IN THE CLEVELAND MUNICIPAL COURT
CUYAHOGA COUNTY, OHIO
HOUSING DIVISION

JOSEPH RABABY PLAINTIFF vs. CITY OF CLEVELAND DEFENDANT	CASE NUMBER 93 CVG 11745 JUDGMENT ENTRY AND OPINION

This is an action for injunctive relief filed by Joseph Rababy seeking to enjoin his landlord, the City of Cleveland, from re-entering and repossessing the rental premises without filing an action in forcible entry and detainer and obtaining a writ of restitution.

In 1985, Mr. Rababy entered into a written lease with the City of Cleveland for the operation of a fruit and nut concession at Cleveland Hopkins International Airport. The term of the lease was for seven years, expiring in November 1992. The lease provided that in the event that Mr. Rababy remained in possession of the premises after expiration of the lease, his tenancy would become month to month, terminable by either party upon thirty days written notice. All other provisions of the lease were to remain in effect during the month to month tenancy.

Mr. Rababy has remained in possession of the premises since 1985. In November 1992 he became a month to month tenant of the City.

On March 31, 1993, the City notified Mr. Rababy in writing that his tenancy would terminate as of April 30, 1993. When Mr. Rababy did not vacate, the City sent him a ten day notice on May 12, 1993, informing him of the City's intention to re-enter and repossess the premises. This was followed by a twenty four hour notice from the City of May 25, 1993.

The City has sent Mr. Rababy rent invoices for each month through May 1993, which Mr. Rababy has paid. Mr. Rababy is therefore current in rent through May 31, 1993.

On May 26, 1993, Mr. Rababy filed this complaint for injunctive relief. He continues to occupy the premises at the present time.

Mr. Rababy seeks an order preventing the City from re-entering and repossessing the premises. The City argues that Mr. Rababy is in violation of his lease and that pursuant to the lease the City may re-enter the premises without filing an eviction action.

Specifically, the City argues that upon his failure to vacate the premises as of April 30, 1993, Mr. Rababy was in violation of the Article XVIII(A) of the lease, which provides:

> A. Concessionaire agrees to yield and deliver possession of the premises and facilities to the City on the date of cessation of this agreement, whether such cessation be by termination, expiration or otherwise, peaceably, promptly and in good condition, reasonable wear and tear excepted, subject to renewals where permitted by this agreement.

As a result of Mr. Rababy's failure to vacate, the City argues, it served the May 12, 1993 ten day notice pursuant to Article XXI(A)(11) of the Lease, which provides that the tenant is in default:

> A. If:
> (11) Concessionaire fails to keep, perform and observe every other promise, covenant and agreement set forth herein on its part to be kept, performed or observed within ten (10) days after receipt of notice of such failure hereunder from the City except where fulfillment of its obligation requires activity over a period of time, and concessionaire has commenced performance to the satisfaction of the City of whatever may be required for fulfillment within ten (10) days after receipt of the notice and continues such performance without interruption.

As Mr. Rababy again failed to vacate the premises, the City argues, it is entitled to re-enter and repossess the premises without judicial process, under Article XXI(B)(4) of the Lease:

> 4: Upon twenty-four (24) hours notice, to re-enter and repossess the premises, either with or without the institution of summary or any other legal proceedings or otherwise and without diminishing, excusing or altering in any way the obligations of concessionaire, hereunder...

The facts in this case present two issues to be decided by the court. The first issue is whether the City may re-enter and repossess the premises by "self-help," without first filing and being granted judgment in an action in forcible entry and detainer against Mr. Rababy; the second issue is whether the City's acceptance of Mr. Rababy's May 1993 rent renewed Mr. Rababy's month to month tenancy, prohibiting his removal from the premises by the City.

Mr. Rababy argues that the provision in his lease with the City which permits the City to repossess the premises without judicial process is both contrary to Revised Code 1923 and against public policy; the City argues that it need not file an action in forcible entry and detainer to remove Mr. Rababy from the premises.

