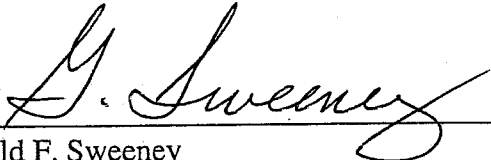


IN THE CLEVELAND MUNICIPAL COURT  
CUYAHOGA COUNTY, OHIO  
HOUSING DIVISION

CMHA	)	
	)	Judge Raymond Pianka
Plaintiff	)	
	)	Case No. 2004 CVG 10962
vs.	)	
	)	JUDGMENT ENTRY
Johnson	)	
	)	Date: August 11, 2004
Defendant	)	

Upon review, the Magistrate's Report is approved and confirmed. Defendant's motion to dismiss is granted. Plaintiff having failed to establish its claims by a preponderance of the evidence, both the claim for possession and the claim for money damages are dismissed. Copies to parties.




\_\_\_\_\_  
Judge Gerald F. Sweeney  
For Judge Raymond L. Pianka  
Housing Division

SERVICE

A copy of this Judgment Entry was sent via regular U.S. Mail to:

Plaintiff's counsel  
  
Earl Williams  
1441 West 25<sup>th</sup> Street  
Cleveland, Ohio 44113

Defendant's counsel  
  
Dennis Dobos  
1223 West 6<sup>th</sup> Street  
Cleveland, Ohio 44113

this 17 day of August 2004. 

IN THE CLEVELAND MUNICIPAL COURT  
CUYAHOGA COUNTY, OHIO  
HOUSING DIVISION

CMHA	)	
	)	Judge Raymond Pianka
Plaintiff	)	
	)	Case No. 2004 CVG 10962
vs.	)	
	)	MAGISTRATE'S REPORT AND
Johnson	)	RECOMMENDATION
	)	
Defendant	)	Date: August 9, 2004

{¶1} This matter came for trial July 19, 2004 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 the plaintiff's claims. Plaintiff present and represented by Mr. Williams. Defendant present and represented by Mr. Dobos.

{¶2} Plaintiff seeks possession asserting defendant breached the lease when drug activity occurred at the premises on or about February 19, 2004. Defendant denies the allegations. Trial had.

STIPULATED FACTS

{¶3} At all times relevant to this action, plaintiff was the owner of the multiple suite residential rental premises known as 10520 Mount Carmel Road, Cleveland, Ohio 44120.

{¶4} Defendant occupied unit #192F in the above mentioned premises pursuant to a written subsidized rental agreement.

{¶5} The written rental agreement provides for a monthly late fee in the amount of \$10.

{¶6} Rent was last paid for the month of February 2004.

ADDITIONAL FACTS

{¶7} At trial, plaintiff put on the testimony of two of the CMHA police officers involved in the events of February 19, 2004. Both officers testified credibly to the events within their knowledge. Plaintiff did not present a witness from the laboratory testing agency.

{¶8} Defendant objected to the officers' reading of the laboratory report asserting that this constituted hearsay. These objections were sustained. Further, at the close of plaintiff's case in chief, defendant objected to admission of the laboratory report arguing that the

document was not self-authenticating and no witness presented was able to authenticate the document. This objection was sustained and defendant then moved for a "directed verdict".

#### DEFENDANT'S MOTION TO DISMISS

{¶9} The appropriate vehicle to end a bench trial at the close of the plaintiff's case in chief is a motion to dismiss under Civil Rule 41(B)(2) ("Civ.R."). This form is in contrast to a motion for a directed verdict, which is used in the context of a jury trial. Defendant's motion was therefore construed as a motion to dismiss pursuant to Civil Rule 41(B)(2).

{¶10} Defendant asserted that plaintiff failed to meet its evidentiary burden by failing to present admissible evidence of the laboratory testing of the contraband seized at the premises. Plaintiff did not offer any basis for admission, nor did plaintiff seek a continuance in order to present such evidence.

{¶11} Civil Rule 41(B)(2) is captioned *Dismissal; non-jury action*. The Rule states in pertinent part, "After the plaintiff, in an action tried by the court without a jury, has completed presentation of the plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence."

{¶12} Thus, the court may weigh the evidence to determine whether or not plaintiff has made its case by a preponderance of the evidence. "Where plaintiff has not met its burden by a preponderance of the evidence, dismissal under Civ.R. 41(B)(2) is proper." *P. & W.F., Inc. v. C.S.U. Pizza, Inc.*, 91 Ohio App.3d 724, at 732 (Eighth Dist. 1993).

{¶13} In the present matter, plaintiff's claim for possession is based upon illegal drug activity occurring at the premises. Plaintiff neither authenticated its laboratory results nor presented a laboratory employee to testify to the findings. As such plaintiff has failed to establish by a preponderance of the evidence admitted that the contraband seized did test positive for a controlled substance. Plaintiff having failed to establish this fundamental element of its claim, dismissal of the claim for possession is warranted.

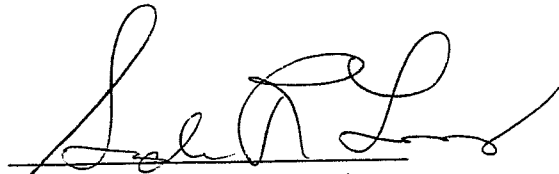
{¶14} As to plaintiff's claim for money damages, Mr. Jenkins, plaintiff's property manager at the premises at the time of the events at issue, was unable to state with certainty the amount of defendant's monthly rental obligation. Mr. Jenkins had, in the time since the events prompting this action, moved as manager to a different property. Further, there was no attempt to refresh Mr. Jenkins memory with the tenant file. In fact, plaintiff indicated that the tenant file was not available in court.

{¶15} As noted above, the parties were able to agree that rent was last paid for the month of February 2004. However, based upon the evidence prior to the close of plaintiff's case in

chief and defendant's motion to dismiss, the Court is unable to say that plaintiff established the amount of the monthly rental obligation by a preponderance of the evidence. Therefore, this claim is dismissed without prejudice.

{¶16} In summary, defendant's motion to dismiss is granted. Plaintiff has failed to prove its claims for possession and for money damages by a preponderance of the evidence. Both claims are dismissed. Copies to parties.

Recommended:

  
Magistrate Sandra R. Lewis

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(E)(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 Judgment Entry was sent via regular U.S. Mail to:

Plaintiff's counsel

Earl Williams  
1441 West 25<sup>th</sup> Street  
Cleveland, Ohio 44113

Defendant's counsel

Dennis Dobos  
1223 West 6<sup>th</sup> Street  
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this 17 day of August 2004. 