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GREGORY A. HILSH
CLERK OF COURTS
MONTGOMERY COUNTY, OHIO

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

EASTCARE III,

Plaintiff,

-vs-

MIKAEL SHOCKLEY

Defendant.

CASE NO. 2009 CV 5424

JUDGE CONNIE S. PRICE
MAGISTRATE DAVID H. FUCHSMAN

MAGISTRATE'S DECISION

TO: Honorable CONNIE S. PRICE

FROM: Magistrate DAVID H. FUCHSMAN

This matter is currently before the undersigned Magistrate pursuant to Rule 53 of the Ohio Rules of Civil Procedure and a general order of reference filed by the Court on April 19, 2004.

I. Procedural History

Plaintiff East Care III initiated this action on July 1, 2009 by filing a forcible entry and detainer action against the Defendant, Mikael Shockley, seeking restitution of the premises located at 2608 Spring Valley Pike, Miamisburg, OH 45342. Plaintiff's Complaint also contains a claim for damages against the Defendant for \$345.47 as of May 28, 2009, plus additional rental fees in the amount of \$181.00 per month as they come due. Defendant, Mikael Shockley, filed an Answer to Plaintiff's Complaint on July 7, 2009.

The eviction hearing portion of the case was originally set for July 10, 2009. However, by agreement of the parties, the hearing was rescheduled for July 28, 2009. The hearing occurred as scheduled and was set to resume on August 6, 2009. However, due to the illness of Defendant,

Mikael Shockley, a Motion for Continuance was granted. The hearing resumed on August 19, 2009.

II. Findings of Fact

The Magistrate first heard testimony from Jennifer Sutton. She is employed by Eastway Corp., which is the mental health facility that owns the Eastcare III apartment complex. She is the apartment manager, and has worked for the company for nine years. Her duties include leasing, invoicing, maintenance, and apartment management. Eastcare III is a government subsidized apartment complex specifically created for individuals with mental disabilities. The Defendant resides at Eastcare III due to a number of health problems coupled with schizoaffective disorder, a mental disability that causes the Defendant to hear voices in his head. The total rent amount each month, for the unit, is \$450.00. However, Mikael Shockley is only required to pay \$181.00 each month. The Secretary of Housing and Urban Development ("HUD") pays the remaining \$279.00 every month.

Jennifer Sutton stated that she has known the Defendant, Mikael Shockley, since 2002 when he first became a resident of Eastcare III. For the duration of his tenancy Mikael Shockley has resided at 2608 Spring Valley Pike, Miamisburg, OH 45342. Mikael Shockley's most recent lease was signed on April 1, 2009. (Plaintiff's Exhibit A).

Included in the lease is a lease agreement between Eastcare III and Mikael Shockley stating that rent is due on the first of every month. However, it is company policy to give a ten day grace period to residents. Rent is not considered late until the 10th of the month. Jennifer Sutton stated that this grace period exists because many residents rely upon government assistance of some kind to pay their bills. She explained that residents typically don't receive this check in the mail until the 3rd or 4th of the month.

Eastcare III has a policy when dealing with residents that have failed to pay rent on time, which is outlined in an agreement to lease which is signed by the tenant and landlord. If the resident has not paid by the 10th, Plaintiff mails a "First Offense Late Notice" letter to the tenant stating that the rent has not been paid, a reminder of the apartment's policy, and the total amount due at the time of the letter. If by the 20th of the month the rent still has not been paid, Plaintiff mails out a "Second Offense Late Notice." This letter contains much of the same information as the first. This second letter typically gives residents until the 10th of the upcoming month to pay the late rent. Jennifer Sutton explained that if a resident has not paid by the date stated on the second letter, it is company policy to issue a 10-day Notice of Termination of Tenancy for non-payment of rent. This 10-day Notice is mailed to the tenant and posted on his/her front door explaining that he must leave the premises due to a material noncompliance with the lease. Additionally, a tenant is not permitted more than two late notices during any 12 month period. A third late notice within the 12 month period results in a 10-day Notice of Termination of Tenancy.

The notice and termination proceedings are listed in the lease and written on the notices, but Eastcare III failed to demonstrate any regular use of this process. The lease agreement signed by both parties does contain a clause dealing with this issue. Section 20 of the lease provides:

Failure of the LANDLORD to insist upon the strict performance of terms, covenants, agreements and conditions herein contained, or any of them, shall not constitute or be construed as a waiver or relinquishment of the LANDLORD's right thereafter to enforce and such term, covenant, agreement, or condition, but he same shall continue in full force and effect.