The Cuyahoga County Court of Appeals examined a similar lease provision in Northfield Park Association v. Northeast Ohio Harness (1987), 36 Ohio App.3d 14. In Northfield Park, the owner of a harness racing track entered into leases with a number of race operators, who operated various meets at the track during the year. The leases contained a provision which permitted the owner, upon default of the lessee-operator, to terminate the Lease, and re-enter into possession of the premises "with or without due process of law." 36 Ohio App. 3d 18. Approximately three years after execution of the lease, the owner determined that some of the operators were in breach of their respective leases. The owner decided to re-enter and take possession of the track. A general partner of the owner entered the premises, with two security guards, and announced his intention to reclaim the premises. He also made provisions that day to change the locks on the premises. Employees of the operators in possession were present at that time, and offered no resistance to the owner's actions. The owner later sued for damages and injunctive relief. The operators counterclaimed for damages in trespass, alleging that the owner's actions violated the public policy. The

trial court granted judgment to the owner on the trespass claim; the Court of Appeals affirmed that judgment.

In reviewing the lease, the court in Northfield Park noted that the legislature has enacted no legislation prohibiting self help eviction provisions in commercial settings. The court therefore declined to "...say, as a matter of law, that a self help provision in a commercial lease is against public policy where the repossession of the premises takes place without a breach of the peace and with the acquiescence of the lessee or its agent..." 36 Ohio App.3d 21.

The City relies upon Northfield Park to support its position that the self-help lease provision is enforceable, while Mr. Rababy argues that Northfield Park is distinguishable from this case in that the tenants in Northfield Park were in "serious default" of the Lease terms, while he is not. This court is persuaded that Northfield Park is distinguishable on other grounds and that under the circumstances of this case plaintiff must file an action in forcible entry and detainer to remove Mr. Rababy from the premises.

As a general rule, a landlord in a commercial setting may, if permitted by a provision in a written lease, evict the tenant by self-help provided that there is no breach of the peace. This is consistent with Northfield Park where the tenants "readily acquiesced" to the owner's demand and vacated the premises. In this case, however, Mr. Rababy has very clearly notified the City that he will not acquiesce to their demand

that he vacate, both through counsel and by filing this action. Where a commercial tenant has clearly expressed to a landlord his intention not to acquiesce in the landlord's demand for the premises and has refused to vacate the premises, the landlord may not evict by self-help, regardless of the existence of a lease provision to the contrary. To rule otherwise would encourage and perhaps even require a tenant who disputed the landlord's claim for possession to physically resist the landlord's attempt to prevent the eviction by self help and permit the tenant to raise defenses to the action in a legal setting. To do so would invite a breach of the peace and perhaps a violent confrontation. Public policy requires minimizing the threat to the landlord, the tenant and the public. Accordingly, where a tenant announces his intention not to acquiesce in the landlord's demand for possession of the premises, the landlord must file an eviction action against the tenant. Under the circumstances presented in this case, the City may not re-enter and repossess the premises by self-help.

The second issue is whether, regardless of the court's position with respect to the self-help provision, the City's acceptance of Mr. Rababy's May 1993 rent renewed his tenancy for that month, waiving the termination notices sent by the City.

It is undisputed that Mr. Rababy's tenancy with the City was on a month to month basis after November 1992. The City issued a rent invoice to Mr. Rababy for all months through May 31, 1993. Mr. Rababy paid, and the City accepted rent, for

May 1993. This acceptance of future rent is inconsistent with the City's proposed termination of Mr. Rababy's tenancy, and therefore waived the City's March 31, 1993 notice of termination of Mr. Rababy's tenancy. See Associated Estates Corp. v. Bartell (1985), 24 Ohio App.3d 6. As the City has not terminated properly Mr. Rababy's tenancy, the City is not entitled to possession of the premises.

Judgment therefore is rendered for Mr. Rababy on his request for preliminary and permanent injunction relief. The defendants, their agents and assigns are prohibited from re-entering and repossessing the premises absent judicial process.

William H. Corrigan

Judge William H. Corrigan
Housing Division