

FILED

2021 MAR 27 AM 7:05

CLERK OF
ELYRIA MUNICIPAL COURT

STATE OF OHIO, LORAIN COUNTY, ss., - THE ELYRIA MUNICIPAL COURT

MAGISTRATE'S DECISION

COLONIAL OAKS PROPERTY LLC
Plaintiff(s)

VS

CASE NO. 2021CVG00455

NICHOLAS HURST, et al.,
Defendant(s)

Pursuant to Rule 53 this matter was referred to the Magistrate for hearing and decision. Plaintiff appeared through counsel. Although Defendants did not appear, case was tried as though they had as required by R.C. §1923.07.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendants are owners of a manufactured home under a written lease with Plaintiff as the park operator for a lot of land within the territorial jurisdiction of this Court. When Defendants failed to pay rent to Plaintiff on February 1, 2021, Plaintiff served them with an R.C. §1923.04 notice to vacate on February 2, 2021 and then filed this action on March 2, 2021.

Our court of appeals in Summit Management Services v. Gough, No. 19714, 2000 WL 1226605 (Summit App. 8/30/00), has explained that a "magistrate must preliminarily determine whether the landlord complied with the procedural requirements of notice." Plaintiff was required to prove this as an essential element of its claim.

Although rent is clearly stated to be "due on the first day of every calendar month" in the first paragraph of the lease, paragraph two anticipates and accepts tenants' failure to pay on the first day without remotely suggesting any breach of the lease. A tenant actually becomes "late" so that associated penalty charges are imposed, only when a tenant pays rent after 5:00 p.m. on the fifth day of the month. The lease does not even impliedly reserve to the Plaintiff any right to deem and decline acceptance of rent as "late" when paid before that date and time. Plaintiff's witness admitted that rent is never declined under such circumstances. It is thus very difficult to adjudge these tenants as in breach of this lease on grounds of "nonpayment of rent" not tendered by the first day of the month. Yet, Plaintiff served the three day notice in this case on February 2, 2021 and asked the Defendants to vacate before their right to pay rent under the lease expired.

SCANNED

w/Procedures
Paketz
Hurst
Hurst
2/27/21
WMS

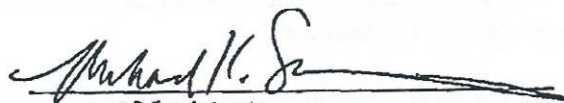
A landlord must clearly wait until a breach of the lease or other circumstance terminating the tenant's right of possession before serving the R.C. §1923.04 notice. *See by analogy, Sterling Health Care Group, Inc. v. Laughlin*, 92WD051, 1993 WL 179509 (Wood App. 2/28/93), *FMI Properties v. Hinton*, No. 50314, 1986 WL 4396 (Cuyahoga App. 4/10/86), *Voyager Village Ltd. v. Williams*, 3 Ohio App.3d 288, 291 (Greene 1982). Service of the R.C. §1923.04 notice to leave the premises was premature because at the time of its service the Defendants' right to possession had not yet ended by any breach of their obligation to pay February's installment of rent.

It is a standard proposition in proceedings for forcible entry and detainer that "a trial court, within its discretion, is entitled to weigh all equitable considerations in determining whether a forfeiture is to be declared." *Southern Hotel Co. v. Miscott, Inc.*, 44 Ohio App.2d 217 (Franklin 1975) (syllabus); *Seventh Urban, Inc. v. University Circle*, 67 Ohio St.2d 19, 22 (1981). The application of equity to evictions is beyond question, because equity abhors a forfeiture. *Akron Metropolitan Housing Authority v. Speegle*, No. 12757, 1987 WL 6193, *1 (9th Dist. App., Summit Cty. 2-4-97). The equities must in fact favor the landlord in a proceeding in forcible entry and detainer in light of "the equitable relief sought... a writ of restitution, to regain possession of the premises leased to" the tenant. *Joseph J. Freed and Associates, Inc. v. Cassinelli Apparel Corp.*, 23 Ohio St.3d 94, 95 (1986) (commercial lease). The equities do not favor a landlord asking its tenant to leave the premises for "nonpayment of rent" while the tenant still has the contractual right to pay rent under the lease.

Proper service of a "three-day notice" under R.C. §1923.04, in terms of its content, the method of service, and timing, is a condition precedent to proper commencement of an eviction action. *See e.g. Sternberg v. Washington*, 113 Ohio App. 216 (Summit 1960). Proper notice to terminate is jurisdictional. *Chinnock v. Kokinda*, No. 10CA009863, 2011 WL 860417, 2 (Lorain App. 3/14/11). When a court lacks subject matter jurisdiction, the "action" must be dismissed. Civil Rule 12(H)(3).

RECOMMENDATION

CASE SHOULD BE DISMISSED WITHOUT PREJUDICE AT PLAINTIFF'S COSTS.


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).

Copies to Parties

SCANNED

Elyria Municipal Court
601 Broad Street, Elyria, OH 44035
Judge Gary C. Bennett ~ Judge Robert C. White
Clerk Eric J. Rothgery, J.D.

FILED

2021 MAY 10 PM 2:10
CLERK OF
ELYRIA MUNICIPAL COURT

Civil Journal Entry

BY: WRJ

Case Number: 2021CVG00455


COLONIAL OAKS PROPERTY LLC
Plaintiff

VS

NICHOLAS HURST
Defendant

Magistrate's decision reviewed, adopted, and incorporated by reference herein. Clerk to journalize the Magistrate's Decision along with this order.

Case is dismissed without prejudice at Plaintiff's costs.


Retired/Assigned Judge
JUDGE White

CLERK TO SERVE ALL PARTIES NOT IN DEFAULT FOR FAILURE TO APPEAR
WITH NOTICE OF JUDGMENT AND DATE OF ENTRY UPON THE JOURNAL.

Copy to Parties

cc: Paletz
Hurst
Hurst
5-10-2021
WRJ