

THE LAKEWOOD MUNICIPAL COURT

Roger Schwenkel

PLAINTIFF

TERM, A.D. 1992
TO-WIT 01/19/93
CASE NO. 92 CVG 2825

VS.

JUDGMENT ENTRY

Vickey J. Daley

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DEFENDANT

This case is before the Court on the plaintiff's objections to the Report and Recommendation of the Referee. The record shows that the parties entered into a lease agreement in November, 1987, for rental of premises located at 2021 Arthur Avenue, Lakewood, Ohio. The monthly rent was \$275.00. The defendant/tenant gave a security deposit of \$275.00 to the plaintiff/landlord. The initial lease term was for a period of one year. After the lease expired, the parties continued the arrangement on a month-to-month basis at a rate of \$300.00 per month. The original lease called for a late fee of \$5.00 per day.

The defendant failed to pay rent for the month of September, 1992. As a result, a three (3) day notice to vacate the premises was given on September 14, 1992 and this proceeding in Forcible Entry and Detainer was commenced on September 18, 1992. A hearing was held on October 1, 1992 and the defendant was ordered to vacate the premises on October 11, 1992. There is no dispute that the rent was not paid for the month of September and October, 1992. The issue raised by the plaintiff's objections is the amount due and owing to the plaintiff.

The Referee found that the plaintiff was entitled to \$300.00 per month for a total of \$600.00. Applying a credit for the defendant's security deposit of \$275.00, the Referee recommended judgment in favor of the plaintiff in the amount of \$325.00.

The lease between the parties called for a late charge of \$5.00 per day. Based upon this provision, the plaintiff claims additional late charges of \$280.00 for the month of September, 1992 (through October) and \$130.00 for the month of October, 1992. With the three (3) day eviction notice, the plaintiff also attempted to raise the defendant's rent from \$300.00 per month to \$20.00 per day beginning October 1, 1992. As such, the plaintiff claims rent for the month of October, 1992 in the amount of \$620.00. The plaintiff objects to the Referee's findings disallowing the late charges and increased rent for the month of October 1992.

I. General restrictions under terms and conditions of residential leases.

As a general rule, parties are free to enter into contracts with terms and conditions agreed by them and, in the absence of illegality, these contractual terms and conditions are binding upon the parties. An exception to this general rule, however, is a residential lease or rental agreement. In 1976, the Ohio General Assembly enacted the Ohio Landlord Tenant Law. This law, as codified by Chapter 5321 of the Ohio Revised Code, imposes limitations on the enforceability of contracts between landlords and tenants in residential premises.

Section 5321.06 of the Ohio Revised Code provides:

A landlord and a tenant may include in a rental agreement any terms and conditions, including any term relating to rent, the duration of an agreement, and any other provisions governing the rights and obligations of the parties that are not inconsistent with or prohibited by Chapter 5321. of the Revised Code or any other rule of law.

As such, parties to a residential lease or rental agreement are only free to enter into terms and conditions of the lease or agreement that are consistent with the provisions of the Ohio Landlord Tenant Act. Moreover, neither a landlord nor a tenant can agree by contract or lease provision that a requirement of the landlord/tenant act is inapplicable. Thus, the Court of Appeals held in Allstate Insurance Co. v. Dorsey, 46 Ohio App. 3d 66, (1988), while a landlord or tenant may include terms and conditions in a rental agreement which impose obligations not contained in Ohio Revised Code Chapter 5321, terms which are inconsistent with or prohibited by Ohio Revised Code Chapter 5321 may not be included due to the restrictions imposed by Ohio Revised Code Section 5321.06. 46 Ohio App 3d at 68. Thus, the mere fact that a term or condition is contained in a lease agreement, signed by the parties, does not mean that it is enforceable upon the parties.

It is this Court's duty to construe the terms of the parties' rental agreement in accordance with the statutory requirements and restrictions of Chapter 5321 of the Ohio Revised Code. There are two issues raised by the plaintiff's objections; 1) increased rent for the month of October; and 2) assessment of late fees.

II. Rental increase for the month of October.

There is no dispute that the original lease had expired after its one year term in 1988 and that the parties had a month-to-month agreement as of September 1992. Notice of increase of rent was given by the plaintiff to the defendant as part of the three (3) day notice on September 14, 1992. According to this notice, the increase by rent was effective October 1, 1992.

A change in rent for a month-to-month agreement is restricted by Section 5321.17 (B) of the Ohio Revised Code. This section provides in applicable part:

A landlord or tenant may terminate or fail to renew a month-to-month tenancy by notice given the other at least thirty (30) days prior to the periodic rental date.

Unless by specific agreement of both parties, a landlord or tenant cannot unilaterally change the amount of rent during the term of tenancy. The periodic rental date in the present case was the first of the month. The notice of increased rent, given on September 14, 1992, was not at least 30 days prior to the periodic rental date for October, as required by Section 5321.17(B) of the Ohio Revised Code. Due to the statutory required minimum thirty (30) day period, the rent could not be increased by the landlord, without the express agreement of the tenant, until the next periodic rental date, which was November 1, 1992.

