

CLEVELAND MUNICIPAL COURT
HOUSING DIVISION
CUYAHOGA COUNTY, OHIO

C.M.H.A.

DATE: MAY 2, 2003

Plaintiff(s)

-VS-

CASE NO.: 01-CVG-19335

JANE COLEY

Defendant(s)

MAGISTRATE'S DECISION

This case is before the Court on the plaintiff's Objections to the Magistrate's Conclusions of Law. Upon the filing of the objections, this matter was referred to Chief Magistrate Barbara A. Reitzloff, for oral argument by the parties. For the following reasons, plaintiff's objections are overruled, and the Magistrate's Decision is affirmed.

Magistrate Pope determined the facts in this case after trial on the first cause of action. They are as follows:

The plaintiff operates the public housing estate as which the defendant is a tenant. (*Addendum, Magistrate's Report and Recommendation, Paras. 1,2*). The CMHA police executed a search warrant on the premises. (*Addendum, Para. 3*). They found a single marijuana cigarette. (*Addendum, Para. 4*) The defendant was arrested and charged with a minor misdemeanor. (*Addendum, Para. 5*).

Plaintiff served defendant an "Emergency Notice of Termination and Invitation to Explain." (*Addendum, Para. 6*) In that Notice of Termination, plaintiff assigned to defendant a time to meet with the management, in an attempt to resolve their dispute. (*Emergency Notice of Termination, attached to Plaintiff's Complaint, and admitted as Plaintiff's Exhibit A*). The Notice advised defendant that unless the matter was resolved with the management office, the defendant's lease would terminate three days from the date of the notice. (*Addendum, Para. 6*) Thereafter, the Notice advised, plaintiff would file eviction proceedings. (*Plaintiff's Exhibit A*).

Six days later, plaintiff served defendant a three-day notice to vacate, under R.C. 1923. (*Notice of Termination, attached to Plaintiff's Complaint, and admitted as Plaintiff's Exhibit B*) Subsequently, plaintiff filed this action.

At the hearing on the first cause of action, the magistrate determined that plaintiff failed to serve the proper Notice of Termination required by the federal regulations. Plaintiff, the magistrate found, was required to serve a thirty day Notice of Termination prior to the service of the Notice to Vacate.

The U.S. Code sets forth lease terms that a Public Housing Authority ("PHA") is required to include in its leases.

"(1) leases; term and conditions; maintenance; termination. Each public housing agency shall utilize leases which * * * require the public housing agency to give adequate written notice of termination of the lease which shall not be less than (A) a reasonable period of time, but not to exceed 30 days – (i) if the health or safety of other tenants, public housing agency employees, or persons residing in the immediate vicinity of the premises is threatened; or (ii) in the event of any drug-related or violent criminal activity or any felony convictions; (B) 14 days in the case of nonpayment of rent; and (C) 30 days in any other case, except that if a State or local law provides for a shorter period of time, such shorter period shall apply;" 42 U.S.C.A .

Federal regulations provide a similar requirement.

"(3) Lease termination notice. (i) The PHA must give written notice of lease termination of: (A) 14 days in the case of failure to pay rent; (B) A reasonable period of time considering the seriousness of the situation (but not to exceed 30 days): (1) If the health or safety of other residents, PHA employees, or persons residing in the immediate vicinity of the premises is threatened; or (2) If any member of the household has engaged in any drug-related criminal activity or violent criminal activity; or (3) If any member of the household has been convicted of a felony; (C) 30 days in any other case, except that if a State or local law allows a shorter notice period, such shorter period shall apply." 24 CFR 966.4.

C.M.H.A.'s lease with the defendant contains the following term:¹

"C.M.H.A. shall give Resident a written Notice of Termination. Such notice shall be for the following time periods: 1. Fourteen days in the case of failure to pay rent; 2. A reasonable time, but not less than three days, if the activities of Resident, household members, family members, guests, or other persons under the control of Resident create or maintain a threat to the health or safety of other residents or C.M.H.A. staff or in the case of criminal or drug-related activity; and 3. Thirty days in all other cases. *Lease, Article XIII.*"

¹ The portion of the lease attached to plaintiff's complaint does not contain the provision regarding the requirements of the Notice of Termination. Plaintiff attaches a copy of the purported lease provision to its objections. Defendant does not deny that the provision supplied by plaintiff is in fact the provision contained in defendant's lease.

The U.S. Code, the Federal Regulations, and defendant's lease all anticipate that a PHA will serve a notice of termination of a "reasonable period of time considering the seriousness of the circumstances," provided that such time will not exceed thirty days. The regulations anticipate that the PHA will apply this "reasonableness" standard in cases where the health and safety of other residents is threatened, drug-related criminal activity is involved, violent criminal activity takes place, and cases where household members have been convicted of a felony. The regulations anticipate that notice will be for a period up to 30 days.

