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

MAGISTRATE'S DECISION

INDEPENDENT MGMT SVCS OF OHIO, INC.

VS

CASE NO. 2014CVG01244

NATASHA DAVIS
Defendant

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Pursuant to Rule 53 this matter was referred to the Magistrate for hearing and decision. Plaintiff appeared through counsel. Defendant appeared *pro se*.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant is a tenant of Plaintiff at 1864 Middle Avenue, #L-11, Elyria, Ohio, under a written lease that is governed by H.U.D. regulations due to subsidies received by Plaintiff. Plaintiff contends that after Defendant's rent increased on May 1, 2014, from $0.00 to $631.00 per month, retroactive to February 1, 2014, as a penalty for her failure to finish a "recertification" process, Defendant failed to pay that rent when due. Plaintiff served a "Ten (10) day Notice of Termination" on Defendant on May 7, 2014, followed by the "three day notice" required by R.C. §1923.04 on May 19, 2014, thereafter filing this action.

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." Procedures include adherence to the requirements of the lease or any federal regulations. Cuyahoga Metro. Hous. Auth. v. Younger, 93 Ohio App.3d 819 (Cuyahoga 1994). Crossroads Summerset Ltd. v. Newland, 40 Ohio App.3d 20, 24 (Franklin 1987). Paragraph 23(b) of the parties' lease states that any "termination of this Agreement by the Landlord must be carried out in accordance with **HUD regulations**, State and local law, **and the terms of this Agreement**." (emphasis added).

A trial court's failure to look at a landlord's compliance with the requirements of federal law to terminate a subsidized tenancy is a basis in itself for reversal and remand. Swartz v. Schutte, No. 14717, 1991 WL 2022 (Summit App. 1/9/91). For example, our court of appeals has held that a subsidized landlord's failure to prove its service of a ten-day notice in addition to the §1923.04 notice is a proper basis to deny an eviction. Arlington Square ABC Management v. Clevenger, No. 88CA004447, 1989 WL 52620 (Lorain App. 5/17/89). *See also* Sandefur Co. v. Jones, 9 Ohio App.3d 85 (1982). To terminate this tenancy, then, Plaintiff had to prove compliance both with terms of the lease **and** dictates of federal law. Natl. Church Residences of Worthington v. Timson, 78 Ohio App.3d 798, 805 (Franklin 1992). Plaintiff did not.

The parties' lease sets forth the requirements for a "ten (10) day notice" to be served whenever Plaintiff considers terminating a tenancy. The language of the lease as to this notice, paragraph 23(e), is taken verbatim from Chapter 8-13(B)(2)(c) of Directive No. 4350.3 of HUD, "Occupancy Requirements of Subsidized Multifamily Housing Programs," setting forth the "minimum standards required by HUD" for terminating a subsidized tenancy. Chapter 8-1(B) of Directive No. 4350.3, explains that a subsidized "owner may only terminate a tenancy in limited circumstances as prescribed by HUD regulations and the lease and must follow HUD and state/local procedures." The policies and procedures that "must be followed when initiating a termination" include "proper notices and documentation," such as enumerated at Paragraph 2(e) of Plaintiff's lease. Directive No. 4350.3, Chapter 8-1(C). The following defects exist:

1) The required date of proposed termination is not disclosed

In the instant action, Plaintiff's notice to Defendant lacks the initial mandated disclosure, namely, "to specify the date this Agreement will be terminated." *See* ¶23(e) of the lease. One state supreme court has held that the absence of this single, important disclosure, unambiguously communicated, nullifies the notice and defeats a subsidized landlord's right to evict. *See* Hedco, Ltd. v. Blanchette (R.I. 2000), 763 A.2d 639. On this basis alone, this case should be dismissed.

2) The "proposed" status of the termination process is not disclosed

According to the federal directive as well as paragraph 23(e) of the lease, this notice issues only "[i]f the Landlord **proposes** to terminate this Agreement." (emphasis added). The purpose of this notice then is to set forth "proposed" action only, not report a decision already concluded. The owner must "specify the date" prospectively that "this Agreement **will be** terminated." (emphasis added). Before this occurs, ten days must be accorded to the tenant "to discuss the **proposed** termination." (emphasis added). This is not a mere formality, but confers on Defendant, beneficiary of the federal subsidy, a first chance at procedural due process to meet with Plaintiff to avoid the potential of termination. The May 7, 2014 letter omits any mention of the "proposed" status of the termination, but says instead that "we **are** terminating your tenancy." This notice suggests that the decision to terminate Defendant's tenancy **already** occurred, with the issuance of the letter. It is not clear what benefit could be derived from the tenant's "discussion" of a matter already decided. This is another basis alone to dismiss this case.

