

IN THE FRANKLIN COUNTY MUNICIPAL COURT
COLUMBUS, OHIO

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Lincoln Management Co.,
Plaintiff,

v.

Case No. M 9312CVG-037858

Cletus Ashiegbu,
Defendant.

REFEREE'S REPORT

This cause came on for hearing before Referee Hummer on January 4, 1994. Attorney Larry Snyder represented plaintiff. Attorney Michael Richter represented defendant. Based on the sworn testimony taken, the referee finds as follows:

FINDINGS OF FACT

1. Defendant is a tenant of plaintiff in a rooming house at 1470 Neil Avenue. The parties entered into a written lease on August 20, 1992 for a term designated under the lease as nine months.

2. Monthly rent was \$165. The lease did not specifically delineate when rent was due other than to say that mail was to be postmarked "no later than midnight the date rent is due."

3. Defendant paid a pro-rated rent from August 20 to August 31 of 1992. All of his successive rent payments were made on or about the first of the month.

4. When the initial lease term expired, defendant remained in the property as a month to month tenant. The periodic rental due date remained the first day of the month.

5. On or about October 21, 1993, plaintiff served defendant

with a 30-day notice to terminate the tenancy pursuant to R.C. 5321.17.

6. On or about November 22, 1993, plaintiff served defendant with a three day notice to vacate the premises pursuant to R.C. 5321.04. Plaintiff filed a complaint in Franklin County Municipal Court on December 3, 1993.

CONCLUSIONS OF LAW

The issue is whether the landlord's three day notice to vacate was delivered prematurely and, if it was, whether the premature delivery is fatal to the successful prosecution of the claim for possession. Based on the statutory and case authority available, the referee believes the three day notice was served prematurely and that the complaint should be dismissed.

R.C. 5321.17(B) provides: "The landlord or the tenant may terminate or fail to renew a month to month tenancy by notice given the other at least 30 days prior to the periodic rental date." Because the lease did not clearly set out the periodic rental due date, the course of dealing between the parties is the most reliable indicator. Defendant provided competent, credible, and un rebutted testimony that rent was due on the first of the month throughout the tenancy, with the sole exception being the first 11 days of the agreement. The evidence thus established that the rental period ran from the beginning to the end of any particular month. Therefore, a 30-day termination notice delivered on October 21 becomes effective on December 1 pursuant to R.C. 5321.17.

The landlord argues that the subsequent three day notice was not defective because it was served more than 30 days after the notice to terminate was delivered. In support of its position, the landlord relies on Voyager Village Limited v. Williams (1982), 3 Ohio App. 3d 288. In Voyager, however, the court relied on the fact that a 30-day termination notice had been served on July 30, 1980. Therefore, the court reasoned that a subsequent notice to leave the premises served on October 16, 1980, was not premature because it was delivered after September 1, in accordance with the 30-day termination notice requirements of R.C. 5321.17. By contrast, the landlord in the case that is the subject of this report delivered the three day notice prior to the expiration of the rental period. The tenancy was not capable of being legally terminated prior to the end of November, yet the three day notice was served on or about November 22. The facts here are distinguishable from those in Voyager.

The tenant correctly cites Siegler v. Batdorff (1979), 63 Ohio App. 2d 76, for the proposition that a three day notice cannot be served prior to the termination of the tenancy or the breach. In Siegler, the court held that in a month to month tenancy a minimum of 33 days must pass between the 30-day termination notice required by R.C. 5321.17 and the filing of a forcible entry and detainer action. Clearly, more than 33 days passed between the time plaintiff served the 30-day notice of termination and the time he filed his suit. But the logical interpretation of Siegler is that more than 33 days are necessary

if the 30-day termination notice is not served on the day the periodic rental period ends. Siegler says a landlord can serve a 30-day termination notice on the last day of a rental period, wait 30 days, serve a three day notice on the 31st day, and then file suit after 33 days in all have elapsed. The court's unstated but clear reasoning, however, is that the three day notice in such a scenario could be served only after the end of the rental period that R.C. 5321.17 addresses. The referee also finds persuasive the reasoning of Cassidy v. Vaccariello (Franklin County Municipal Court, August 28, 1989), Case No. 8907CVG-26434, which held that a landlord may not serve a notice to vacate the premises until a tenancy has been terminated.

RECOMMENDATION

Judgment in favor of defendant and against plaintiff on plaintiff's complaint. Complaint to be dismissed. Costs to plaintiff.

January 25, 1994



REFEREE MARK HUMMER

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