

JUDGE WILLIAM H. CORRIGAN
CLEVELAND MUNICIPAL COURT
HOUSING COURT

SERVICE

A copy of the Referee's Report was sent by ordinary United States mail to the Plaintiff's Attorney, Robert C. Klein, 1700 Ohio Savings Plaza, Cleveland, Ohio 44114 and to the defendant, Forestine McGinnes, 2026 Forestdale Avenue, Cleveland, Ohio 44109 this 30th day of December 1991.

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

RECOMMENDED: *Barbara A. Reitzloff*

BARBARA A. REITZLOFF
HOUSING COURT REFEREE
CLEVELAND MUNICIPAL COURT

APPROVED: *William H. Corrigan*

JUDGE WILLIAM H. CORRIGAN
CLEVELAND MUNICIPAL COURT
HOUSING COURT