

CLEVELAND MUNICIPAL COURT
HOUSING DIVISION
JUDGE RAYMOND L. PLANKA

GRAIG BROWN,

Plaintiff(s)

-VS-

ROSE MARIE RAY,

Defendant(s)

Date: November 26, 2008

Case No.: 08-CVG-25314

JUDGMENT ENTRY

Upon review, the Magistrate's Decision is approved and confirmed.

The plaintiff, his agents, servants, employees, and all persons in active contact or participation with them are restrained from directly or indirectly interfering with the electrical service and access to the premises known as 2980 South Moreland, #3, Cleveland, Ohio 44120 ("premises"). Specifically, THE COURT ORDERS PLAINTIFF TO RESTORE ACCESS TO THE PREMISES TO DEFENDANT, PROVIDE KEYS TO THE NEW LOCKS TO DEFENDANT, AND RESTORE ELECTRICAL SERVICE TO THE PREMISES.

The Court ORDERS plaintiff to take any and all actions necessary to immediately RESTORE ACCESS TO THE PREMISES TO DEFENDANT, PROVIDE KEYS TO THE NEW LOCKS TO DEFENDANT AND RESTORE ELECTRICAL SERVICE TO THE PREMISES.


The Court ORDERS that this preliminary injunction will be in effect until such further time as the Court dissolves it, or at such point in time that a permanent injunction is granted, or other order of this Court.

The Court ORDERS that the parties appear for a status hearing on December 2, 2008 at 10:30 a.m. on the Thirteenth Floor of the Justice Center. PLAINTIFF GRAIG BROWN IS ORDERED TO APPEAR PERSONALLY.

The Court ORDERS that a copy of this Magistrate's Decision and the Judgment Entry be immediately served by Housing Court Bailiff upon plaintiff's counsel for record: E. Yvonne Harris, 55 Erieview Plaza, Suite 380, Cleveland, OH 44114 and also posted on the door to the premises at 2980 South Moreland #3, Cleveland, Ohio 44120.

Plaintiff's first cause of action is set for hearing on December 5, 2008 at 10:30 a.m. in on the Thirteenth Floor to weigh the equities, and determine whether

plaintiff has come before this Court with clean hands, while attempting to pursue an equitable remedy. Ruling on the first cause of action is held in abeyance pending the status hearing. Note: Failure to attend may result in the dismissal of the failing party's claims, default judgment, or other appropriate sanction.


JUDGE RAYMOND L. PIANKA
HOUSING DIVISION

SERVICE

A copy of this Judgment Entry was sent by regular U.S. mail to the parties on _____

CLEVELAND MUNICIPAL COURT
HOUSING DIVISION
CUYAHOGA COUNTY, OHIO

GRAIG BROWN,

Plaintiff(s)

-VS-

ROSE MARIE RAY,

Defendant(s)

Date: November 26, 2008

Case No.: 08-CVG-25314

MAGISTRATE'S DECISION

Case called for preliminary injunction and first cause of action bearing on November 24, 2008 with Magistrate Heather A. Veljković, to whom it was referred by Judge Raymond L. Planka, pursuant to Ohio Rule of Civil Procedure 53. Plaintiff was not present, but was represented by counsel. Defendant was present, and was represented by counsel.

Preliminary Issues

Prior to the case being called, the Court observed that plaintiff in this matter, while seeking restitution of the property in the instant case, has outstanding warrants in one or more criminal cases in this Court (2008 CRB 32381). Consequently, plaintiff seeks to invoke this Court's jurisdiction, and have the Court execute on an order in the eviction action, while failing to acknowledge the jurisdiction in the same Court over the plaintiff in pending criminal cases.

Restitution is available as an equitable remedy, "where *** property identified as belonging in good conscience to the plaintiff could clearly be traced to *** property in the defendant's possession." *Santos v. Ohio Bur. of Workers' Comp.* (2002), 103 Ohio St.3d 74, 77, 801 N.E.2d 443, 445.

