

CLEVELAND MUNICIPAL COURT
HOUSING DIVISION
CUYAHOGA COUNTY, OHIO

OPHELIA TOLLIVER

DATE: DECEMBER 28, 1999

Plaintiff

-VS-

CASE NO: 99-CVG-13123

CHANDRA WARREN

Defendant

MAGISTRATE'S REPORT and
RECOMMENDATION and
JUDGMENT ENTRY

This case came to be heard before Magistrate Barbara A. Reitzloff, to whom it was referred by Judge Raymond L. Pianka, to take evidence on all issues of law and fact regarding plaintiff's first and second cause of action and defendant's counterclaim.

Plaintiff in court with counsel.

Defendant in court with counsel.

FINDINGS OF FACT:

1. Plaintiff is the owner of the residential rental premises located at 10603 Olivet, Cleveland, Ohio 44108. Plaintiff has been the owner of the premises at all times relevant to this action.
2. The premises is a duplex, consisting of three floors. The downstairs unit consists of five rooms on the first and second floors; the upstairs unit consists of three rooms on the third floor.
3. In approximately April 1998, plaintiff rented the downstairs unit of the premises to defendant.
4. Defendant's monthly rent was to be \$300., due on the first day of each month
5. The tenant who occupied the premises immediately prior to defendant paid \$400. per month.
6. Defendant did not pay plaintiff a security deposit.

7. Several items at the premises have been in need of repair during defendant's tenancy.
8. The front screen door of the premises was missing a bottom panel, from September 1998 until September 1999.
9. The cover of the heater vent in the living room was not adequately secured to the wall, posing a danger to a small child. This condition existed from October 1998 until September 1999.
10. The dining room wall was cracked and peeling. This condition existed from September 1998 until September 1999.
11. The dining room window seat drawers were in need of repair.
12. Electrical outlets lacked covers, and were not functional. This condition existed from September 1998 until September 1999.
13. The bathroom floor was cracked, the toilet was not secured to the floor, the tub was worn, the sink was not properly affixed to the wall, and the ceiling had a hole in it. Defendant complained to the plaintiff of these conditions in September 1998.
14. Defendant first complained to plaintiff of the conditions set forth above in September 1998.
15. The City inspector inspected the premises in February 1999. At that time, the inspector observed a number of violations at the premises.
16. Plaintiff repaired the ceiling in February 1999. Plaintiff made repairs to the toilet in July 1999 and September 1999.
17. The inspector reinspected the premises in September 1999, at which time he observed that some, although not all, of the repairs had been made.
18. Plaintiff argued both that repairs were completed much earlier than September 1999, and that defendant denied plaintiff's repairpersons entry to make repairs. Plaintiff's testimony on these issues, however, was in direct conflict with that of plaintiff's own witnesses, and thus was not credible.
19. Defendant testified that in her opinion, the premises was worth \$150. per month, for the period from September 1998 through September 1999, by which time many of the defective conditions had been repaired.
20. Plaintiff accepted defendant's January 1999 rent on January 12, 1999; the February 1999 rent on March 12, 1999 (paid along with the March 1999 rent); and the April 1999 rent on April 9, 1999.

21. On or about April 9, 1999, defendant notified plaintiff in writing of complaints defendant had regarding the condition of the premises.
22. Defendant paid and plaintiff accepted the May 1999 rent on May 11, 1999.
23. On June 7, 1999 plaintiff served defendant with a three day notice to vacate. The notice contained the language required by R.C. 1923.04.
24. Defendant initiated a rent deposit by paying her June 1999 rent into the court on June 8, 1999, in Account No. 99-RD-79. Defendant has paid her rent into the court each month since then.
25. On June 15, 1999, plaintiff filed this action against defendant, seeking restitution of the premises and money damages.
26. On July 6, 1999, defendant filed and served an answer and counterclaim.
27. Plaintiff failed to file an answer to the counterclaim.
28. Defendant remains in the premises at the present time.

CONCLUSIONS OF LAW AND FACT:

Plaintiff's claims

Plaintiff, in her complaint, seeks restitution of the premises, and money damages.

Plaintiff seeks restitution of the premises based upon nonpayment of rent for the month of June 1999, which plaintiff alleges was not paid in a timely manner.

Plaintiff has established that the parties' initial agreement required payment of rent by the first of each months. Defendant, however, established that there was in place a pattern of acceptance of late payment by plaintiff, permitting payment as late as the twelfth day of the month. A landlord's repeated acceptance of a tenant's late rent payments may establish a course of conduct between the parties that waives the tenant's obligation to pay rent by the agreed-upon due date, instead requiring payment by the date established by the course of conduct. Fairborn Apts. v. Herman, No. 90-CA-28 (Ct. App. Greene Cty. Jan. 31, 1991); Finkbeiner v. Lutz (1975), 44 Ohio App.2d 223; Bates & Springer, Inc. v. Nay (1963), 91 Ohio L. Abs. 425.