Even with the clause in place, Eastcare III was lax in upholding the rules listed in its own lease agreement. In 2006, Mikael Shockley failed to pay rent on time and continuously carried a back balance due on his account for the months of April, May, June, and July. (Defendant's Exhibit 1). However, he only received one notice letter during this period dated June 19, 2009. (Plaintiff's

Exhibit B). Furthermore, he received a notice letter from December 13, 2006 stating that he owed \$281.12, however Jennifer Sutton stated that he should not have received this letter because his account was up to date at that time.

The 2007 records demonstrate the same pattern. Mikael Shockley failed to pay rent in January and no late notice letter was sent. Additionally, in February through April Mr. Shockley owed a back balance on his account and was never issued a late notice. In August, Mr. Shockley failed to pay his rent at all. (Defendant's Exhibit 1). He was issued a notice on August 14 and August 23. (Plaintiff's Exhibit B). This amount was paid on September 10, 2007.

In March 2008, Mikael Shockley only made a partial payment to his account and had a balance of \$62.00 remaining on his account. No notice was issued. In June, the Defendant failed to make another rent payment and received no notice letter. In July, he made a partial payment to his account but still had a \$70.00 balance remaining with no letter sent. The Defendant failed to pay rent in both the months of August and September 2008. No notice letters were sent during this period. Mr. Shockley made partial payments to his account in October and November, but still carried a back balance. Then, again, in December, he failed to make a rent payment and no notice was issued. Additionally, East Care III's ledger shows that Mr. Shockley reached his third late within a 12 month period on August 14, 2008, but no 10-day Termination Letter was sent. (Defendant's Exhibit 1).

The year 2009 started a little better for Mr. Shockley's account. He actually carried credit on his account balance for the first three months of the year. However, Mr. Shockley failed to pay rent for the month of April. Jennifer Sutton began the late notice process against Mikael Shockley on April 15, 2009 when she mailed a first offense letter. The letter stated that Mr. Shockley had until April 20, 2009 to pay \$148.00. (Plaintiff's Exhibit C). Mr. Shockley only owed \$148.00

instead of the full rent amount due to a credit on his account from a previous month's overpayment. (Plaintiff's Exhibit G). Then, on April 29, 2009, Jennifer Sutton sent a second notice letter to Mr. Shockley. This letter stated that he now owed \$329.00 and that if he didn't pay the sum by May 10, 2009 that he would receive a 10-day Notice of Termination of Tenancy for non-payment of rent. (Plaintiff's Exhibit D).

Ms. Sutton testified that when May 10, 2009 arrived, she still had not received any form of payment from Mr. Shockley. Therefore, on May 28, 2009 she mailed Mr. Shockley a Notice to Leave the Premises letter. Additionally, this letter was posted on his front door by Ms. Sutton's assistant, Crystal Crisenberry. The letter states that Mikael Shockley was to leave the premises on or before June 2, 2009 on the grounds of material non-compliance with the lease and for non-payment of rent. The letter also explained that if Mr. Shockley failed to leave the premises by the required date, that an eviction action could be initiated against him. (Plaintiff's Exhibit F).

Mikael Shockley did not leave his apartment on or before June 2, 2009. He testified that he did not leave for a number of reasons. First, he does not remember receiving the first or second late notice letters from Jennifer Sutton. Second, on April 28, 2009 Mr. Shockley took out a money order for \$200.00. (Plaintiff's Exhibit I). In his testimony he states that he sent this money order to the landlord, however Eastcare III never received the money order.

The money order receipt provided by Mr. Shockley does not conclusively show that he attempted to pay his rent for April and May. Crystal Crisenberry, Ms. Sutton's assistant, testified that she spoke to Mr. Shockley around the 15th of April. In the conversation he stated that he had sent a money order, and they should be receiving it soon. But, the money order did not cover the total amount owed for April and May's rent. Mr. Shockley testified that he had written a letter with a promise to pay the remaining amount by May 22, 2009 and enclosed it with the money order. He

stated that he couldn't pay both April and May's rent in full because he needed to purchase a new television. The money order was never cashed, but Mr. Shockley did not learn of this until after the eviction was filed when his attorney informed him of the matter.

In mid-June, Ms. Sutton went to Mr. Shockley's apartment to replace a smoke detector. Mr. Shockley was in the apartment during this visit and attempted to rectify the situation with the apartment complex. He told Ms. Sutton that he wished that she would just let him pay what he owes and put everything behind them. Ms. Sutton responded that she could not do this because the termination letter had already been executed. At this point, Mr. Shockley did not have a check in hand and merely stated that he wanted to pay. However, Ms. Sutton testified that even if he did hand her a check she would not have accepted it. As of August 19, 2009, the date the hearing concluded, Mikael Shockley was still residing at Eastcare III. He has not paid rent since February 25, 2009 which covered the month of March and \$33.00 toward April's rent.