The maxim that, "he who comes into equity must come with clean hands" requires that the party seeking equitable relief not be guilty of reprehensible conduct. *Berovic v. Berovic* (11th Dist.), 2003-Ohio-4479. A party will not obtain equitable relief if the injury incurred by such party is, "chargeable to his own wrong." *Pitt v. Smith* (1861), 12 Ohio St. 561, 570.

At hearing, counsel for defendant made an oral motion to dismiss the plaintiff's first cause of action. Ruling upon the motion was held in abeyance. The Court now denies the defendant's motion, since counsel for plaintiff filed a Notice of Appearance and was present for the hearing. However, in light of the fact that plaintiff has an active warrant, the first cause will be continued to the Court's warrant docket.

FINDINGS OF FACT:

{1.} Defendant is a tenant at the premises located at 2980 South Moreland #3, Cleveland, Ohio ("premises"), pursuant to a Housing Choice Voucher Program contract.

{2.} Plaintiff is the tenant's landlord.

{3.} Pursuant to the contract, Ms. Ray's portion of the rent is \$189.

{4.} Ms. Ray last paid rent to plaintiff on September 16, 2008, for the month of September, 2008.

{5.} On Sunday, October 5, 2008, defendant awoke to discover that the electricity in her unit was not working.

{6.} She called the Illuminating Company, thinking that they may have some insight as to the problem; they did not.

{7.} She called Mr. Brown, her landlord; she left a voicemail that was unreturned.

{8.} Ms. Ray then called the Cleveland Police Department; an officer arrived, and he called Mr. Brown.

{9.} On Monday, October 6, 2008, Ms. Ray was still without electricity.

{10.} She called both Mr. Brown and the Cleveland Police Department again.

{11.} She also contacted Ms. Dara Flores, a Housing Specialist with the Cleveland Municipal Court, Housing Division.

{12.} Ms. Ray made several more phone calls to Mr. Brown; she only spoke to him once, and he indicated to her that the electrical service would not be restored because it was going to cost him Five Hundred Dollars to do so.

{13.} Ms. Ray has asthma, a chronic health condition that is aggravated by coldness.

{14.} Ms. Ray testified that it was very cold in her apartment.

{15.} Due to the coldness at her unit, which aggravated her asthma, Ms. Ray spent time at her mother's apartment unit.

{16.} Ms. Ray does not have an automobile, so she had to walk the 10 to 15 blocks from her apartment to her mother's home.

{17.} Ms. Ray checked, by walking to her apartment, at least ten times over the next couple of weeks, and her power still was not restored.

{118.} As a result of having no electricity, all of the food in Ms. Ray's refrigerator and freezer spoiled.

{119.} On Friday, October 31, 2008, Ms. Ray went again to check whether her power had been restored.

{120.} This time, the key would not turn to open her unit door.

{121.} She was able to gain access into the building, just not into her unit.

{122.} Sometime prior to October 31, 2008, Ms. Ray closed the back door to her unit with a slide lock.

{123.} She used the slide lock as an extra safety precaution; with the slide lock closed, access cannot be gained from the outside into the unit from the back door.

{124.} Ms. Ray used the front door all of the time for means of entry; she only used the rear door to take the trash out.

{125.} When discovering that she could not enter her apartment, Ms. Ray called Mr. Brown; she left a voice mail message.

{126.} Mr. Brown never returned her call.

{127.} Ms. Ray attempted to gain access to the unit this past Thursday and Friday, but was unable to do so.

{128.} In addition, Ms. Ray attempted to gain access on the morning of hearing, and still was unable to do so.

{129.} All of Ms. Ray's personal belongings are in her apartment, including: clothes, televisions, couches, bedroom suite, coat, boots, birth certificate, son's birth certificate, social security card, daughter's and grandchildren's social security cards, and purse.

{130.} Ms. Ray was born in Pittsburgh, Pennsylvania, and it would be very difficult for her to attempt to obtain an additional copy of her birth certificate.