In light of the mandatory 30 day notice requirement, imposed by statute, the plaintiff's notice of rental increase could not be effective until at least November 1, 1992. As such, the Referee was correct in her finding that the monthly rent for the month of October, 1992 was \$300.00.

III. Assessment of late charges.

The plaintiff also objects to the disallowance of late fees. The lease agreement provided for an assessment of \$5.00 per day for rent that was not timely paid. The assessment of daily late fees was cumulative.

As was stated earlier, due to the mandatory restrictions of Chapter 5321 of the Ohio Revised Code, the mere fact that late fees are provided for in a lease agreement does not mean that this term or condition is enforceable. The construction and enforceability of a lease agreement is governed by the restrictions imposed by Section 5321.14 (A) of the Ohio Revised Code, which provides:

If the court as a matter of law finds a rental agreement, or any clause thereof, to have been unconscionable at the time it was made, it may refuse to enforce the rental agreement or it may enforce the remainder of the rental agreement without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

When the parties have agreed on an amount of damages, ascertained by estimation and adjustment, and have expressed that agreement in clear and unambiguous terms, the amount so fixed should be treated as liquidated damages and not as a penalty. When, however, the actual damages are not uncertain or sufficient to ascertain, a stipulated amount which does not bear a reasonable relationship to the actual loss the provision in the contract is in the nature of a penalty clause. A clause in a rental agreement that imposes a penalty is not enforceable, Riding Club Apts. v. Sargent 20 Ohio App. 3d 146. (1981).

The issue of assessment of monetary damages for breach of a residential lease, in addition to the recovery of unpaid rent, was addressed by the Court of Appeals for this district in Berlinger v. Suburban Apartment Management 10, 7 Ohio App. 3d 122 (1982). In Berlinger, supra the landlord attempted to enforce as provision in the lease agreement for a daily assessment against the tenant for keeping a motorcycle on the premises in violation of the lease agreement. The Court of Appeals stated that the amount of the daily assessment did not bear a reasonable relationship to any loss which might be foreseeable sustained. 7 Ohio App. 2d. at 124. The Court of Appeals went on to declare this provision of the contract invalid under Section 5321.14 of the Ohio Revised Code.

In the recent case of Siara Management Company v. Medley, (Case no. 61433;- Ct. App., Cuyahoga County, issued October 15, 1992), the Court of Appeals in this county specifically addressed the assessment of late fees in a residential lease. Relying on the Court's prior decision in Berlinger, supra, the Court of Appeals stated:

Appellant [landlord] argues that late payment by tenants leads to late payment by appellant and late charges assessed by appellant's creditors. However, the damages flowing from a breach of a lease are not uncertain as to amount and difficult of proof. Any party due money could claim that the resultant decrease in cash flow might result in late charges against it. That is unduly speculative. Appellant sued for the lost rent and recovered it. Late charges would therefore be a penalty.

The Court of Appeals went on to find that the provision in the lease for late charges was not enforceable.

This Court is bound by the directives given by the Court of Appeals and the statutory requirements of the Ohio Revised Code. The late charges in this case, being cumulative in nature, would rapidly exceed the amount of rent due. Similar to the provisions discussed in the Court of Appeals cases cited above, they do not bear a reasonable relationship to any foreseeable loss. As such, based upon the Court of Appeals decisions and Section 5321.14 of the Ohio Revised Code, the late charge provision contained in the lease agreement is not enforceable.

In Berlinger, supra the Court of Appeals stated that in the absence of a valid provision for liquidated damages, the landlord was entitled to recover only the monetary equivalent of the actual damages caused by the tenant's breach. 7 Ohio App. 3d at 125. Similarly, Section 5321.14(A) provides that if a clause of a lease is found to be unconscionable, the Court "may so limit the application of any unconscionable clause as to avoid any unconscionable result."

In the present case the parties agreed to the concept of late charges for untimely paid rent. The problems with the enforceability of the late charge provision is based upon its amount. The general remedy for money due and

owing is the assessment of interest. Section 1343.03(A) of the Ohio Revised Code provides an interest rate of ten percent per annum when a rate of interest is not stipulated by the parties. Applying this interest rate to the unpaid rent, the plaintiff would be entitled to accrued interest of \$11.25 for the September rent and \$8.75 for the October rent, for a total of \$20.00.

The plaintiff is entitled to recover rent for the months of September and October, 1992 at \$300.00 per month for a total of \$600.00 with additional late charges of \$20.00 as accrued interest. The defendant is entitled to a credit for her security deposit in the amount of \$275.00.

Accordingly, the recommendation of the Referee is adopted as modified and judgment is entered in favor of the plaintiff and against the defendant in the amount of \$345.00, with interest at a rate of ten percent per annum from the date of entry of this judgment. The court costs in this case, including filing fees, are assessed against the defendant.

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Joseph P. Gault
Judge