3) The violation of the lease is inadequately described

The section of the lease purportedly breached by Defendant is identified as paragraph 23(c)(1), as to her "material noncompliance" with the lease. The actual section breached is narrower, found at paragraph 23(d)(4), that is, "nonpayment of rent," the grounds given for the eviction. Yet, the cite to catchall provision at 23(c)(1) is telling. After all, Defendant's rent had just increased based on her alleged "material noncompliance" with the provisions of her lease pertaining to annual recertification. One court has stated that when an increase in rent is due to a recertification problem, the notice must state as grounds more than nonpayment of rent, but also detail the recertification issue that led to the increase in rent:

> A notice of termination in a federally subsidized assisted housing program must state with specificity the reason for the proposed termination of tenancy. The purpose of requiring specifics is to "insure that the tenant is adequately informed of the nature of the evidence against him so that he can effectively rebut that evidence." Plaintiff's notice fails in this respect. It makes no mention of the basis for Plaintiff's decision to raise Defendant's rent to market rent. * * *
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> [T]he two step procedure of raising a tenant's rent to market rent, then evicting for nonpayment of that rent, must allow a tenant to challenge in an eviction proceeding the basis for the landlord's decision to raise the rent to market rent. It follows that **the notice of termination for nonpayment of that rent must specifically state the reason the landlord raised the tenant's rent to market rent. Otherwise a tenant can never be prepared to defend** against the landlord's evidence of good cause for its decision to raise the rent.

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Boardwalk Glenville Apts. v. Cage, No. 2007-CVG-3065, sli op. at 8 (Ohio Mun. Cleveland Hous. Div. 7/13/07) (citations omitted)(emphasis added). At hearing, Defendant indeed disputed the validity of the increase in her rent. The ten-day notice here did not specify why Defendant's rent increased and, therefore, this case should be dismissed.

4) Inadequate notice in the recertification process

This was Defendant's first annual recertification. After Defendant "responded" within the requisite timeframe, that is, on November 25, 2013, seemingly satisfying the recertification requirements of her lease, H.U.D. randomly chose her file for an "audit," which extended and complicated the process for Plaintiff and Defendant. As H.U.D. wanted more and more, Plaintiff repeatedly asked Defendant to supplement her file, such as about student enrollment and military status. Plaintiff asserts that Defendant was not very cooperative, but Defendant explained that she was often away due to health issues related to ongoing construction at the complex. In any case, when the papers were finally deemed completed and ready for her signature, Plaintiff on Friday, April 18, 2014, posted on Defendant's door this one and only written notice:

> It is mandatory you come to the office on Monday April 21, 2014 to sign your completed paperwork[.] [I]f the paperwork isn't signed by Monday your subsidy will be terminated and you will be responsible for Market Rent as of May 2014 which will be $631. If you have any questions please call the office at (440) 323-2080. Thank you for your immediate attention in regards to this matter.

The office was closed both Saturday and Sunday. Defendant was thus given one business day to come to the office to sign the papers or lose her subsidy.[1] Plaintiff's witness testified that had Defendant arrived even the next day to sign, retroactive market rent would have nonetheless been charged. This short of a time frame for Defendant's action in response to a written notice –

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[1] Plaintiff was likely rushing because it had only until May 1, 2014, to process the recertification under Directive No. 4350.3, Chapter 7-6, to avoid its loss of the federal funds. Defendant claimed that she was confused about this letter partly because Plaintiff posted yet another notice on her door on Monday, but only about a $16 debt owed by her, with such payment alone stated as being necessary to avoid termination of the tenancy. See Plaintiff's Exhibit 10.

effecting a loss of Defendant's federal benefits – was patently unreasonable notice and is unconscionable to enforce. The recertification process here remains incomplete until reasonable written notice is sent to her to sign the final papers.[2]

5) "Ineffective" notices of termination of assistance and increase to market rent