{131.} Ms. Ray has some, but not all, of her asthma medications with her; there are some still in the unit.

{132.} Because Ms. Ray has only a few articles of clothing with her, she has to wash them frequently so that she has clean clothes to wear.

CONCLUSIONS OF LAW:

Standard for Preliminary Injunction

{132.} No preliminary injunction shall issue without reasonable notice. Ohio R. Civ. Pro. 63(B)(1). While counsel for plaintiff disputes that reasonable notice was given, the Court disagrees. Counsel for plaintiff was present at status hearing the prior week; although she had not yet filed a Notice of Appearance, she represented to the Court that she had been retained by the plaintiff, and that she was in fact appearing in Court on his behalf. A Housing Court Bailiff served counsel with a copy of the Motion for Temporary Restraining Order, and the TRO, which contained a notice to appear. In addition, Ms. Harris was advised, personally in Court, about the time and date to appear for the preliminary injunction hearing. While her client was absent, she was present, indicating that there was reasonable notice.

{134.} In deciding whether to grant a preliminary injunction, a court must look at the following factors: 1) whether there is a substantial likelihood that the movant will prevail on the merits; 2) whether the movant will suffer irreparable injury if the injunction is not granted; 3) whether third parties will be unjustifiably harmed if the injunction is granted, and 4) whether the public interested will be served by the injunction. *Valco Cincinnati v. N & D Machining Serv. Inc.* (1986), 24 Ohio St.3d 41, 492 N.E.2d 814.

{135.} The party seeking injunctive relief must prove that she is entitled to the preliminary injunction by showing clear and convincing evidence of each element of the claim. *Mead Corp., Diconix, Inc., Successor v. Lane* (1988), 54 Ohio App.3d, 560 N.E.2d 1319.

1. Substantial Likelihood that Movant Will Prevail

{136.} Will Ms. Ray prevail on the complaint for injunctive relief? Plaintiff has a statutory duty to provide electrical service to the unit. R.C. 5321.04(A)(1), (2) and (4). Plaintiff cannot lock out the defendant. R.C. 5312.15(A). Ms. Ray has been without power to her unit for nearly three months; she has been without physical access to the premises for nearly one month. There is a substantial likelihood that Ms. Ray will prevail on the merits.

2. Irreparable Injury

{137.} Will Ms. Ray suffer irreparable injury if the injunction is not granted? Ms. Ray provided credible testimony that she suffers from a chronic health condition that is aggravated by a lack of heat (which is caused by the fact that there is no working electricity in the unit). In addition, Ms. Ray testified that there are personal items in the premises that are very difficult for her to replace (e.g., her birth certificate), especially in light of the fact that defendant does not drive. Finally, the Court notes that Ms. Ray is a participant in the Housing Choice Voucher Program; she has a Poverty Affidavit on file with the Court, indicating that she makes \$812.50 per month. This results in an annual salary of under \$10,000. The Magistrate finds that, in addition to the other irreparable

injuries, that Ms. Ray's financial situation, also makes it such that she cannot simply go out and purchase all of the things that she needs in her day-to-day life and then later sue the plaintiff for money damages. Defendant has established that she has met the irreparable harm requirement.

3. Unjustifiable Harm to Third Parties

138.) Will any third parties be unjustifiably harmed if the injunction issues? The Court cannot imagine, and counsel for plaintiff provided no theory regarding, any harm that could be thrust upon third parties if the Court grants defendant's request for injunctive relief. To the contrary, other tenants may benefit from the injunction, inasmuch as the injunction may send a signal to other landlords that they may not choose to unilaterally kick their tenants out of their apartments, or choose not to make repairs - that is, they must follow the law as set forth in the Ohio Landlord-Tenant Act.

