

CLEVELAND MUNICIPAL COURT
HOUSING DIVISION
CUYAHOGA COUNTY, OHIO
RAYMOND L. PLANKA, JUDGE

CMHA
Plaintiff (s)

Date: July 25, 2012

-VS-


2012 CVG 007158

JAMES HAWTHORNE
Defendant (s)

JUDGMENT ENTRY

The Court, having reviewed the *Magistrate's Decision* of July 25, 2012 under Ohio Rule Of Civil Procedure 53(D), adopts that decision.

The Court vacates the *Judgment Entry* of May 29, 2012 granting judgment to Plaintiff on is first cause of action and dismisses Plaintiff's first cause of action with prejudice.



Raymond L. Planka
Judge

SERVICE

A copy of this judgment entry and order was sent by regular U.S. mail to the addresses of record for parties/counsel on 7/31/12 by [initials]

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MAGISTRATE'S DECISION

The Court set this case for hearing June 20, 2012 on Defendant's motion for relief from judgment. Plaintiff and Defendant appeared before Magistrate David D. Roberts, Judge Raymond L. Pianka having assigned Magistrate Roberts to hear all questions of fact and law. The Court grants Defendant's motion for relief from judgment for the reasons that follow.

Conclusions of Law

A landlord who, after its knowledge of a breach of lease, or after its service of a notice of termination, or after its service of a notice to vacate, can waive its rights to pursue an eviction action if it acts inconsistently with its pursuit of the eviction. One action that may be inconsistent is the acceptance of rent after the breach, notice of termination or notice to vacate. Another action that can be inconsistent is a delay in taking action, between a breach and notice of termination, between the service of a notice of termination and the service of a notice to vacate or between the service of a notice to vacate and the filing of an eviction.

The question of whether a landlord's actions are inconsistent is one of fact. It does not depend on any fixed periods of time. Where a landlord can justify the number of months during which it accepted rent or the months of delay between steps in the eviction process, it will not be held to have waived its right to evict. In *Lucas Metropolitan Housing Authority v. Carmony*, 2001 WL 672150 (6th Dist.), although a public housing authority waited three years to pursue an eviction for possession of drugs, the court held that the housing authority had reasons for the delay that supported the trial court's conclusion that the delay was not inconsistent with the right to evict; in particular the police had asked the Housing Authority to delay the eviction as part of its prosecution of drug offenses. But in *Vistula Management v. Newson*, 120 Ohio App.3d 500 (6th Dist.), delays that accumulated to only six months, coupled with action to recertify the tenant, supported the trial judge's decision to overturn the decision of a magistrate that found that the delay was not inconsistent with the pursuit of the eviction; in particular, the landlord showed nothing rebutting the conclusion that the

actions were inconsistent with pursuing the eviction. Placing the burden on the landlord to rebut the conclusion is consistent with other jurisdictions. *Dunbar Housing Authority v. Nesmith* (1990) 184 W.Va. 288 at ¶3.

In this case, the facts are not in dispute. Plaintiff does not dispute that it waited over two months from December 30, 2011 (the date of the conduct that constituted a breach) to March 7, 2012 before serving Defendant with a notice of termination and then accepted rent payments for March 2012 and April 2012 before serving a notice to vacate April 10, 2012. The receipt that Plaintiff provided to Defendant states a date of March 10, 2012 and April 10, 2012 as the dates of the payments. Plaintiff's witness testified that those dates represent the date on which the payments are credited to the account and not the dates on which they were received (else the March 10, 2012 payment would be inconsistent with the March 7, 2012 notice of termination and the April 10, 2012 payment with the April 10, 2012 notice to vacate). But Plaintiff concedes that the April payment, made some time before April 10, 2012, was certainly accepted after the March 7, 2012 notice of termination.

Plaintiff argues that the delay between the conduct and the notice of termination was occasioned by the fact that it takes some time for reports of tenant conduct from the police to get to the property manager of an estate and thus, although Plaintiff controls that delay, it is not evidence of action inconsistent with pursuing the eviction. Plaintiff argues that the acceptance of the April 2012 rent was due to inadvertence and is thus not evidence of inconsistent action.

The Court does not agree that the delay between its knowledge of a tenant's conduct and its internal communication of the details of that conduct to a property manager cannot be considered evidence of actions inconsistent with pursuing an eviction based on that conduct. Plaintiff manages its own police department and could put the burden on that department to promptly communicate the details of conduct to property managers. Plaintiff also directs its own property managers and could require them to make frequent checks with its police department. But the Court does not conclude that a two month delay is particularly long and thus only represents some action by the landlord inconsistent with pursuing the eviction.


The Court does not agree that Plaintiff can negate a conclusion that its action in accepting rent after the service of the notice of termination was inconsistent simply by stating that it was inadvertent. Plaintiff did not produce any evidence as to why it accepted Defendant's rent in April. An organization is generally imputed with the knowledge of its agents. *Fay v. Swicker*, 154 Ohio St. 341 (1950). The acceptance of rent for April is thus presumed to be a knowing acceptance unless Plaintiff can show otherwise. That makes it clear evidence of inconsistent conduct with Plaintiff offering no evidence to negate that conclusion.

The total circumstances of this case are thus as follows. Defendant had a guest in his unit in December who brought marijuana with him. It was a breach of Defendant's lease for Defendant not to prevent his guest from doing so, giving rise to Plaintiff's right to evict him. Plaintiff delayed two months before giving Defendant a notice of

termination of his tenancy due to the conduct, the delay occurring because Plaintiff has an administrative process with built-in delays. Plaintiff also accepted rent for the next two months, March and April 2012, the second payment clearly after the notice of termination despite Plaintiff's knowledge of Defendant's conduct. Plaintiff then filed an eviction in May. As a result of the delays, Defendant found himself in an eviction hearing six months after the incident in December that constituted a breach of his lease, like the tenant in *Vistula Management v. Newson, supra*. This Court reaches the same decision as the Court in *Vistula*. Under these circumstances, Plaintiff's actions were inconsistent enough to constitute a waiver. The Court therefore vacates its judgment for Plaintiff on the first cause of action and dismisses the first cause of action with prejudice.

Decision

The Court vacates the *Judgment Entry* of May 29, 2012 granting judgment to Plaintiff on his first cause of action and dismisses Plaintiff's first cause of action with prejudice.



David D. Roberts, Magistrate

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(D). 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 addresses of record for parties/counsel on 7/26/12 by WHL.