

IN THE FRANKLIN COUNTY MUNICIPAL COURT, COLUMBUS, OHIO

ECCO MANOR, Ltd.

Plaintiff,

-vs-

GLYNIS PASS, et al

Defendant.

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CASE NO. M'88 CVG 42788

REFEREE'S REPORT

This cause came on for hearing before Referee Nancy Ivers Ferguson on January 11, 1989. Plaintiff was unrepresented by counsel and defendant was represented by Molly A. Hennessey, Attorney at Law.

Based on the evidence presented and weighing the credibility of the witnesses, the referee makes the following findings of fact, conclusions of law and recommendation:

FINDINGS OF FACT

1. The defendant rented from the plaintiff the premises known as 1001 E. Rich Street, Apartment 295, Columbus, Ohio under the terms of a written rental agreement entered in October, 1987. Under the terms of said agreement, the defendant was to pay the plaintiff \$26 per month rent and the balance of her rent was to be subsidized by the Department of Housing and Urban Development (HUD).

2. The lease agreement between the parties provided that rent was "due on the first day of the month at 2229 Yellow Pine Avenue, Columbus, Ohio 43229". The lease did not provide a five day grace period but indicated a late charge could be collected by the landlord on the sixth day of the month if rent was not paid in full "by the end of the fifth day". The lease also did not specify whether the rent was to be mailed or received

by the first day or the fifth day of the month. The plaintiff pointed out, however, that a HUD policy manual provides for payment of late charges when rent is not received by the fifth day and specifically indicates that postmarking by the fifth day is not sufficient to avoid late charges.

3. Other than these references to the provisions in the lease and policy manual regarding late charges, no claim for late charges has been made by the plaintiff and the non-payment of late charges is not a grounds claimed by the plaintiff for the eviction action.

4. In March of 1988 plaintiff had not received the plaintiff's rent by the fifth day of the month. He served a "10-day notice" to leave the premises on the defendant and received rent from her on March 8th. At that time the plaintiff orally informed the defendant that he must receive rent by the fifth of the month or must receive a phone call from the defendant indicating why her rent would be late. He also stated that if he did not receive the rent or phone call he would commence the eviction action.

5. In July of 1988 the defendant again failed to get her rent to the plaintiff by the fifth of the month and received a "10-day notice". Plaintiff received defendant's rent on July 8th.

6. In September, the defendant called the plaintiff and informed him she would be unable to pay her rent by the fifth. Defendant did pay her rent by September 9th and was permitted to stay in the premises.

7. The following month (October) defendant again called the plaintiff and informed him she would be late with her rent. Defendant did not pay her rent until the 15th of October.

8. In November, the defendant did not call the plaintiff by the fifth of the month to indicate the rent would be late. At the close of

business on the 5th of November, the plaintiff's general manager, John Ross, served a "Notice to Leave Premises" form (Plaintiff's Exhibit B) and a termination notice (Plaintiff's Exhibit C) on the defendant by slipping them through her mail slot. Mr. Ross also mailed a copy of the "termination notice" to the defendant on that date.

9. Defendant was home when the notices were put through her mail slot and opened her door and informed Mr. Ross that a check had been mailed to him earlier that day. Defendant claims Mr. Ross informed her she could disregard the notices if the checks had been mailed to him. Mr. Ross, testified he did not recall this conversation.

10. At the time of trial the defendant presented a money order dated December 3rd and an envelope which she had used to mail the money order. The envelope (Defendant's Exhibit 2) was postmarked November 5, 1988.

11. When the plaintiff received the envelope he did not open it. Instead he wrote on the side of the envelope "rent refused please let me know when you can vacate". Defendant's envelope was placed in an envelope of the plaintiff and mailed to the defendant on November 18, 1988.

12. The money order for November's rent (Defendant's Exhibit 3) was presented at the time of trial. On January 3, 1989 the defendant paid December's and January's rent into the Clerk's Office indicating her ability to come current on the rent. The trial was held on January 11, 1989.

CONCLUSIONS OF LAW

The Franklin County Court of Appeals stated in Zanetos v. Sparks (1984), 13 O. App. 3d 242 part as follows:

"Clauses in written leases which give lessors the right to declare forfeiture of the lease for non-payment of rent are valid. However, unless a lessee's conduct is willful or malicious, or if compensation for the breach cannot be made due to the lessor, a court exercising its equity powers will grant the lessee relief from forfeiture. The forfeiture clause for non-payment of rent is not strictly construed, rather, it is viewed merely as security for the payment of rent. The courts will balance the equities of the case and relieve the forfeiture where the equities favor the lessee....

Numerous Ohio cases involving lease agreements stand for the proposition that equity abhors a forfeiture and a forfeiture will not be declared where the equities of the parties can be adjusted."

Although the defendant was aware of plaintiff's oral requirement that he receive rent by the fifth of the month, she chose to mail it to him on that date rather than deliver it personally. The referee finds there was no evidence that the defendant's actions were "willful or malicious". Furthermore, defendant was able to "come current" in her rent as of the time of trial. The referee finds these equities weigh in favor of the defendant. Because "equity abhors a forfeiture" the defendant should be permitted to retain possession of the premises.

REFEREE'S RECOMMENDATION:

Judgment for defendant on the first cause of action for possession of the premises.


REFEREE NANCY IVERS FERGUSON