4. Public Interest

139.) Will the public interest be served if the request for preliminary injunction is granted? Most definitely. Plaintiff has a statutory duty to ensure that there is electrical service to the unit. R.C. 5321.04(A)(1), (2) and (4). Plaintiff cannot simply lock out the defendant and engage in self-help. R.C. 5312.15(A). Plaintiff has ignored the temporary restraining orders previously issued by the Court; it appears that there is no other way to ensure that defendant is afforded her rights created by state statute than to grant the defendant's request for injunctive relief. In addition, it is the always within the public interest to ensure that laws created by the Ohio General Assembly are given full force and effect.

140.) For these reasons, the Magistrate concludes that the defendant's request for preliminary injunction should be granted.

Bond.

141.) No preliminary injunction is operative until the party obtaining it gives a bond in an amount fixed by the Court to secure the party enjoined the damages he may sustain, if it is finally decided that the injunction should not have been granted. Ohio R. Civ. Pro. 5(C). Neither party made an argument about bond at the hearing. The Court finds that plaintiff will sustain no damages if it is finally decided that the injunction should not have been granted; therefore, no bond is required.

RECOMMENDATIONS:

142.) Defendant's request for preliminary injunction is granted. No bond is required.

143.) The plaintiff, his agents, servants, employees, and all persons in active concert or participation with them are restrained from directly or indirectly interfering with the electrical service and access to the premises known as 2980 South Moreland, #3, Cleveland, Ohio 44120 ("premises"). Specifically, THE COURT ORDERS

PLAINTIFF TO RESTORE ACCESS TO THE PREMISES TO DEFENDANT, PROVIDE KEYS TO THE NEW LOCKS TO DEFENDANT, AND RESTORE ELECTRICAL SERVICE TO THE PREMISES.

{144.} The Court ORDERS plaintiff to take any and all actions necessary to immediately restore access to the premises to defendant, provide keys to the new locks to defendant and restore electrical service to the premises.

{145.} The Court ORDERS that this preliminary injunction will be in effect until such further time as the Court dissolves it, or at such point in time that a permanent injunction is granted, or other order of this Court.

{146.} The Court ORDERS that the parties appear for a status hearing on December 2, 2008 at 10:30 a.m. on the Thirteenth Floor of the Justice Center. PLAINTIFF CRAIG BROWN IS ORDERED TO APPEAR PERSONALLY.

{147.} The Court ORDERS that a copy of this Magistrate's Decision and the Judgment Entry be immediately served by Housing Court Bailiff upon plaintiff's counsel for record: B. Yvonne Harris, 55 Erieview Plaza, Suite 380, Cleveland, OH 44114 and also posted on the door to the premises at 2980 South Moreland #3, Cleveland, Ohio 44220.

{148.} Plaintiff's first cause of action is set for hearing on December 5, 2008 at 10:30 a.m. on the Thirteenth Floor to weigh the equities, and determine whether plaintiff has come before this Court with clean hands, while attempting to pursue an equitable remedy. Ruling on the first cause of action is held in abeyance pending the status hearing. Note: Failure to attend may result in the dismissal of the failing party's claims, default judgment, or other appropriate sanction.

Heather A. Veljkovic
MAG. HEATHER A. VELJKOVIC

ATTENTION: A PARTY MAY NOT ASSIGN AS ERROR ON APPEAL ANY MAGISTRATE'S FINDING OF FACT OR CONCLUSION OF LAW UNLESS THE PARTY TIMELY AND SPECIFICALLY OBJECTS TO THAT FINDING OR CONCLUSION AS REQUIRED BY CIV. R. 53(F)(3). ALL OBJECTIONS TO THE MAGISTRATE'S DECISION MUST BE FILED IN WRITING WITHIN FOURTEEN DAYS OF THE JOURNALIZATION OF THIS DECISION. OBJECTIONS MUST BE FILED EVEN IF THE TRIAL COURT HAS PROVISIONALLY ADOPTED THE MAGISTRATE'S DECISION BEFORE THE FOURTEEN DAYS FOR FILING OBJECTIONS HAS PASSED. OBJECTIONS 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.

SERVICE

A copy of this Magistrate's Decision was sent by regular U.S. mail to the parties on _____