

IN THE MARION MUNICIPAL COURT FOR MARION COUNTY, OHIO

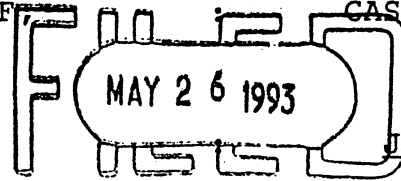
REAL PROPERTY SERVICES CORP.,  
DBA: FAIRVIEW I APARTMENTS,

PLAINTIFF :  
MUNICIPAL COURT  
CASE NO. 93 CVG 7804

vs

DIANA BONEN, et. al.,

DEFENDANTS. MARION, OHIO



This day this cause came on before the Court upon the Objections to the Referee's Report filed by the Plaintiff in this action.

For the reasons stated in the accompanying Ruling on Objections to Referee's Report, the Court overrules the Objections to Referee's Report filed by the Plaintiff.

It is, therefore, the Judgment and Order of the Court that the First Claim of Plaintiff, Real Property Services Corp. dba: Fairview I Apartments against Defendants, Diana Bonen and all other occupants, be dismissed with prejudice.

It is the further Judgment and Order of the Court that Plaintiff, Real Property Services Corp. dba: Fairview I Apartments, recover judgment against Defendant, Diana Bonen, in the amount of \$440, plus interest at the rate of 10% per annum.

Court costs are to be paid by the Defendant.

*William R. Finnegan*  
JUDGE WILLIAM R. FINNEGAN  
MARION MUNICIPAL COURT

cc: ✓ Dean Washburn, Attorney for Plaintiff  
✓ Mitch Libster, Attorney for Defendant

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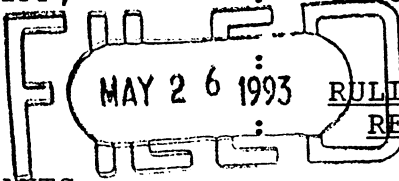
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PLAINTIFF MUNICIPAL COURT CASE NO. 93 CVG 7804

vs

DIANA BONEN, et. al.,

DEFENDANTS. MARION, OHIO



RULING ON OBJECTIONS TO  
REFEREE'S REPORT

This day this cause came on before the Court upon the Objections of the Plaintiff to the Referee's Report of May 3, 1993, which Objections were filed by the Plaintiff on May 18, 1993. The Defendant has filed a response to the Plaintiff's Objections, and has also moved to strike said Objections on the basis that said Objections were not timely filed.

Turning first to the Motion to Strike, the Court finds said Motion not well-taken. Although it is true that the Objections to Referee's Report filed by the Plaintiff were submitted one day late, the Court finds that it may consider said Objections sua sponte and that the Court grants leave for the filing of the late Objections. Baker vs Baker, 68 Ohio App. 3d 402 (Wood Co. 1990). The Court finds it especially appropriate to consider said Objections of the Plaintiff, given the fact that there are several other pending lawsuits involving the apartments of the Plaintiff which have similar legal issues. The Motion to Strike of the Defendant is therefore overruled.

Turning to the merits of the Objections raised by the Plaintiff, the Plaintiff objects to the Recommendation of the Referee that the First Claim of Plaintiff, requesting restitution of premises, be

dismissed. The Referee apparently made this Recommendation based upon the testimony adduced at hearing that over the last year, the Plaintiff has served several Notices of Termination of Tenancy upon the Defendant. The first couple of Notices allege that the Defendant failed to keep her apartment unit clean. No allegations were made relating to non-payment of rent. The Defendant had been current in her rental payments, but when she attempted to make further rental payments after the Notice to Terminate was served upon her, the Plaintiff refused said tenders of rent over a period of several months. The Defendant offered this rent for several months.

Although the Plaintiff apparently filed suit to evict the Defendant on the ground of failing to keep her unit clean, in June, 1992, the Plaintiff voluntarily dismissed said action.

In January, 1993, a third Notice to Leave the Premises was given to the Defendant, which alleged for the first time the Defendant's non-payment of rent. A second eviction was filed against the Defendant in March, 1993, but this eviction was also dismissed by the Plaintiff.

On March 23, 1993, the fourth Notice of Termination of Tenancy was given to the Defendant, also alleging non-payment of rent. This is the Notice which is before the Court today.

The testimony at hearing revealed that it was the Plaintiff's policy not to accept tenders of rent once a Notice of Termination of Tenancy has been served upon the Defendant. At no time did the Plaintiff notify the Defendant that it would be willing to accept rental payments from the Defendant. It is also apparent that over several months, the Plaintiff repeatedly attempted to make tenders of rent to the Plaintiff during this time.

Upon consideration, the Court finds the Objections of the Plaintiff to the Referee's Report should be overruled. As this is Federally subsidized housing, evictions from said housing must be accomplished pursuant to the requirements contained in the Code of Federal Regulations, 24 C.F.R. Section 247. The Plaintiff in such evictions is limited to rely upon the grounds which were set forth in the Termination Notice served on the tenant. 24 C.F.R. Section 247.6(b). The Plaintiff is therefore limited to the allegations of alleged non-payment of rent by the Defendant. The testimony at trial clearly revealed, however, that on several occasions, the Defendant attempted to tender rent to the Plaintiff, but that the Plaintiff refused these tenders of rent of the Defendant. It is clear that where the obligations of a contract have attached, and one party, without the consent of the other, does some act which prevents the carrying out of the contract according to its terms, he cannot avail himself of this conduct to avoid his liability to the other party to the contract. Suter vs Farmers Fertilizer Co., 100 Ohio St. 403 (1919). If a promisor prevents or hinders the performance of a return promise, and the performance of the return promise would have been rendered except for such prevention or hindrance, the condition is excused. Warner vs Biederman, 64 Ohio App. 423 (Hamilton Co. 1940). As the policy of the Plaintiff was to refuse all rental tenders from tenants once a Notice to Terminate Tenancy has been served upon said tenants, the Plaintiff cannot now be heard to use the ground of non-payment of rent as a grounds for eviction, when the tenant had previously been fully current on her rent prior to the beginning of the refusal to accept further rent by the Plaintiff.

There is no question that the Defendant has received the benefit of occupancy of the premises, and that the Plaintiff is therefore entitled to a money judgment for the rent which has not been paid. However, the Court does not find it fair or equitable, based upon the above case authority, to order a forfeiture of premises against the Defendant on these facts.

The Court does not find the arguments of Plaintiff persuasive as to the Defendant in effect receiving several months of free occupancy of the premises. The Plaintiff could have avoided this result by proceeding forward with the prior evictions against the Defendant; had said evictions been successfully completed, the Defendant would be out of the premises; had said prior evictions been lost by Plaintiff at trial, the Plaintiff would thereafter have resumed receiving rental payments, with a minimum of lost rental income.

The Court finds that the Objections of the Plaintiff are not well-taken, and are, therefore, overruled.

  
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JUDGE WILLIAM R. FINNEGAN  
MARION MUNICIPAL COURT

cc: Dean Washburn, Attorney for Plaintiff  
✓ Mitch Libster, Attorney for Defendant