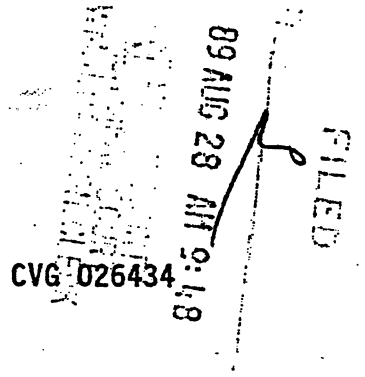
IN THE FRANKLIN COUNTY MUNICIPAL COURT
COLUMBUS, OHIO



Christopher Cassidy,	:	
Plaintiff,	:	
v.	:	Case No. M 8907 CVG 026434
Ken Vaccariello,	:	
Defendant.	:	

REFEREE'S REPORT

This matter came on for hearing before Referee Kathleen E. Graham on August 21, 1989. Plaintiff was represented by Attorney James Britt. Defendant was represented by Attorney Joseph Maskovyak, The Legal Aid of Columbus.

A court reporter was present. All witnesses were sworn. Plaintiff's Exhibits "1" thru "3" and Defendant's Exhibits "A" thru "B" were admitted without objection. Defendant's Exhibits "D", "E", "F", and "G" were admitted over the objection of the plaintiff.

Based upon the evidence presented, the Referee recommends the following Findings of Fact, Conclusions of Law, and Recommendation:

FINDINGS OF FACT

1. Defendant has rented an apartment located at 70-72 West California, since April 1979. The defendant occupied the premises pursuant to the terms of a written rental agreement with the previous landlord, Gordon Schilling, dated April 4, 1986 (Plaintiff's Exhibit "2").

2. On June 28, 1989, plaintiff purchased the premises from Mr. Schilling. At the time of the closing, plaintiff was unaware that defendant occupied the premises subject to the terms of a written lease agreement between Mr. Schilling and the defendant. On June 29, 1989, plaintiff notified the tenants by letter (Defendant's Exhibit "A"), that he was the new owner of the property and that future rent should be directed to his attention. Assuming the defendant occupied on an oral month-to-month lease, the notice advised the defendant that his rent would be increased effective August 1, 1989.

3. Sometime prior to July 6, 1989, defendant called plaintiff and advised him that he had a written lease agreement. Defendant mailed a copy of the lease agreement to the plaintiff. During the telephone conversation, defendant advised the plaintiff that his rent had always been due on the 15th of the month.

4. Annoyed with defendant's assertion that his rent was always due around the 15th of the month, plaintiff prepared a new lease with the increased rent provision and sent it to the defendant. Defendant did not agree to sign a new lease with the plaintiff.

54. For at least a two year period preceding the hearing, Mr. Schilling and/or his agent accepted rent from defendant which was received on or after the fifteenth of the month (Defendant's Exhibits "D", "E", "F", and "G"), for which the rent was due.

5. Despite the language of the lease agreement dated April 4, 1986, the pattern and practices of the defendant and his previous landlord demonstrate that the due date for the payment of rent, referenced in the lease, had been changed from the first of the month to the fifteenth of the month.

6. On July 6, 1989, plaintiff served the defendant with a Notice to Leave the Premises (Plaintiff's Exhibit "3").

7. On July 18, 1989, defendant mailed a money order in for $275.00 (the amount of the July rent) to the plaintiff (Plaintiff's Exhibit "1"). The plaintiff received the money order on the 20th and returned it to the defendant by letter dated July 21, 1989.

8. The pattern and practice of payment of rent between the defendant and his previous landlord modified the payment provisions of the lease agreement dated April 6, 1986. The rent was "due" on the fifteenth of the month. However, defendant had a grace period of a couple of days until at least the twentieth to pay the rent. That "grace period" upon which the defendant was also the result of the pattern of payment over the last 10 years. The July 1989 rent received by the plaintiff on July 20, 1989, was not past due. Receipt by the landlord on or before the twentieth of the month was consistent with the pattern of payment.

CONCLUSIONS OF LAW

The plaintiff, as the new landlord, took subject to the lease agreement and to the established course of dealings between the defendant and the previous landlord Classic Real Estate v. Bowen (1979), Franklin Cty. M.C. M79 CVG-00404, unreported. Rent for July 1989 was not due until the fifteenth of the month. As of that date, the defendant was not in breach of his rental agreement. Nonetheless, plaintiff served the defendant with a Notice to Vacate the Premises on July 6th. A landlord may not serve a Notice to Vacate the Premise until a tenancy has been terminated. A tenancy may be terminated by its own terms or by a breach

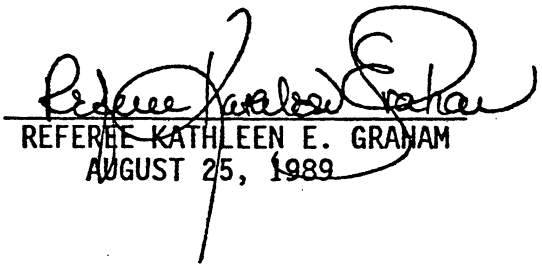
of the agreement. Because the tenancy had not been terminated, the notice was served prematurely and is invalid. Ewert v. Basinger (1978), 11 Ohio Op. 3d. 171. On that basis alone, the eviction action should be dismissed.

The evidence further demonstrates that the plaintiff, as successor landlord, waived the right of payment of rent on the fifteenth of the month by the established pattern of payments sometime between the fifteenth and the nineteenth of each month. A pattern of accepting late payments is a defense. Bates & Springer, Inc. v. Nay (1963) 9 Ohio Law Abs. 425; Crossroads Sommerset Ltd. v. Newland (Dec. 21, 1987) Franklin App. No. 87AP-362. In order to cure a pattern of accepting late rent payments, a landlord must provide a reasonable notice to a tenant of an intent to enforce the rent on the due date. The three-day notice which was served upon the defendant on July 6, did not constitute sufficient notice to the defendant that late payments (i.e. payments after the 15th) would be refused.

Plaintiff has failed to prove by a preponderance of the evidence the allegations in the first cause of action.

RECOMMENDATION

Judgment in favor of defendant and against plaintiff on the first cause of action only.



REFEREE KATHLEEN E. GRAHAM
AUGUST 25, 1989

CC: James C. Britt, Jr., Esquire
490 City Park Avenue
Columbus, Ohio 43215-5797
ATTORNEY FOR PLAINTIFF

Joseph V. Maskovyak, Esquire
Legal Aid Society
40 West Gay Street
Columbus, Ohio 43215
ATTORNEY FOR DEFENDANT