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FAIRBORN APARTMENTS

FAIRBORN-GREENE COUNTY CASE NO: 91-CVG-356

Plaintiff

DEAN RYBAK
CLERK OF COURTS

(ACTING JUDGE,
ANTHONY J. ZAHARIEFF)

vs.

PATRICIA WALKER

DECISION AND
JUDGMENT ENTRY

Defendant.

This cause came on to be tried before Acting Judge, Anthony J. Zaharieff. At the conclusion of the presentation of the evidence, the parties were given the opportunity to file memoranda in support of their relative positions. Both parties have done so and the Court has reviewed said memoranda. This cause is now posturally ripe for adjudication.

The lease herein prohibits the making or permitting of "noise". The Court is unwilling to accept that the making or permitting of any "noise" constitutes good and just cause to support legal grounds for eviction. A reasonable interpretation of the term "noise" must necessarily lead the Court to conclude that, before noise rises to level of a basis for eviction, it must be continuous, excessive, deliberate and/or offensive to persons of normal and/or average sensitivities. To conclude otherwise would not only unduly strain the imagination, but would also make all noises associated with normal everyday living automatic grounds for eviction. For example, a literal interpretation of the term "noise" would lead the Court to conclude that the noise made by Hanna Lowery's banging on the ceiling in her attempt to stop the noise from the upstairs apartment would give the Plaintiff grounds to evict Lowery. The Court is unwilling to give the term "noise" such a literal and strict interpretation. To do so would not only "shock the conscience", but would also accept an invitation to commit plain, reversible error.

Factually, the Court finds that "noise" associated with the activities of the Defendant's child are the normal, daily noises associated with children and the by-product of living with them and raising them. In this factual content, the Court is unwilling to find that these noises were continuous, excessive, deliberate and/or offensive to persons of normal and/or average sensitivities. Even the loud playing of the stereo on limited occasions does not rise to such a level. Apartment living, by its very nature, invites even greater intrusion into that elusive state of privacy which everyone seeks, but must, from time to time, sacrifice as the price to pay for choosing to reside in a communal rather than hermit society. The lease makes reference to "repeated minor violations". The Court finds that the acts complained of were not "violations". Secondly, even if the Court had concluded that they were "violations", minor or otherwise, the Court cannot conclude that they were "repeated".

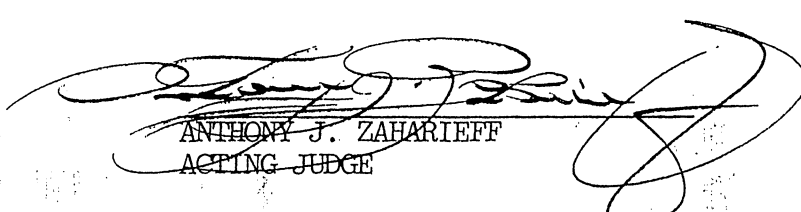
Although the Court's factual findings herein are already dispositive of this controversy, the Court would further find that the Defendant's acceptance of partial rent from H.U.D. vitiates any attempt on the part of the Plaintiff to terminate this tenancy during the months said partial rent was accepted by the Plaintiff and constitutes a waiver of the Plaintiff's right to terminate the lease during those months. (See Fairborn Apartments v. Herman, Case No. 90-CA-28, Court of Appeals for Greene County, Ohio, unreported.)

Having concluded by the above that the Plaintiff is not entitled to judgment, it is not necessary for the Court to decide whether or not the Defendant received the proper notices prior to the institution of this action.

Accordingly, the Court enters the following ORDERS:

- (1) Judgment is rendered in favor of the Defendant;
- (2) The Plaintiff's COMPLAINT is hereby dismissed;
- (3) Costs are assessed against the Plaintiff.

IT IS SO ORDERED:


ANTHONY J. ZAHARJEFF
ACTING JUDGE