Moreover, Defendant's subsidy was terminated and her rent increased without proper disclosures from Plaintiff. Under paragraph 15 of the parties' lease, Defendant's failure to "submit the required recertification information" in this process results in the "penalty" of "higher, HUD-approved market rent" without the usual thirty-day waiting period for a change in a subsidy. Lease ¶ 15(a). However, Plaintiff is still bound by the express terms of its lease that it "may implement these penalties only in accordance with the **administrative procedures** and **time frames** specified in HUD's regulations, handbooks and instructions related to the administration of multifamily subsidy programs." *Id.* (emphasis added). Those procedures and time frames are found at Chapter 8-6(A), which covers "terminating assistance," such as when a "tenant fails to provide required information at the time of recertification." Directive No. 4350.3, Chapter 8-5(A) and (G). Neither the April 18, 2014 letter nor the one given on May 1, 2014 saying that her "subsidy has been terminated and you are responsible for contract rent" advise, as required: "if the tenant fails to pay the increased rent, the owner may terminate tenancy and seek to enforce the termination in court" or that she had "the a right to request, within 10 calendar days from the date of the notice, a meeting with the owner to discuss the proposed termination of assistance." Directive No. 4350.3, Chapter 8-6(A)(3). Plaintiff cannot "equate termination of the tenancy and termination of the subsidy" because "the HUD Handbook plainly distinguishes between the two, establishing distinct procedural steps for each." Prospect Heights Associates v. Gonzalez, 34 Misc.3d 1203(A), 2011 WL 6822297, at *3 (N.Y.City Civ.Ct., 10/26/11). Plaintiff also never served these by mail. "Service of the notice is deemed effective once the notice has been both mailed and hand delivered." Directive No. 4350.3, Chapter 8-6(A)(5) (underline in original). No legally cognizable notice has been issued to Defendant of the change. Without a "proper rent demand," Plaintiff's claim for market rent is "fatally flawed," invalidating the subsequent notices and requiring the case to be dismissed. Prospect Heights Associates, *supra.*

In other words, a proper "ten day notice" notice under the lease and federal law was never delivered and, therefore, an R.C. §1923.04 notice could not be served. Service of this last notice is not an empty formality but a condition precedent to commencement of an eviction. *See* Sternberg v. Washington (Summit 1960), 113 Ohio App. 216. Proper notice to terminate is jurisdictional in Ohio. When a court lacks subject matter jurisdiction, the "action" must be dismissed. Civil Rule 12(H)(3).

Finally, keeping in mind that the increase in rent due to an incomplete recertification is a "penalty," "[i]t is well established that penalties are not favored in either law or equity and should be imposed only when clearly justified." State ex rel. Reed v. Industrial Commission, 2

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[2] Plaintiff's other notices in the recertification process may be said to be deficient and bar an increase in market rent under the standards of Lambert Houses Redevelopment Co. v. Jobi, 35 Misc.3rd 1215(A), 1014 WL 2198291, at *2 - 4 (N.Y.City Civ.Ct., 4/10/14). *See also* Park Lane Residences, L.P. v. Boose, 26 Misc.2d 1233(A), 2010 WL 838144, 4 (N.Y.Dist.Ct. 3/11/10).

should be imposed only when clearly justified." State ex rel. Reed v. Industrial Commission, 2 Ohio St.2d 200, 203 (1965). On the evidence at hearing, this penalty was not "clearly justified."

When begun, the recertification process was new for Defendant, her first annual one in a year-old tenancy. Some of the problems in this recertification arose from the unexpected audit by H.U.D. and might not exist in a normal recertification. Defendant testified that she was confused by this process. Plaintiff's witness complained about seeing Defendant, such in the parking lot, and that she would talk with Defendant about these problems, but Defendant would not come into office. Defendant instead dropped off papers in the after-hours box. However, the evidence was insufficient to show that Defendant was advised in writing that no less than her personal appearance was required, except for the original recertification meeting, which she attended, and for her signature on the final papers. Defendant explained that she has been hampered for months as to coming into the office. She stays away from her own apartment and the complex due to the effect on her health from major construction that has been under way. She claims to have complained as early as January during an inspection of her premises about her sickness from the construction, but remedial steps by Plaintiff have only recently been taken. 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 (Summit App. 2-4-97). "Ohio courts have the power, and **often** exercise it, to relieve a tenant from the consequences of forfeiture of a leasehold interest" for equitable reasons. David v. Edwood Development Co., No. 19252, 2000 WL 46107 (Summit App. 1-12-00) (emphasis added). Equity should relieve Defendant here as well.

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RECOMMENDATION

PLAINTIFF'S NOTICES WERE INADEQUATE TO TERMINATE EITHER DEFENDANT'S SUBSIDY OR DEFENDANT'S TENANCY.

DEFENDANT SHOULD BE ISSUED PROPER NOTICE AFFORDING THE DEFENDANT A REASONABLE PERIOD OF TIME TO SIGN THE FINAL RECERTIFICATION PAPERS.

THIS CASE SHOULD BE DISMISSED 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).

COPY TO ATTORNEY OWEN FOR PLAINTIFF
DEFENDANT PRO SE