

IN THE FRANKLIN COUNTY MUNICIPAL COURT

Columbus, Ohio

Rallie Company,
Manager of Barrington Square Ltd.
374 North Virginia Lee, West
Columbus, Ohio 43209

Plaintiff,

- vs -

Case No. M76CVG-463763

Jeannette Pastor
2369 White Chapel Court
Columbus, Ohio 43229

Defendant.

RULING ON MOTION FOR SUMMARY JUDGMENT

The plaintiff herein, acting as rental agent for Barrington Square Ltd., brings this action to terminate a rental escrow. The defendant, by way of a lease agreement, is the lessee of Apartment No. 2369 in Building 8 located at 2369 White Chapel Court in the Barrington Square Apartment complex.

On or about July 30, 1976 the defendant applied to this Court to pay her rent into escrow pursuant to Sections 5321.07 and 5321.08 of the Ohio Revised Code (See Application No. 230, Book 2).

The plaintiff has commenced this action by way of a "Recital" seeking termination without specific referral to the methods provided by Section 5321.09(A), Revised Code for a landlord to apply for a release of rent deposited with the Clerk of the Court pursuant to Section 5321.07 of the Revised Code. Instead, he relies generally on Chapter 5321, Landlords and Tenants, apparently (as it appears in further pleadings) to avoid the possibility of being estopped to question the validity or constitutionality of a law by invoking the provisions of the law. (See 10 O Jur 2d 147, Constitutional Law)

The defendant's answer incorporates a counterclaim wherein she seeks to recover \$4,000.00 in compensatory damages, \$5,000.00 in punitive damages and reasonable attorneys fees. The defendant's counterclaim for damages, consisting of 27 paragraphs, would, in some respects, if proved, establish a typical basis for the kind of tenant redress for which the Landlord Tenant Act of 1974 was designed to provide.

However, the plaintiff now moves for summary judgment on the basis that the establishment of the escrow is contrary to the Fourteenth Amendment to the Constitution of the United States.

It is argued that the provisions of the Ohio Revised Code permitting the escrow of rent do not:

(a) require the tenant to prove that he is entitled to the benefits of a rent escrow; nor,

(b) require a hearing prior to the creation of an escrow.

Without these requirements, the plaintiff claims, the rent escrow provisions are constitutionally defective, in that the Fourteenth Amendment provides, in part, that no State shall deprive any person of life, liberty, or property, without due process of law.

It has been the established law of Ohio at least since 1864, that the right to receive rent runs with the land and is a property right. Sutliff v. Atwood, 15 Ohio 186, 192-193.

In Shelley v. Kraemer 334 US 1, 68 Supreme Court 836 (1948) it was held that the power of a state to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment.

Procedural due process includes the right to notice and an opportunity to be heard at a meaningful time and in a meaningful manner. Moreover, the opportunity for such a hearing must be provided before deprivation of a property interest takes effect. See Fuentes v. Shevin, 407 US 67; 92 Supreme Ct. 1983.

Relying upon Fuentes, supra, the United States District Court for the Northern District of Ohio, Western Division, held in the case of Turner v. Block, Civil No. C 72-242 (1973), that the replevin statutes of Ohio, Chapter 2737, Revised Code, were unconstitutional as violating the due process clause of the Fourteenth Amendment, to the extent that the statutes allowed and permitted replevin of a chattel prior to judgment without notice and an opportunity to be heard. It was ordered that the person whose chattels were to be seized by a proposed replevin be given an opportunity to contest the validity of the seizure before a court might issue a writ for execution of the seizure.

Section 5321.07, infra, provides that if a landlord fails to fulfill the statutory obligations imposed by Section 5321.04, Revised Code, or if the tenant reasonably believes that the landlord has failed to fulfill such obligations, the tenant may give notice in writing to the landlord specifying the acts, omissions or code violations comprising noncompliance. If the landlord receives the notice and fails to remedy the condition within a reasonable time and at least within 30 days, then the tenant, if he is current in rental payments, may deposit all rent that is due and thereafter becomes due to the landlord in escrow with the clerk of courts.

The tenant may also apply to the court for an order directing the landlord to remedy the condition, still retaining the right to deposit his rent in escrow.

Section 5321.08, infra, places a duty upon the clerk of court to accept the escrow deposit and give written notice of such fact to the landlord.

The Clerk of the Franklin County Municipal Court provides a form for application by the tenant to deposit rent in accordance with Sections 5321.07 and 5321.08 of the Ohio Revised Code. In support thereof the application requires a sworn affidavit of the tenant that (1) the landlord did not advise the tenant by written notice that he, the landlord, was exempt from the provisions of Section 5321.07(C) as a party to rental agreements which covered three or fewer dwelling units; (2) that the landlord was advised in writing of his failure to fulfill the specified obligations of a landlord; and, (3) that the tenant is presently current in his rental payments, the due date of his next rental payment and the amount. Thereafter the clerk accepts the escrow deposits and sends a copy of the tenant's application to the landlord.

Section 5321.09, Revised Code, provides that when the landlord receives notice of the escrow deposit, he may then apply to the clerk, or the court, for release of the escrow or other relief. It is important to take note of the fact that the landlord's right

of recourse is subsequent to the escrow deposit. The plaintiff's arguments that compliance with Sections 5321.07 and 5321.08, *infra*, do not require the tenant to prove that he is entitled to the benefits of a rent escrow, nor that there is a requirement for a hearing prior to the creation of an escrow, are of substantial merit.

A temporary, non final deprivation of property is, nonetheless, a deprivation in terms of the Fourteenth Amendment. No later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. Fuentes v. Shevin, 407 US 67, 82.

Given the premises established herein, it seems clear to this Court that the reasoning and legal philosophy of Fuentes must apply with equal weight to the problem of allowing a rent escrow without a prior hearing. It is the opinion of this Court that Sections 5321.07 and 5321.08, Ohio Revised Code are unconstitutional insofar as these statutes permit a deprivation of property without the procedural safeguard of due process as required by the Fourteenth Amendment to the Constitution of the United States.

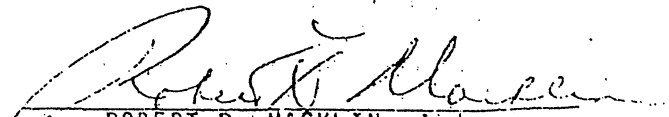
The plaintiff's motion for summary judgment is granted and defendant's counterclaim is dismissed without prejudice.

It is ordered that the Clerk of the Franklin County Municipal Court terminate the rent escrow established under Application No. 230, Book 2, and the proceeds thereof be paid over to the defendant, with the plaintiff free to seek his remaining remedies at law in the circumstances.

It is further ordered that upon future applications of tenants for the deposit of rent, the Clerk of the Franklin County Municipal Court shall refer the applications to the Administrative Judge of the Franklin County Municipal Court for assignment of prior hearings to determine the applicant's rights to deposit of rents in escrow with the clerk.

Costs to defendant.

April 11, 1977


ROBERT D. MACKLIN, Judge

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Hon. Ted Hysell, Clerk (2)
Franklin County Municipal Court