In this case, C.M.H.A. served the defendant with a Notice of Termination specifying that her tenancy would terminate in three days. Six days later, C.M.H.A. served the three-day notice to vacate. C.M.H.A. argued that the Notice of Termination met the requirements of the federal regulations, as the period of time was reasonable, under the circumstances. The magistrate disagreed, and found that defendant was entitled to a thirty-day notice, under the circumstances in this case.

Plaintiff cites three cases involving drug-related activity, *Burton v. Tampa Housing Authority*, 171 F.Supp.2d 1314 (2000), *Hartford Housing Authority v. Amalbert*, 1988 WL 492434 (Conn. Super.), and *Akron Metropolitan Housing Authority v. Konich*, 1995 WL 553250 (Ohio App. 9 Dist.), in which the timing of the eviction suggests that a Notice of Termination of less than thirty days was used. Plaintiff acknowledges, however, that there is no language in those cases to suggest that the issue of the length of the notice was raised or examined by the court. Plaintiff cites a fourth case, *Cincinnati Metropolitan Housing Authority v. Browning*, 2002 WL 63491 (Ohio App. 1st Dist.), in which it is clear that a Notice of Termination three days in length was served after the tenant's son was found to be in violation of curfew and in possession of marijuana. As with the other cases, however, nothing in the language of that case suggests that the defendant raised or the trial court examined the issue of the length of the notice.

In support of her position, defendant cites *Housing Authority of New Jersey v. Myers*, 295 N.J.Super. 544, 685 A.2d 532, for the proposition that a 30-day Notice of Termination is required in eviction actions based upon illegal drug activity.

In *Myers*, the court relied upon 42 USCA 1437d(1)(3), which *at that time* allowed for a Notice of Termination of a "reasonable period of time when the health or safety of other tenants or public housing agency employees is threatened." Under that statute, the court held, the PHA could not evict using an abbreviated notice of termination (shorter than 30 days) unless it demonstrated a threat to the health or safety of other tenants or PHA employees. The court went on to say that the mere fact of the tenant's arrest for possession of drug paraphernalia was not sufficient in and of itself to show a threat to the other tenants or employees of the PHA. While *Myers* may be instructive on the issue of

whether possession of drug paraphernalia is sufficient to show a threat to health and safety, it is not instructive as to the issue of the notice, as *Myers* was decided under 42 U.S.C. 1437d prior to the 1998 amendment, which modified the reasonable time provision from one providing for a shortened notice only when the health or safety was threatened, to one providing for a shortened notice when reasonable for conduct threatening health and safety, drug activity, or violent criminal activity.

Defendant also cites *New York City Housing Authority v. Harvell*, 189 Misc.2d 295 (2000). In *Harvell*, however, the court in a very brief opinion appears to address the issue of the need to serve a Notice of Termination, while commenting in what essentially is dicta on the length of the notice. *Harvell*, however, was decided in 2000, under federal regulations similar to those in effect in *Myers*. The regulations, however, were amended in May 2001, to reflect the previous changes in the U.S. Code.

The trial magistrate in this case determined that defendant was in possession of a single marijuana cigarette. There was no finding of any aggravating circumstances, e.g., no evidence of violent conduct involving defendant, or evidence of trafficking in drugs by the defendant. Further, the defendant, according to the trial magistrate's findings, was charged not with a felony, but with a minor misdemeanor.

The regulations, by their language, anticipate that some drug-related criminal activity will not serve as a basis for an abbreviated notice; were that not the intent of the legislature, the U.S. Code and supporting regulations could easily have been drafted to simply provide for a notice of specified, abbreviated length for all drug-related activity. As some drug-related activity, given the language of the regulations and lease, will require a thirty day notice, the Court is persuaded that the conduct as determined by the magistrate at trial, that is, the defendant being in possession of a single marijuana cigarette, resulting in a minor misdemeanor charge, is conduct which will not support the service of an abbreviated notice of termination. Plaintiff having provided the Court with no persuasive authority to the contrary, the Court shall affirm the magistrate's previous decision in this matter.

As a final note, the Court wishes to make it clear that it does not condone the possession of illegal drugs, nor does it minimize the seriousness of such an offense. However, under the facts as determined by the trial magistrate, the Court is prepared to and does find that the service by plaintiff of an "emergency" three-day notice of termination was not reasonable.

For these reasons, plaintiff's objections to the magistrate's decision are overruled. The magistrate's decision as previously issued is affirmed. Plaintiff's motion for the payment of rent into court as bond is rendered moot by this decision.

Case is set for default hearing on plaintiff second cause of action on **June 2, 2003, at 1:30 p.m. in Courtroom 3A.**


CHIEF MAG. BARBARA REITZLOFF

IN ORDER TO BE CONSIDERED, ALL OBJECTIONS TO THE MAGISTRATE'S DECISION 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.

A copy of this judgment entry was sent by regular U.S. mail to parties/
counsel on 5 17 103.


