IN THE CUYAHOGA FALLS MUNICIPAL COURT

SUMMIT COUNTY, OHIO

AKRON METROPOLITAN HOUSING AUTHORITY DEFENDANT vs MICHELLE HARRIS & OCCUPANTS PLAINTIFF	CASE NO. 92 CVG 3133 <u>O R D E R</u>

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This matter came on for hearing upon the Motion of the Plaintiff, Akron Metropolitan Housing Authority, objecting to the recommendation of the Referee. A hearing was held on this objection, both parties were represented by counsel.

Taking into consideration the facts and law outlined in the Referee's report and statements made by the attorneys during the objections to the Referee's recommendation hearing, the Court confirms the recommendation of the Referee.

The defendant's objection to the Referee's report appears to be moot, therefore, their motion is overruled.

So Ordered.

JUDGE WILLIAM B. PIKE

cc: James E Brown, Attorney for Plaintiff
Gregory Sain, Attorney for Defendant
File

IN THE CUYAHOGA FALLS MUNICIPAL COURT

SUMMIT COUNTY, OHIO

AKRON METROPOLITAN HOUSING AUTHORITY	)	CASE NO. 92 CVG 3133
PLAINTIFF	)	
vs	)	
MICHELLE HARRIS	)	
DEFENDANT	)	REFEREE'S REPORT

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The within matter came on for hearing on March 19, 1993, on the defendant's motion for a new trial pursuant to Civ. R. 59; a judgment of restitution having been awarded the plaintiff on January 22, 1993.

The within action in forcible entry and detainer was filed by the plaintiff, Akron Metropolitan Housing Authority, on November 19, 1992. A hearing was scheduled before a referee on January 5, 1993; briefs of the parties being submitted subsequent to the presentation of evidence. By report of January 22, 1993, it was recommended that a judgment of restitution of premises at 3273 Prange Drive in the City of Cuyahoga Falls, owned by the plaintiff, and leased to the defendant, Michelle Harris, be awarded the plaintiff, and that Akron Metropolitan Housing Authority be restored to possession of such premises. The report of referee was adopted and made the judgment of the court on January 22, 1993.

Execution of such judgment was stayed pursuant to the defendant's request on February 4, 1993; the motion to stay being predicated upon a motion for new trial filed by Harris at the same time. Hearing on the subject motion was scheduled for March 15, 1993. Prior to such time, the defendant obtained subsequent counsel due to an unfortunate illness which befell Harris' prior counsel. Pursuant to request of such new counsel, the hearing scheduled for March 15, was continued until March 19, 1993; such continuance being granted due to a schedule conflict of such new counsel, and to enable such person an opportunity to familiarize himself with the case. On March 18, 1993, a new brief in support of the motion for a new trial was filed.

At the within hearing, it was indicated that the brief filed by the defendant at 4:00 PM on the day before such hearing would not be considered; a brief having been filed with the timely-filed motion for a new trial, and the plaintiff having had an opportunity to respond to the same. Clearly, it would seem that any new grounds and/or arguments in support of the new trial motion would be untimely; a motion for a new trial to be filed not later than 14 days after the entry of judgment. Civ. R. 59(B). On March 18, 1993, the defendant also filed objections to the referee's report of January 22, 1993. Any decision relative to the applicability of Civ. R. 53 to forcible entry and detainer actions and/or the timeliness of such objections, are matters which, it would appear, are properly left to the consideration of the court. Although it would appear that there might be some question as to the

appropriateness of Civ. R. 59 to actions in forcible entry and detainer, at least insofar as the same pertain to defendant tenants against whom judgments of restitution have been awarded, no objection was lodged by the plaintiff, and the stay of execution was, as previously indicated, specifically predicated upon the defendant's motion for a new trial. Accordingly, the motion of February 3, 1993, will be entertained.