III. Conclusions of Law

A. Eviction

24 C.F.R. § 247.3 provides that a landlord may not terminate any tenancy in a subsidized project except upon the following grounds: material noncompliance with the rental agreement, or other good cause. Under the regulation, material noncompliance includes nonpayment of rent or any other financial obligation due under the rental agreement, including any portion paid beyond the grace period. However, equity abhors forfeiture and will only decree it when such action is clearly required. See Peppe v. Knoepp, 140 N.E.2d 26, 27 (Ohio App. 1956).

In federally subsidized housing, it has been held that 24 C.F.R. § 247.3 requires "good cause" for termination of a lease. Nonpayment of rent might not, by itself, presumptively constitute "good cause" for eviction. See Real Properties Servs. Mgmt. v. Anatra, 1997 Ohio App. LEXIS

3485. This "good cause" condition imposes on a private landlord who operates a public housing project a limitation not ordinarily found in private leases. Private landlords receive consideration for this additional condition in the form of rental payments from the Federal Government that are both ample and regular. Therefore, requirement of "good cause" does not impose a condition for which the landlord has not bargained or been paid. Furthermore, it is justified as a reasonable recognition that persons who must use public housing are subject to irregular and reduced incomes are require special accommodations. See, Fairborn Apts. v. Herman, 1991 Ohio App. LEXIS 333.

Due to the "good cause" condition, a court may take into consideration the circumstances surrounding the alleged breach of a rental agreement. To justify "good cause" for eviction, Eastcare III relies upon Mr. Shockley's missed payments for the months of April and May, 2009. They cite Section 20 of their lease agreement which states that the failure of the landlord to require strict compliance with the lease does not waive their right to strict compliance in the future. However, it is a general rule that where a landlord acquiesces in the making of belated payments of rent, in departure from the express terms of the lease, for a length of time and under circumstances establishing a course of dealing upon which the tenant may rely, the landlord cannot forfeit the lease for non-payment of rent. If the landlord wants to make use of the right to forfeit for that purpose, one must first warn the lessee of his intention as to future payments. See BWS Props. v. La Salle, Inc., 1986 Ohio App. LEXIS 7954.

The record demonstrates a long history of late and missed payments by Mr. Shockley with little or no recourse by Eastcare III. In 2006, Mr. Shockley was late or otherwise behind during four months and only received one late notice. The pattern continued in 2007 and 2008 when Mr. Shockley was either late or carried a back balance for thirteen months and received only two late

notice letters during this two year period. Therefore, it was reasonable for Mr. Shockley to rely upon this lengthy pattern of accepted late payments.

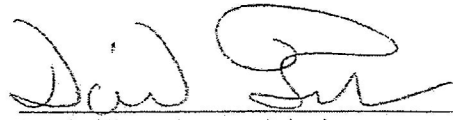
Since Mr. Shockley relied upon the established history of late payments of rent, Eastcare III was required to give the Defendant warning of its intention to begin strictly complying with the terms of the lease. This is especially true given Defendant's mental deficits. However, the landlord did not do this before starting the eviction action against Mr. Shockley. The landlord's failure to warn before beginning an eviction action keeps the nonpayment of rent from rising to the level of "good cause" as required by 24 C.F.R. § 3, therefore it is the Magistrate's decision not to grant the eviction.

IV. MAGISTRATE'S DECISION

IT IS THEREFORE THE DECISION OF THE MAGISTRATE:

- 1) Plaintiff's request for a Writ of Restitution be denied, at this time, and the case shall be administratively dismissed subject to reactivation upon a motion filed by either party.
- 2) The Defendant shall remain current on his monthly rent obligation and pay an extra \$100.00 per month until the net arrearage is paid in full. Both the current rent and the \$100.00 payment, per month on the arrearage shall be paid to the Plaintiff no later than the 5th day of each month, beginning with the month of December. Should Defendant fail to pay, as ordered herein, Plaintiff may file a motion to reactivate the case and to seek reconsideration of denial of the writ of restitution.

- 3) At that time, should the Court determine that Defendant has failed to remain current on the obligations set forth herein, there is a strong likelihood that the Writ of Restitution will be granted.
- 4) Costs of this action shall be divided by the parties, equally.


David H. Fuchsman, Magistrate

Counsel and Defendants are referred to Civil Rule 53 and Rule 2.31 of the Rules of the Montgomery County Common Pleas Court regarding the filing of objections to the Magistrate's Decision.

A party shall not assign as error on appeal the Court's adoption of any finding of fact or conclusion of law in that decision, unless the party timely and specifically objects to that finding or conclusion as required by Civil Rule 53(E)(3).

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