

IN THE FRANKLIN COUNTY MUNICIPAL COURT, COLUMBUS, OHIO

Richard L. Kaylor,
Plaintiff,

-v-

Lawrence Cunningham and
Charlene Cunningham,
Defendants.

Case No. M'85 CV G 26535

This cause came on for hearing before Referee Dennis Kimball on October 2, 1985. Plaintiff was represented by Attorney James Hunter, III. The defendants were represented by Attorney Clement Pyles. Based upon the testimony and evidence presented, after weighing the credibility of the witnesses, the Referee makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. At the beginning of the hearing, the defendants, through counsel, moved for a continuance due to the fact that defendant Charlene Cunningham was not present. Defendant Lawrence Cunningham was also absent from the courtroom. Defense counsel represented to the Court that Charlene Cunningham had told him that day that she was ill and would be consulting a doctor. Defense counsel did confirm that Charlene did visit a doctor on the morning of the hearing, but he could not confirm her medical condition. Due to the fact that this was the second continuance requested by the defense, and due to the lack of any indication that Charlene's claimed illness was legitimate, the Referee overruled the motion for continuance.

2. The plaintiff bought the property known as 2353 Lenora Avenue in Columbus, Ohio in June 1985. The defendants were tenants of the property at that time. When the plaintiff came to pick up July rent, he gave an oral 30 day notice to terminate the tenancy in order to rehabilitate the property. When he came to check the property in August, he discovered the defendants still residing therein. The defendants refused to move. After that date, the plaintiff went to the residence to collect rent. No one responded to his knocks on the door. During a prior conversation with the defendants, the plaintiff had established that rent would be collected by his visit to the residence on the second or third of each month. Plaintiff could not recall when he visited the residence in August to collect the rent. The plaintiff made no other attempts to collect the rent in this case.

3. The plaintiff served a three day notice and filed a previous eviction action which was heard on August 27. That action was dismissed. No evidence was produced to indicate whether the dismissal was with or without prejudice.

4. The plaintiff served a written 30 day notice of termination on August 27 effective October 1. The plaintiff then served a new three day notice on September 3 alleging non-payment of September rent. This action was filed on September 9. No other

three day notices have been served in this case. At the close of the hearing the plaintiff moved to amend the complaint to include termination of the tenancy as grounds for eviction. The amendment was allowed. The defendant moved to dismiss those grounds due to the failure to serve a new three day notice at the end of the termination. The Referee withheld ruling on that motion.

5. During the course of the hearing defense counsel withdrew and testified in this action under questioning by Attorney Bonnie Clevinger, who entered the case to represent the defendants.

CONCLUSIONS OF LAW

The Referee finds that the plaintiff has not presented sufficient evidence to substantiate a basis for eviction in this case by a preponderance of the evidence. The mode of payment required the plaintiff to appear and demand rent on the second or third of each month before rent would be due. The plaintiff made no such demand for September or October rent. The plaintiff made a demand for August rent, but he could not recall when the demand was made. The plaintiff must prove that he demanded payment of rent on the second or third of August; he cannot evict for non-payment of rent by merely making an unplanned, unannounced visit to the property after the third of the month and finding the defendants absent. Thus there was insufficient evidence to prove a basis for eviction for non-payment of rent.

As of the hearing date, the tenancy had officially terminated by the written 30 day notice of August 27. However, to evict on such grounds requires the service of a three day notice after the termination of the tenancy, which occurred on October 1. Voyager Village Limited v. Williams (1982), 3 OApp.3d 288 (Court of Appeals for Greene County). There being no three day notice served after October 1, the plaintiff cannot evict for a holdover tenancy.

REFEREE'S RECOMMENDATION

The Referee recommends that the case be dismissed at the plaintiff's costs. As the characterization of dismissals is discretionary, the Referee further recommends that the dismissal of this action on the grounds of a holdover tenancy be a dismissal without prejudice.



REFEREE DENNIS KIMBALL

Copies to:

James Hunter, III, Attorney for Plaintiff
Clement Pyles, Attorney for Defendants