

IN THE FRANKLIN COUNTY MUNICIPAL COURT, COLUMBUS, OHIO

E. VENETTA :
and J. A. VENETTA :
Plaintiffs, :
-vs- :
FAITH STAPLES, et al :
Defendant. :

APR 19 1988
FILED

CASE NO. M'88 CVG 12477

REFEREE'S REPORT

This cause came on for hearing before Referee Dennis Kimball on April 19, 1988. The plaintiffs were represented by Attorney M. E. Rothhaar. The defendant was represented by Attorney Kathleen LaTour. Based upon the testimony and evidence presented, and after weighing the credibility of the witnesses, the referee makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The defendant has been a tenant of the plaintiffs at 1880 Holburn Avenue, Apt. A, in Columbus, Ohio under a written lease since March, 1987. The parties participate in a federal subsidy program by which the plaintiffs receive \$256 a month from the Columbus Metropolitan Housing Authority, with the defendant obligated to pay rent of \$14 per month. According to the lease, rent is due in advance by the first day of each month, with a late charge of \$1 per day to be assessed for payment made after the 5th day of the month.

2. The defendant consistently made payments late. The defendant paid \$14 on April 10, 1987, \$28 on May 18th, \$14 on each of the dates of June 26th, July 3rd, August 7th, September 28th, and October 5th; the defendant then paid \$42 on January 5, 1988, \$14 on February 9th, and \$28 on

March 5th. The plaintiff then served the defendant with a 3-day notice on March 7, 1988, alleging non-payment of rent. On April 8th, the plaintiffs received a \$14 payment from the defendant. The plaintiffs did not cash that payment, nor did they return it to the defendant or notify her in writing that it was not accepted. The plaintiffs still hold that payment.

3. The plaintiffs assert that they followed a rent payment application policy which provides that late payments are first applied against charges from previous months, with any balance then applied against rent for the current month. Under this policy, plaintiffs assert that the defendant's payments fell behind the accruing late charges as early as the June 26, 1987 payment, and that all payments thereafter were applied to the previous balance, not to the current rent. The rent payment application policy employed by the plaintiffs was never disclosed to the defendant in writing, and thus the defendant never agreed to such a policy. The defendant asserts that she has paid an average of \$14 per month for the period of her tenancy, thus fully paying her rent obligation under the lease; she did not raise any dispute over owing the late charges.

4. The plaintiffs sent several notices to the defendant reminding her of the obligation to pay the late charges and other charges assessed on her account. In the notice of September 15, 1987, the plaintiffs state that the defendant owes a previous balance of \$154.55; they then acknowledge receipt of "June rent of \$14.00" from the defendant; finally, they state that the defendant still owes late charges of \$7.00 for June, \$30.00 for July and \$30.00 for August. This reveals the fact that the plaintiffs applied the defendant's late payments of June 26th, July 3rd, and August 7th to her rent obligations for those months, not to the previous balance; otherwise, the September 15th notice would show rent still due for those

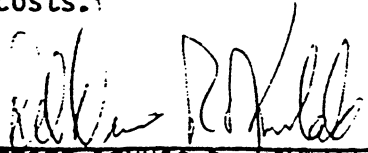
months. Thus, the referee finds the defendant's evidence more credible, and finds that the parties had a custom of applying rent payments to the current month's rent first, then to rent for the previous months, and then to prior charges.

CONCLUSIONS OF LAW

The referee finds that the plaintiffs have not proven a right to recover in this action by a preponderance of the evidence. With the 3-day notice alleging the defendant's non-payment of rent, the plaintiffs are limited to that basis for bringing this action. Under the terms of the rental application policy proven by the custom of the parties, the defendant has fully paid the rent through March, 1988. With the plaintiffs repeatedly accepting rent late, they have waived strict enforcement of the rent due date term of the lease; they failed to reinstate strict enforcement of that term by proper notice to the defendant. Southern Hotel Co. v. Miscott, Inc. (1975), 44 Ohio App. 2d 217 (Court of Appeals for Franklin County). Thus the plaintiffs may not evict the defendant for the late payment of April rent on April 8th. Finally, the plaintiffs' failure to return the April 8th payment or to notify her that it was not accepted amounts to acceptance of that payment, thereby waiving the 3-day notice as a matter of law. Presidential Park Apartments v. Colston (1980), 17 Ohio Opinions 3d 220 (Court of Appeals Franklin County). In summary, the referee finds that the plaintiffs waived the right to evict for late payment of April rent, failed to prove the non-payment of April rent, and waived the 3-day notice, depriving the court of jurisdiction in this matter.

REFEREE'S RECOMMENDATION:

Judgment for the defendant on the first cause of action, with the first cause to be dismissed at the plaintiff's costs.




REFEREE DENNIS R. KIMBALL

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DRK:seh 
May 12, 1988