

IN THE MUNICIPAL COURT OF AKRON
SUMMIT COUNTY, OHIO

CLARENCE W. DEVORE

Plaintiff

V.

ANDREA HIGGINS

Defendant

CASE NO. 99 CVG 06094

Magistrate: JAMES K. REED

MAGISTRATE'S DECISION WITH
FINDINGS OF FACT AND CONCLUSION
OF LAW

Aug 21 1 03 PM '99

This cause came to be heard before Magistrate James K. Reed on August 13, 1999 on plaintiff's complaint for forcible entry and detainer. Plaintiff was present. Defendant was present and represented by attorney Joann Jolstad of Western Reserve Legal Services. Based upon the testimony and evidence presented, the court finds the facts to be as follows.

Plaintiff is the owner of the property located at 999 Laurel Street in Akron, Ohio. In May of 1999, defendant rented said premises pursuant to an oral month to month lease. At the time the parties entered into the rental agreement, plaintiff knew that defendant used her ADC public assistance check to pay her rent and that same was acceptable to him. Defendant's monthly rent was \$450.00 and defendant was to pay the water bill, which averaged \$75.00 per month. Rent was payable on the third day of each month. Defendant actually moved into the premises in the middle of May and paid plaintiff the sum of \$450.00, which defendant testified consisted of a pro-rated share of May's rent of \$225.00 and a \$225.00 security deposit. Since plaintiff lived in Orrville, Ohio, the parties established practice of rent collection was that plaintiff would drive to Akron and collect the rent from defendant in person.

Thereafter, on June 6, 1999, plaintiff drove to Akron and personally collected June's rental payment from defendant. However, on that date plaintiff testified that he only received a partial rental

payment in the amount of \$350.00 from defendant leaving a balance due of \$100.00. At trial, defendant testified that on June 6, 1999, she paid plaintiff the sum of \$450.00 for June's rent and that the June rent was paid in full. Plaintiff further testified that defendant also failed to pay July's rent of \$450.00. Specifically, plaintiff testified that on Saturday, July 3, 1999, he drove to Akron to collect July's rent only to be told by defendant that her ADC check had not yet arrived and therefore she could not pay her rent until it arrived. Defendant testified at trial that due to an error at the Department of Human Services all the checks to ADC recipients in Summit County would be a couple of days late in arriving. Defendant testified that she informed plaintiff that she would probably be receiving her check on Monday, July 5, 1999, and that she could pay her rent at that time. Defendant further testified that she gave plaintiff a phone number to call her at on Monday to make arrangements to pick up the rent but plaintiff never called her. In addition, defendant testified that on Wednesday, July 7, 1999, she called plaintiff and left a message for him but plaintiff failed to return the call. Finally, defendant testified that she tried to call defendant again on Friday, July 9, 1999, but received no answer.

At trial, plaintiff denied that defendant told him she would pay the rent on July 5, 1999. In addition, plaintiff testified that defendant never called him and told him that she had received her ADC check and could now pay her rent. Thereafter, on July 19, 1999, plaintiff served defendant with a three (3) day notice to vacate the property by posting same at the premises and subsequently initiated the instant forcible entry and detainer action.

At trial, defendant's sister, Sharon Holmes, testified that she was present with defendant when she rented her apartment from plaintiff. Specifically, Ms. Holmes testified that on May 17, 1999, defendant paid plaintiff \$450.00 which consisted of a half month's rent and a \$225.00 security deposit.

In addition, defendant's daughter, Tiffany Vincent, testified that on June 6, 1999, she personally observed defendant pay plaintiff the sum of \$450.00 for June's rent. Plaintiff disputed Ms.

Vincent's testimony and claimed that defendant only paid him the sum of \$350.00 and told him that she would pay the \$100.00 balance the following week. At trial, both parties testified that plaintiff gave defendant a receipt for the rental payment made on June 6, 1999. However, neither party could produce a copy of the receipt at trial.

Ms. Vincent also testified that on June 6, 1999, the parties discussed the payment of the water bill and defendant informed plaintiff that she would pay the water bill if he would give it to her. At trial, defendant acknowledged that she never paid the water bill but claims that plaintiff never gave her a copy of the water bill which was mailed to plaintiff as the owner of the property.

In order for a party to prevail, the party has a duty of establishing the truth of their case by a preponderance of the evidence. This means evidence of a greater weight and more convincing than the evidence which is offered in opposition to it. It is the opinion of the Magistrate that plaintiff has failed to provide that preponderance of the evidence necessary to prevail on his complaint for the following reasons.

First, concerning the alleged partial payment of June's rent, although both parties acknowledge that a receipt was given to defendant, neither party could produce a copy of same for the court to review. As such, based on the testimony and evidence presented, it is the opinion of the Magistrate that plaintiff has failed to provide that preponderance of evidence necessary to establish that defendant failed to pay her June rent in full.

Second, concerning defendant's alleged failure to pay July's rent, based upon the testimony and evidence presented, the court finds by clear and convincing evidence that the parties established a rental collection practice whereby plaintiff would drive from Orrville to Akron to personally collect the rent from defendant. It is undisputed that plaintiff knew that defendant paid her rent with her ADC check and that plaintiff did not object to being paid in this manner. In addition, at trial plaintiff did not dispute defendant's testimony that she could not pay her July rent on July 3, 1999, because

she had not yet received her July ADC check through no fault of her own. As such, it is the opinion of the Magistrate that due to the Summit County Human Resources Department's failure to timely issue ADC checks in July of 1999, that defendant has a valid affirmative defense that her nonpayment of rent was caused by circumstances beyond her control. The Magistrate further finds that defendant promptly informed plaintiff of the circumstances surrounding her failure to pay her rent and thereafter made a diligent effort to pay her rent by calling plaintiff on several occasions to make the necessary arrangements to pay her rent. See in accord, Cincinnati Metropolitan Housing Authority v. Green, 41 Ohio App. 3d, 365, 536, N.E. 2d 1 (1987). Absent any testimony that plaintiff attempted to collect the July rent after July 5, 1999, and that defendant refused to pay same, under the circumstances this court cannot find that defendant failed to tender her July rent in a timely manner. Since equity abhors a forfeiture of a lease, plaintiff's request for a writ of restitution is not well taken. See Gorsuch Homes, Inc. V. Wooten, 73 Ohio App. 3d 426 (1992).

Wherefore, based upon the testimony and evidence presented, it is the recommendation that a writ of restitution NOT BE allowed. It is my further decision that the second cause be continued.

James K Reed 8-23-99
MAGISTRATE JAMES K. REED

JUDGMENT ENTRY

The decision of the Magistrate is approved. It is the judgment of the court that a writ of restitution MAY NOT issue. Costs to be paid by the plaintiff.

8/23/99
DATE

[Signature]
JUDGE

Aug 24 1 06 PM '99
CLERK