In this case, plaintiff's conduct in accepting rent late waived defendant's obligation to pay rent by the first day of the month, altering the due date to the twelfth day of each month. In light of the foregoing, and the delivery by defendant to plaintiff of written notice of the defective conditions of the premises, plaintiff's service of a three day notice on June 8, 1999 was premature, and defendant's deposit of rent with the Court on

June 8, 1999 constituted timely payment. Accordingly, defendant is entitled to judgment on plaintiff's first cause of action.

Plaintiff, in her second cause of action, seeks judgment for unpaid rent and property damage.

This court has determined that defendant deposited her rent with the court properly. Defendant continues to deposit her rent with the court at this time. Plaintiff last received rent directly from defendant for the month of May 1999. This case came to trial in September 1999. At that time, defendant owed plaintiff four months of rent, totalling \$1200.

Plaintiff did not present evidence in her case in chief of any property damage caused by defendant, or any expenses incurred by defendant. Some mention was made of poor housekeeping by defendant; however, such evidence was insufficient to support a claim for damages. Accordingly, plaintiff's recovery is limited to \$1200. on her second cause of action.

Defendant's Counterclaims

Plaintiff, mid-trial, moved for leave to file an answer instanter to defendant's counterclaim. This motion was denied. Plaintiff having failed to file a timely answer to the counterclaim, defendant is granted a judgment by default.

The court, at trial, elicited testimony from defendant, subject to cross-examination by the plaintiff, regarding the amount of damages suffered.

Defendant testified credibly that numerous defective conditions, enumerated above, existed at the premises for approximately twelve months after defendant's initial complaints to plaintiff. During this time, she testified, defendant suffered inconvenience, disruption of her normal living routine, and a reduction in the use and enjoyment of the rental premises.

A tenant is competent to give opinion testimony as to the rental value of the premises in their defective condition. Smith v. Padgett (1987), 32 Ohio St.3d 344. In this case, defendant testified that the premises during the year in which the defective conditions existed, was worth \$150. per month rent, a reduction of \$150. per month. Plaintiff disputed this figure. In light of the evidence presented, the court concludes that defendant's estimate is somewhat high. This court concludes that a reduction of \$75. per month is proper compensation for the conditions under which defendant suffered.

Accordingly, defendant is entitled to recover damages on her counterclaim in the amount of \$75. per month, for twelve months, for a total of \$900. Plaintiff's recovery of \$1200., then, is reduced by \$900., to \$300.

There was on deposit the sum of \$1200. as of the date trial (September 1999). From those funds, plaintiff is entitled to recover the \$300. described above, which the Clerk of Court shall release to plaintiff. Defendant is entitled to recover the balance of \$900., deposited through September 1999, which the Clerk of Court shall release to defendant.

The Court notes that there remains on deposit the rent for the months of October, November, and December 1999. As many but not all of the requisite repairs were completed by the day of trial, and this entry disposes of the parties competing claims through the month of September 1999, the rent for the three months set forth above shall remain on deposit, until such time as plaintiff completes the repairs, and files an Application for Release of Rent with this Court.

RECOMMENDATION:

Judgment for defendant on plaintiff's first cause of action. Defendant may remain in the premises.

Judgment for plaintiff on her second cause of action in the amount of \$1200., less the judgment rendered for defendant on her counterclaim in the amount of \$900., for a net judgment for plaintiff of \$300.

Clerk to release funds to satisfy the above claims, as follows:

- 1) Clerk of Court to release from the funds on deposit in 99-RD-79 the sum of \$300., less poundage, to plaintiff Ophelia Tolliver, 16400 Biltmore Ave., Cleveland, Ohio 44128;
- 2) Clerk of Court to release from the funds on deposit in 99-RD-79 the sum of \$900., less poundage, to defendant Chandra Warren, c/o Stephanie M. Jackson, Esq., 1223 West Sixth Street, Cleveland, Ohio 44113.

Rent Deposit Account No. 99-RD-79 shall remain open and active, and defendant may continue to deposit her rent into it.

Recommended:


MAGISTRATE BARBARA REITZLOFF
HOUSING DIVISION

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

JUDGMENT:

The foregoing recommendation is approved and confirmed, and judgment is entered as follows:

Judgment for defendant on plaintiff's first cause of action. Defendant may remain in the premises.

Judgment for plaintiff on her second cause of action in the amount of \$1200., less the judgment rendered for defendant on her counterclaim in the amount of \$900., for a net judgment for plaintiff of \$300.

Clerk to release funds to satisfy the above claims, as follows:

- 1) Clerk of Court to release from the funds on deposit in 99-RD-79 the sum of \$300., less poundage, to plaintiff Ophelia Tolliver, 16400 Biltmore Ave., Cleveland, Ohio 44128;
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Rent Deposit Account No. 99-RD-79 shall remain open and active, and defendant may continue to deposit her rent into it.



JUDGE RAYMOND L. PLANKA
HOUSING DIVISION

A copy of the Magistrate's Report and Recommendation and Judgment Entry was sent by ordinary U.S. mail to plaintiff's attorney, and to defendant's attorney, on

12/27/99.