In the midst of the within hearing, the defendant objected to the referee's consideration of the motion; such objection being based upon the absence of a specific order of reference in the matter. It would seem that such objection is not well taken; the same not having been raised until after the hearing had already commenced, and the absence of a specific written order of reference not being fatal to a referee's consideration of a matter. Hines v. Amole, 4 Ohio App. 3d 263, 265 (Ct. App. Greene County 1982).

The judgment of restitution was awarded based upon evidence that the tenant had breached that paragraph in the lease providing that she should "[R]efrain from and cause other persons who are on the premises with the tenant's consent to refrain from illegal or other activity which impairs the physical or social environment of the development.". Evidence at the forcible entry and detainer hearing revealed that Harris invited her cousin into her apartment; several other people already being in the unit. Harris then went upstairs to the second floor to attend to her children. While she was upstairs, a brief argument apparently developed downstairs, her cousin produced a gun and fired a shot into the ceiling separating

the first from the second floors. Harris did not know that her cousin had a weapon in his possession when he entered her apartment, nor was there evidence that she reasonably should have known. No one in the apartment knew that Harris' cousin had a firearm until he produced the same and fired the single shot. Similarly, no evidence was adduced from which it could be found that she reasonably should have known that her cousin would fire a weapon within the apartment. The bullet lodged in the ceiling, with there being no personal injury, and no other property being damaged, apart from a glass from a picture which broke when the picture apparently fell to the floor. Harris was unaware of what transpired until after the incident, when she came downstairs to find out what had happened.

After due deliberation, and upon further reflection, it is believed that the previous ruling was in error. The former holding amounted to the imposition of strict liability upon a tenant, and, arguably, could result in the eviction of a tenant due to the act of a guest even if the tenant had taken all reasonable precautions and made all reasonable efforts to cause such guest to refrain from prohibited conduct. In arriving at the former ruling, great reliance was placed upon the case of Chaves v. Housing Authority of City of El Paso, No. 91-8611(5th Cir. October 1, 1992). Although such case does stand for the proposition that the lease provision at issue is not constitutionally infirm, and violates neither a tenant's freedom of association, equal protection of the law or due process of laws, it cannot be found that, upon further reading,

such case requires the eviction of a tenant in the circumstances presently at bar. A further reading of Chaves reveals that the guest whose conduct lead to the lease termination had a history of violent acts on the premises; two specific instances being expressly mentioned. It does not seem unreasonable to believe, therefore, that the tenant in Chaves either knew, or reasonably should have known, of the violent predisposition of the guest whose conduct lead to the termination of her lease. The within matter will not admit of any such conclusion. Harris did not know, and had no reason to know that her cousin was inclined to act as he did in her apartment, nor did she know, or have any reason to know, that such person was in possession of a firearm. Similarly, there was no evidence that any similar prior activity had ever occurred during Harris' tenancy. Although she may have gone upstairs to attend to her children subsequent to inviting her cousin into the apartment, it cannot be found that such activity was unreasonable. She did not leave her cousin, alone and unattended, in the apartment for any appreciable period of time. It would not seem reasonable to believe that the only way in which a tenant could avoid violating the challenged lease provision would be to keep guests under constant observation, following them wherever they went in the apartment, or having the guests follow the tenant wherever such person went. Such a construction of the lease provision would be devoid of reason and common sense, and would place an undue and unreasonable hardship upon any tenant.

The within matter having been tried without a jury, and the

sole issue being strictly a matter of law, it is, therefore, recommended that the judgment of January 22, 1993, be vacated, and that the judgment of restitution be denied.

Accordingly, in light of all of the above, it is recommended that the defendant's motion for a new trial be granted; that the judgment of January 22, 1993, be vacated; that a judgment of restitution not issue; and that the costs of this action be taxed to the plaintiff.

STEVEN J. SCHWARTZ, Referee

cc: James E. Brown, Attorney for Plaintiff
Gregory Sain, Attorney for Defendant
File