

CLEVELAND MUNICIPAL COURT
HOUSING DIVISION
CUYAHOGA COUNTY, OHIO

Owner's Management)	
)	Judge Raymond L. Pianka
Plaintiff)	
)	Case No. 97 CVG 07486
vs.)	
)	MAGISTRATE'S DECISION AND
Weems)	JUDGMENT ENTRY
)	
Defendant)	

This matter came for trial on June 30, 1997 before Magistrate Sandra R. Lewis, to whom it was assigned by Judge Raymond L. Pianka pursuant to Ohio Rule of Civil Procedure 53, to take evidence on all issues of law and fact regarding plaintiff's claim for restitution. Both parties present and represented in court by counsel.

STIPULATIONS

Prior to trial, the parties stipulated to the following facts:

1. Plaintiff/Owner's Management Company is the landlord of the residential rental building located at 1380 East 13th Street, Cleveland, Ohio 44114.
2. Defendant/Mr. Weems occupies unit #910 in the above-mentioned building pursuant to a written HUD subsidized lease. Monthly rent is therefore calculated on the basis of defendant's monthly income. The lease was not presented to the Court.

FINDINGS OF FACT

1. Under the lease, defendant's monthly portion of the rent was \$131 due on the first of the month.
2. Until December 1996, defendant's source of income was Supplemental Security Income. Consumer Protection Agency was his representative payee.
3. On or about the end of December 1996, defendant received notice that he would no longer receive benefits under the SSI program.
4. At the beginning of January 1997, defendant promptly notified plaintiff's resident manager, Ms. Kovar, of the loss of income. Ms. Kovar forwarded a copy of defendant's notification letter to management's main office so that defendant could be recertified due to the

loss of income. She also told defendant to continue to pay his rent and a credit would be issued once the rent was recertified to a lower amount.

5. Due to the loss of income, defendant failed to pay any portion of rent for January 1997 and all subsequent months.

6. On or about February 28, 1997, plaintiff served defendant with both a thirty-day termination notice for cause and a ten-day termination notice for non-payment. Neither party presented any further evidence as to the basis for the "for cause" notice. The ten-day termination notice was a "combined" notice containing both the HUD required language regarding an opportunity to discuss the termination, as well as the R.C. 1923.04 statutory language. (See Plaintiff's Trial Exhibit D; Defendant's Trial Exhibit 3).

7. On or about March 31, 1997, plaintiff filed the complaint for eviction solely on the grounds of non-payment.

CONCLUSIONS OF LAW

Plaintiff seeks restitution of the premises. Defendant defends his non-payment based upon his loss of income.

At trial, plaintiff presented a copy of the notice served, which combined the HUD termination notice and the R.C. 1923.04 notice. However, this Court has previously held that landlords may not combine HUD notices with the R.C. 1923.04 notice. Oppmann Properties v. Jackson (Cleveland Muni. May 29, 1990), No. 90-CVG-9118 (unreported).

In Oppmann, this Court reasoned that although regulations may allow the HUD notice to run concurrently with any comparable state notices,

"The R.C. 1932.03 notice to vacate is not a comparable notice to the notice of proposed termination. Cf. Cincinnati Metropolitan Housing Authority v. McCollum, 45 Ohio App. 2d at 199, 341 N.E.2d at 859. The notice of proposed termination proposes to, but will not necessarily, terminate the tenancy; whereas the R.C. 1923.04 notice to vacated directs the tenant to leave the premises because the tenancy already has terminated."

Oppmann at 6.

In the present matter, the combined notice was served on February 28, 1997 and purported to terminate the tenancy on February 28, 1997. However, under HUD requirements, the tenancy would not have terminated until March 10, 1997.

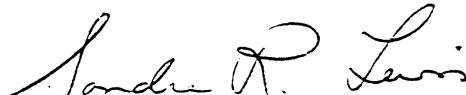
Since the tenancy would not have terminated until March 10, 1997, the R.C. 1923.04 notice could not have been served until March 11, 1997. See FMJ Properties v. Hinton (Cuyahoga App. April 10, 1986), No. 50314 (unreported).

Plaintiff presented no other notices containing the R.C. 1923.04 statutory language. Therefore, this Court concludes that service of the R.C. 1923.04 notice prior to the expiration

date of the tenancy was improper. Without proper service of the R.C. 1923.04 notice, this Court is without jurisdiction to proceed. FMJ Properties v. Hinton (Cuyahoga App. April 10, 1986), No. 50314 (unreported); Oppmann Properties v. Jackson (Cleveland Muni. May 29, 1990), No. 90-CVG-9118 (unreported).

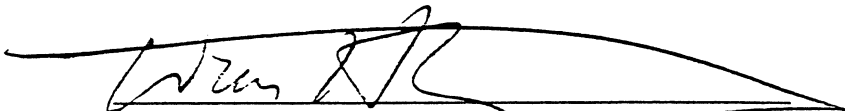
Therefore, plaintiff's claim for restitution is dismissed without prejudice.

Recommended:


Magistrate Sandra R. Lewis

JUDGMENT

Upon review, the Magistrate's Recommendation is approved and confirmed. Judgment is for defendant, who may remain in the premises.


Judge William H. Corrigan
for Judge Raymond L. Piarka
Housing Division

IN ORDER TO BE CONSIDERED, ALL OBJECTIONS TO THE MAGISTRATE'S REPORT MUST BE FILED WITHIN FOURTEEN (14) DAYS OF JOURNALIZATION OF THIS DECISION AND MUST COMPLY WITH THE OHIO RULES OF PROCEDURE AND THE LOCAL RULES OF THIS COURT. FOR FURTHER INFORMATION, CONSULT THE ABOVE RULES OR SEEK LEGAL COUNSEL.

SERVICE

A copy of this Judgment Entry was sent via regular U.S. Mail to the plaintiff's counsel Ted S. Friedman, 6175 S.O.M. Center Road, Solon, Ohio 44139 and to defendant's counsel Marsha L. Rucker, 1223 West 6th Street, Cleveland, Ohio 44113 this 23 day of July 1997.



CLEVELAND MUNICIPAL COURT
HOUSING DIVISION
CUYAHOGA COUNTY, OHIO

OWNER'S MANAGEMENT CO.

DATE: AUGUST 8, 1997

Plaintiff(s)

-VS-

CASE NO: 97-CVG-7486

KENNETH WEEMS

Defendant(s)

JUDGMENT ENTRY

Plaintiff's objections to the magistrate's report and recommendation are overruled. Prior decision is affirmed.

15/

JUDGE RAYMOND L. PLANKA

A copy of this judgment entry was sent by regular U.S. mail to plaintiff's attorney, Ted S. Friedman, 6175 S.O.M. Center Road, Suite 210, Solon, Ohio 44139, and to defendant's attorney, Marsha L. Rucker, 1223 West 6th Street, Cleveland, Ohio 44113 on August 8, 1997.

M. Boyd