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KETTERING
MUNICIPAL COURT

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ANDREA J. WHITE
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IN THE KETTERING MUNICIPAL COURT

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| CORNERSTONE OF KETTERING | : | CASE NO. 05-CVG-2546 |
| Plaintiff | : | |
| vs. | : | <u>MAGISTRATE'S DECISION</u> |
| JAMES HOOD, et al. | : | |
| Defendants | : | |

This matter came before the court for hearing May 17, 2005 upon Plaintiff's Complaint for Forcible Entry and Detainer filed April 19, 2005. On May 5, 2005, Defendant filed a timely answer requesting dismissal of the complaint.

The basic facts are not in dispute. In October, 2004, Defendants, James and Kelly Hood leased a 3-bedroom apartment from Plaintiffs at a rate of \$995.00 per month. Rental payments for October, November and December were not fully paid when due, but rather were made in installments (see Defendant's Exhibit A).

In January, 2005, Plaintiff and Defendant entered into a new agreement moving Defendants to a less expensive apartment at the rate of \$785.00 per month effective February 1, 2005. The new agreement included one free month rent, which was credited for February, 2005.

As of March 1, 2005, the sum of \$1,135.00 was owed by Plaintiff to Defendant consisting of one month's rent at \$785.00 plus a \$350.00 security deposit. Defendant received installments from Plaintiff as follows: \$200.00 on March 2; \$400.00 on March 3; \$470.00 on March 10; and \$104.00 on March 18 (see Defendant's Exhibit B). These installments covered the \$1,135.00 due plus a late fee. As of the end of March, 2005, Defendants were current.

April's rent in the amount of \$785.00 was not timely paid at the beginning of the month. On April 8, 2005, a 3-day notice to vacate the premises was served upon Defendants.

Plaintiff presented the testimony of Darlene Rivera, manager of Beaver Ridge Run Apartments who admitted having accepting rental installments as discussed above. However, Ms. Rivera testified that prior to April she had orally advised Defendant, Kelly Hood, that she would no longer be able to accept late payments or installment payments. She further testified that no April rent was either tendered or received prior to the April 8, 2005 3-day notice.

Defendant, Kelly Hood, testified that she had in fact tendered a partial payment on April 1 that was not accepted by Plaintiff. Ms. Hood then testified that she wanted to pay rent into escrow due to the complaints about the condition of the premises. However, she admitted that she had not paid any rent into escrow either prior to April, 2005, nor at anytime since because she did not understand the procedure.

The issue before the court is whether based upon the prior course of dealing between the parties, Plaintiffs have waived their right of forcible entry and detainer by establishing a pattern of accepting late rent and/or installment payments of rent in the months prior to April, 2005.

Defendants contend that they had tendered partial payment of rent on or about April 1 - - Plaintiffs deny any such tender - - which offer was not accepted. Defendant cites the case of Fairborn Apartments vs. Herman (1991) Ohio App. Lexis 333 (Greene County Court of Appeals, 1991) and Crossroads Summerset Limited vs. Newland 40 Ohio App. 3d. 20 (Franklin County Court of Appeals, 1987) in support of the proposition that an established course of conduct in accepting late rental payments remains in effect unless and until the landlord provides the tenant a new notice that the course of conduct will no longer be permitted.

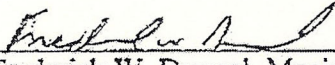
Although Plaintiff acknowledges a pattern of accepting late and/or installment payments of rent, Plaintiff claims that Defendants had been orally advised prior to April that installment payments and late payments would no longer be acceptable.

Defendants contend that Plaintiff's notice that it would no longer accept late or installment payments is not sufficient notice because it was not in writing. Defendants further contend that although Plaintiff suggested that there might be a problem with late or installment payments, the conversation took place in February and Plaintiff continued to accept installments in March, resuming the prior course of dealing despite any prior oral conversations of the contrary.

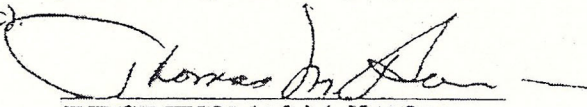
The court cannot conclude that Plaintiff's past acceptance of late rent and installment payments forever obligated Plaintiff to continue such a course of conduct. However, it is clear that the established course of conduct between the parties allowed some leeway regarding the rental payment schedule, and that the course of conduct continued through the end of March, 2005. Thus, to alter the course of dealing between the parties, it was necessary that some notice be given from Defendants to Plaintiff.

Defendants cite the case of Cincinnati Metro Housing Authority vs. Fambro (1980) Ohio App. Lexis 10243 (Hamilton County Court of Appeals, 1980) for the proposition that notice terminating the prior course of conduct must be in writing and must be given to the tenant at a reasonable time in advance of the rental due date. In this case it is clear that Plaintiff's decision to alter the prior course of conduct was never communicated to Defendants in writing, nor were Defendants given a reasonable amount of time given that Plaintiffs instituted the forcible entry and detainer action only 8 days after the rental due date.

Based upon the evidence presented, the court cannot find that Plaintiffs have met their burden to establish that they are entitled to a writ of restitution at this time. Accordingly, the court recommends that judgment be entered in favor of Defendants on the issue of forcible entry and detainer.


Frederick W. Dressel, Magistrate

Upon review of the findings of the Magistrate, the Magistrate's Decision herein is adopted as a permanent order of the court. The order shall be stayed upon the filing of objections of either party within 14 days of the filing date. This permanent judgment is being adopted pursuant to Civil Rule 53(E)(4)(c).


JUDGE THOMAS M. HANNA

cc: Lisa M. Ellis, Attorney for Plaintiff
Debra A. Lavey, Attorney for Defendants