

THOMAS L. HARMON, CLERK
CANTON MUNICIPAL COURT

IN THE CANTON MUNICIPAL COURT
STARK COUNTY, OHIO

95 JAN 20 PM 3:15

INSIGNIA MANAGEMENT GROUP
MANAGING AGENT FOR CHIP APTS.

Case No. 94 CVG 6277

Plaintiff

Judge John A. Poulos

vs.

GAIL TATE

JUDGMENT ENTRY

Defendant

This matter came on for hearing before the Court on January 18, 1995 upon the Defendant's written "Objections to Report of Referee" filed January 10, 1995. Prior to the hearing (on January 13, 1995), the Court listened to the tape of the original trial before the Referee on December 5, 1994. Although a written transcript was not ordered by either party, the Court was able to clearly hear the entire trial that occurred before the Referee.

Plaintiff was represented by Attorney Jon M. Hollingsworth. The Defendant was represented by Attorney Jonathan E. Morris. Both counsel represented their respective parties at both the trial of this matter before the Referee and the "Objections" hearing before the Court.

Defendant's "Objections to the Report of Referee" are based on the following three propositions:

1. Defendant alleges that "Finding of Fact #3" is in error;
2. Defendant alleges that she relied on a pattern and practice established between herself and the Plaintiff in tendering the double payment in November; and

3. The Referee erred in failing to balance the equities. The Court will address the second and third issue raised by the Defendant.

FINDINGS OF FACT

1. Plaintiff and Defendant are landlord and tenant respectively, for the rental of the premises located at 3112 Kalahari N.E., Canton, Ohio. This is federally assisted housing for which the United States, through the Department of Housing and Urban Development, provides a subsidy.

2. Plaintiff filed this action in forcible entry and detainer on November 14, 1994.

3. Defendant lives at the above described premises with her four children, ages 13, 12, 10, and 5.

4. During the year 1994, Defendant has tendered her rent payment late on five separate occasions. Pursuant to the terms of the lease, she is permitted to make late payments as long as a late fee of \$1.00 per day is paid. Until October of 1994, all payments were received.

5. In October of 1994, the Defendant failed to pay her rent. Defendant testified that on November 4, 1994 she offered to Plaintiff rent for the months of October and November along with \$1.00 per day late charge. According to Defendant's testimony, Plaintiff indicated that it was too late to accept the rent since "the file had been sent out to the attorney for eviction."

6. According to the testimony presented by the Plaintiff,

on November 4, 1994, the Defendant approached the Plaintiff's manager in the parking lot and said that she had a check for the two months rent and the late charges but was advised that the office was closed and that her file was already forwarded to the attorney for an eviction. (See also Plaintiff's Trial Brief dated December 15, 1994).

7. As part of his Findings of Fact, the Referee found that "She (the Defendant) tendered the October rent together with November's rent on or about the 5th of November (1994)."

CONCLUSIONS OF LAW

1. The Plaintiff accepted late payment of rent from the Defendant on five separate occasions in 1994. It is this Court's opinion that this was sufficient to establish a pattern and practice of accepting late rent on the part of the Plaintiff, which Defendant by law could rely upon.

2. The failure of a landlord to object to a pattern of late payment of rent amounts to a waiver of the right to set up such breach of the lease as grounds for termination. Finkbeiner, et al. v. Lutz, et al. (1975) 44 Ohio App. 2d 223. It is this Court's opinion that the tender of the double rent payment by the Defendant on November 4, 1994 was within the pattern and practice established between the parties for permissible late payment. It is this Court's opinion that Defendant was not in breach of her obligations.

3. Furthermore, the Court agrees with the proposition raised by Defendant that "the Court should balance the equities."

4. It is this Court's opinion that the damages suffered by the Plaintiff in receiving the rent along with the late payment on November 4, 1994 are far outweighed by the forfeiture of the subsidized tenancy to Defendant and her four children. In good conscience, the Court "balances the equities" and finds in favor of the Defendant.

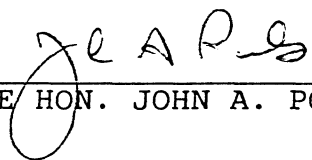
CONCLUSIONS

1. The Court having made an independent analysis of the issues and the applicable law, hereby VACATES the judgment of the Referee of the Canton Municipal Court dated January 6, 1995.

2. Plaintiff's "Complaint for Eviction" filed November 14, 1994 is DISMISSED.

3. Plaintiff is ordered to pay the costs of this action. Exceptions to both parties.

IT IS SO ORDERED.



THE HON. JOHN A. POULOS

Dated: January 19, 1995

cc: Jon M. Hollingsworth, Counsel for Plaintiff
Jonathan E. Morris, Counsel for Defendant