

MAGISTRATE'S DECISION

2008 JUN 12 A 9 42

THE CROSSINGS, LLC.,
Plaintiff

CLERK OF
ELYRIA MUNICIPAL COURT
J

VS

CASE NO. 2008CVG01528 BY: _____

COINMACH CORPORATION
Defendant

Pursuant to Rule 53 this matter was referred to the Magistrate for hearing and decision. Plaintiff and Defendant appeared through counsel.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant leases several laundry rooms from Plaintiff in buildings on Park Meadow Drive in Elyria, Ohio under two leases. The leases were first executed by the parties' predecessors-in-interest in 1989 and were most recently extended for five-years in 2004. Plaintiff acquired these premises on November 30, 2007, subject to these leases. It asks for restitution, alleging "non-payment of rent" and Defendant's "failure to comply with Lease in connection with Lessor's request for Field Audit."

The evidence does not support Plaintiff's argument that a "field audit" was ever requested. Each lease provides that "Lessor shall have the right to request a field audit from time to time during the term of this Lease, provided Lessor pays to Lessee the prevailing charges therefor." Plaintiff argued that a December 2007 letter to Defendant demanding "notification of collection no less than 72 hours prior to the collection" was its exercise of this right and Defendant's subsequent inaction should be treated as a denial, a material breach of the lease, and a basis for eviction.

This demand cannot be plausibly construed as a request for a "field audit." A field audit is a time-consuming process by which the money from each laundry machine is counted in the presence of the landlord's agents. The plain objective of Plaintiff's written request was advance "notification of collection." How Defendant should have divined from this language that something more than "notification" was being sought by Plaintiff is not clear. Plaintiff's meaning could have been easily conveyed with clarity, such as by asking for an "audit." Nothing within the leases required that notice be given to Plaintiff before Defendant's routine collection of money from the laundry machines, so as to find the failure to give the requested notification a basis for eviction.

Plaintiff's contention that Defendant breached the lease by "non-payment of rent" is actually an allegation of late payment of rent. Plaintiff suggests that rent was due on the first day of the month and that Defendant never made timely payment. The leases' addenda contain the only provisions as to rent, the most recent ones stating: "Effective October 1, 2004, Lessee shall pay to Lessor a monthly rental of Seventy Percent of the collections." Plaintiff is not persuasive that any basis exists to interpret the date, October 1, 2004, when rent increased from sixty-five to seventy percent of collections, as also signifying that rent would thereafter become due on the first of every

month. No day of the month is thus stated when Defendant "shall pay" this sum. Nothing in the law requires that a lease include a specific date for payment. The time frame for payment here, e.g., "monthly" or within the span of a month, is sufficiently definite to be enforceable.

Plaintiff argued that even if payment is not tied to a particular day of the month, Defendant should be evicted because no money at all was received by Plaintiff in February of 2008. Nothing in this lease requires rent to be "received" monthly, only that "Lessee shall pay... monthly." (emphasis added). If a tenant is authorized to pay rent by mail, "delivery of the money to the post office satisfies the obligation." 65 Ohio Jur. 3d Landlord and Tenant § 281, citing *Norskog v. Atha* (Dayton Muni 1951), 61 Ohio L. Abs. 604. The February payment, containing the February 13, 2008 check, is postmarked February 28, 2008. Its envelope shows processing by the post office on February 29, 2008. That Plaintiff did not receive the check until March of 2008 was not a breach.

Finally, the term "monthly" need not be read here as requiring payment within a calendar month. This case does not present the typical lease in which payment of rent secures future occupancy. According to Professor White: "In the absence of an express agreement with respect to the time of payment, rent is due as it accrues and is not payable in advance." White, OHIO LANDLORD TENANT LAW §6:7 (West 2007). The contracted for rent here cannot be paid "in advance." Payment of rent is based on a percentage of collections a few weeks to more than a month before. The intervals between Defendant's collections vary from a couple of weeks to a month and a half, e.g., 12/20/07 to 1/11/08, 1/11/08 to 2/28/08, 2/28/08 to 3/10/08. Defendant has "sole discretion" under the lease as to these intervals. Plaintiff at hearing disclaimed an intent to raise any issue as to the fact that a tender of rent may reflect collections several weeks earlier. Rent here thus does not accrue until the regular collections are processed. Under these circumstances, an agreement to "pay to Lessor a monthly rental" may be seen as a duty to pay according to this cycle, taking more or less than an exact month, than to ensure payment between the first and last day of each calendar month.

Based on the foregoing, this Court need not decide whether Plaintiff is bound to the course of dealings established between Defendant and Plaintiff's predecessor in interest as to the timing of the payment of rent. See *Iskin*, OHIO EVICTION & LANDLORD-TENANT LAW, p. 499 (3rd Ed. 2003). Nor need the Court decide if Plaintiff's retention of rent checks without deposit constituted an acceptance of rent, waiving the three day notice and the right to evict. *Pace v. Buck* (Franklin 1946), 86 Ohio App. 25. See also *King v. Dolton* (Wayne App. 5/14/03), No. 02CA0041, 2003 WL 21078088; *Cipolla v. McCloskey* (Lorain App. 12/9/98), No. 97CA006866, 1998 WL 852810.

RECOMMENDATION

JUDGMENT SHOULD BE ENTERED FOR DEFENDANT.


Magistrate

A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(II), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).

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