

IN THE NEW PHILADELPHIA MUNICIPAL COURT
NEW PHILADELPHIA, OHIO

PHILADELPHIA
MUNICIPAL COURT

MAR 13 PM 3 52

CLERK

WESLEY TOLLE, : CASE NO. CVG-9600580
PLAINTIFF
vs. : MAGISTRATE'S DECISION
DAVETTA HILL,
DEFENDANT :

The threshold issue for determination by this Court is whether the plaintiff landlord should prevail on his first cause of action in the Forcible Entry and Detainer action. There is no dispute that the premises were leased to the defendant under a plan whereby the major portion of the monthly rent was paid by the Tuscarawas County Metropolitan Housing Authority and the balance was due from the tenant. Nor is there any dispute that the plaintiff received the subsidized portion of the rent for the month of September, the month when the Notice to Leave the Premises was served, as well as the portion of subsidized rent for October, the month when the action was commenced. Nor is there any dispute that the tenant, by way of money orders, tendered her portion of the rent for the months of September and October.

Attached to the Complaint is the contract between the plaintiff landlord and the defendant tenant. Counsel for the plaintiff contends that payments by the housing authority are not rent payments. However, the language of paragraph 9 of the contract provides, in part,

"The monthly housing assistance payment by the HA shall be credited toward the monthly rent to owner under this lease. The balance of the monthly rent shall be paid by the tenant."

It is interesting to note that the contract prohibits the landlord from terminating the tenancy should the housing authority fail to pay its portion of the rent. Here, the plaintiff seeks to terminate the tenancy on the basis of non-payment by the tenant.

Counsel for plaintiff relies upon National Corporation for Housing Partnerships dba Spring Hill Apartments vs. Chapman (1984) 18 Ohio App. 3d 104, for the proposition that the tenant may be evicted for failing to pay rent or a portion of the rent even though the landlord has received partial payment in the form of federal housing assistance. In that case, the separate lease between the landlord and the tenant provided,

"The Landlord may terminate this Agreement only for:
(1) The Tenant's material noncompliance with the terms of this Agreement."

"Material noncompliance includes, but is not limited to non-payment of rent."

No such language is contained in the contract attached to plaintiff's complaint.

This court is not willing to accept the rationale of National Corporation vs. Chapman, supra, but places its reliance upon Shelter Management Group, Inc. vs. Fawcett, Ct. App. Knox, unreported, 91 CA 0000094.

The undersigned believes that the retention of even a portion of future rent bars the landlord's right to terminate the tenancy.

The argument of retaining rental payments as evidence has created confusion among the various courts of this State, and the better reason cases hold that the landlord must give notice to the tenant of the reason for the retention. Here, no such notice was given to the tenant.

Plaintiff's counsel also asserts that the payments received from the housing authority are not separated or individualized, but rather one lump payment is made for all units covered by a subsidized contract. If such be the case, then the rejection of any payment by the tenant becomes more compelling.

Upon such tender the landlord is placed upon notice that the tenant is paying his portion of the rent and nothing short of a clear and unequivocal rejection should be permitted.

Additionally, since equity abhors forfeiture, the equities in this case lie with the defendant.

It is, therefore, the order of this Court that

1. Plaintiff's Complaint is dismissed at his costs;
2. Plaintiff is granted the right to file his Reply to the counterclaim instantar;
3. Defendant shall pay the escrowed rent and continue to pay her monthly portion to the Clerk of this Court;
4. All other pending motions by either party are overruled; and
5. This matter shall come before the Court for Jury trial on the 21st day of November, 1997, at 9:00 A.M.

IT IS SO ORDERED.


MAGISTRATE LESLIE R. EARLY

NOTICE

IF YOU DISAGREE WITH THIS DECISION OF MAGISTRATE, YOU MUST FILE WRITTEN OBJECTIONS TO THIS DECISION WITH THE CLERK OF COURTS WITHIN FOURTEEN DAYS. THE FOURTEEN DAY PERIOD FOR THE FILING OF WRITTEN OBJECTIONS COMMENCES ON THE DATE THIS DECISION IS FILED WITH THE CLERK OF COURTS.

INSTRUCTIONS TO THE CLERK

PLEASE SERVE A COPY OF THIS REPORT UPON ATTORNEY FOR THE PLAINTIFF, THOMAS FOX, AT 309 HUNTINGTON BANK BLDG, DOVER, OHIO, 44621, BY ORDINARY MAIL; UPON ATTORNEY FOR DEFENDANT, ~~BARBARA EVANS CASE~~ AT SEOLS, 131 FAIR AVE NE, NEW PHILA., OH 44663, BY ORDINARY MAIL; AND UPON THE MAGISTRATE (LG).


MAGISTRATE LESLIE R. EARLY

IN THE NEW PHILADELPHIA MUNICIPAL COURT
NEW PHILADELPHIA, OHIO

NEW PHILADELPHIA
MUNICIPAL COURT

'97 JUN 18 AM 9 29

BRENDA J. SMITH
CLERK

WESLEY TOLLE, : CASE NO. CVG-9600580
PLAINTIFF
vs. : JUDGMENT ENTRY
DAVETTA HILL,
DEFENDANT :

This matter comes before the Court for consideration.

The Court

FINDS that Leslie R. Early, Magistrate of this court, filed his Decision of Magistrate in this case on March 13, 1997.

FINDS that no objections to the Magistrate's Decision have been filed within the extended period of time which was granted to the plaintiff for the filing of any objections by order of this Court filed March 27, 1997.

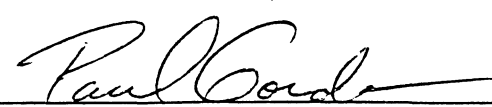
FINDS there are no defects, irregularities or errors of law on the face of the Magistrate's Decision of March 13, 1997, therefore, said Decision shall be adopted by the Court.

It is, therefore,



ORDERED that the Magistrate's Decision is hereby approved and adopted in full.

ORDERED that this matter shall come before the Court for Jury trial on the 21st day of November, 1997, at 9:00 A.M.

IT IS SO ORDERED.



ACTING JUDGE/ JUDGE

cc:  Atty T. Fox/ Atty D. Worth
 Atty R. Case Evans/ R.L. Collins 