

CLEVELAND MUNICIPAL COURT
HOUSING DIVISION
CUYAHOGA COUNTY, OHIO
JUDGE W. MONÁ SCOTT

MOHAMED HUSEIN
Plaintiff (s)

Date: July 22, 2020

-VS-

2020 CVG 005042

DIETRA A PAYNE et al
Defendant (s)

JUDGMENT ENTRY

Upon review pursuant to ORC 53(D)(4)(a), the Magistrate's decision attached and incorporated herein, is approved, adopted and confirmed. Judgment for Defendants on the first cause of action.



Judge W. Moná Scott
Housing Division

Service: Copies sent by regular U.S. mail to parties/counsel on 7/27/20 by Am.

☐ Clerk to issue notice of Final Appealable Order

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MAGISTRATE'S DECISION

The matter came on for trial on the 15th day of June, 2020 before Magistrate Tracey S. Gonzalez, to whom it was referred by Judge W. Mona Scott, pursuant to Ohio Civ. R. 53, to take evidence on all issues of fact and law regarding the ¶¶ matters herein. Plaintiff Mohamed Husein was present and represented by Attorney Christina Lowder. Defendants Dietra Payne and David Rogers (hereinafter Defendants) were present and represented by Attorney Anastasia Elder and Attorney Matthew Vincel.

FINDINGS OF FACT

- (¶1.) Plaintiff is the owner of the residential premises located at 3428 West 59th Street, Cleveland, Ohio 44102.
- (¶2.) Defendants resided in the premises from approx. December 2015 to the present date pursuant to a written lease agreement.
- (¶3.) Pursuant to the written lease agreement, attached as exhibit 1 to Plaintiff's supplemental brief, in paragraph 1, it states the amount of rent and the due date for on-time payments being from the 1st through the 3rd of the month. This provision is not in dispute. Nevertheless, during the course of the tenancy, Defendants would tender, and Plaintiff would accept, the rent payment as late as the last Friday in the month.
- (¶4.) Pursuant to the written lease agreement, in paragraph 10 it states, "Utilities/Services – tenant agrees to pay all utilities and services with the exception of the following which Landlord agrees to pay: _____". The additional space for Landlord responsibility is blank.
- (¶5.) Despite the ambiguity in the lease provision, Defendants were held responsible for the water charges and paid those charges each month. It is disputed whether those charges were always paid together or on occasion separately from the rent.

- (¶6.) On April 30, 2020, Defendant attempted to tender the monthly rent to Plaintiff without inclusion of funds for the water bill. The payment was rejected.
- (¶7.) On June 8, 2020, Plaintiff served Defendants with a 3-day notice by posting on the premises.
- (¶8.) On June 15, 2020, Plaintiff filed the current eviction action alleging non-payment of rent as the grounds for termination of the rental agreement.

LEGAL QUESTION

Has Plaintiff established by a preponderance of the evidence that they are entitled to Judgment on the first cause based upon non-payment of rent? The answer to this legal question turns upon the acceptance of late rent and who bears responsibility for water bill payments.

CONCLUSION OF LAW – LATE RENT

The testimony taken was consistent in establishing the acceptance of late payments throughout the tenancy. Both parties went further in explaining that Defendant Dietra Payne paid the rent out of her second paycheck of the month. As such, she would generally pay the rent by the last Friday of the month. No testimony established that a late fee was ever assessed.

While Plaintiff was lenient in his acceptance, he nevertheless established a course of conduct that solidified an end of the month payment routine. A cursory look at the 2019 calendar shows that the last Friday of the month could fall anywhere between the 22nd and the 31st day of the month. Yet, the attempted tender of rent on the 30th of April was rejected.

A landlord waives the right to insist on punctual payment of rent by consistently accepting delinquent rent. *Fairborn Apts. v. Herman* (1991), No. 90-CA-28, 1991 WL 10962 (Ohio App. 2nd Dist.). “When a landlord, by a course of dealing in accepting overdue rent, has put a tenant off his guard, a forfeiture of the lease for a delayed payment of rent cannot be enforced, unless notice has been given to the tenant calling on him for a compliance with the strict terms of the lease; and equity will relieve from such a forfeiture.” *Mibourn v. Aska* (1946), 81 Ohio App. 79.

Plaintiff failed to present evidence establishing a termination of the accepted course of conduct. To unilaterally reject the end of the month payment without notice, will not support an eviction action.

WATER BILL

The Court turns its attention to the water bills. The rejection of tendered rent at issue above also turns on the failure of Defendant to include the water bill payment. While the failure to pay the water bill was not alleged in the complaint as the grounds for eviction, this Court would be remiss to not speak to this issue as future guidance to Plaintiff.

C.C.O. 375.05 Reads as follows:

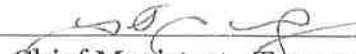
- (a) A landlord who is a party to a rental agreement shall pay for the electric, gas, and water services for the tenant's dwelling unit unless:
 - (1) The applicable utility service is provided to the tenant's dwelling unit through an individual meter or submeter that measures usage only in the tenant's dwelling unit; and
 - (2) The rental agreement provides that, with respect to the applicable utility service, the tenant shall pay only for the cost of the utility service that is provided through the individual meter or submeter during the tenancy; and
 - (3) The rental agreement provides that the tenant shall have reasonable access at all times to the individual meter or submeter, for the purpose of reading the meter or submeter; and the landlord grants the tenant such access to the individual meter or submeter; and
 - (4) **The provisions in the rental agreement that implement this section are stated in clear and unambiguous language.**

If it is the intention of the parties to enter into an agreement for the tenant to pay for water services, said intent must be stated in the lease agreement in explicit and unambiguous terms. C.C.O. 375.05 (a)(4). Plaintiff's lease is clearly not explicit as to the payment of utilities. It makes a blanket statement that leaves one to question what is included and excluded. It is well established that ambiguity in a contract is construed against the party who drafted it.

While Defendant has moved to strike the inclusion of the lease agreement in Plaintiff's supplemental brief, this Court denies the motion as the inclusion further strengthens the argument and supports a finding that the portion of the rental agreement related to utilities lacked the specificity required by law.

Plaintiff may not reject the rent tendered for its failure to include water bill payments that were never appropriately included in the rental agreement. It is further noted that equity does not support what appears to be a cat and mouse game concerning the water bill. Even a proper inclusion of water bill payments may not be actionable where Plaintiff fails to supply a copy of the bills to the tenant. Plaintiff never indicated in his testimony that he supplied Defendants with an actual copy of the water bill.

The Court grants Judgment to Defendant on Plaintiff's first cause of action.


Chief Magistrate Tracey S. Gonzalez
Housing Division

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