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CLEVELAND MUNICIPAL COURT
HOUSING DIVISION
CUYAHOGA COUNTY, OHIO
JUDGE W. MONÁ SCOTT

ARTHUR MCKOY
Plaintiff (s)

Date: November 5, 2021

-VS-

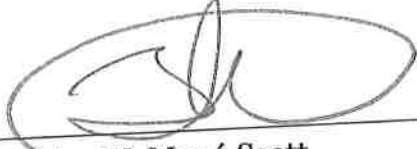
2021 CVG 008782

SUSAN BELL
Defendant (s)

JUDGMENT ENTRY

Upon review, the Magistrate's Decision is approved and confirmed.

{¶1.} Defendant's *Motion to Dismiss* is granted and the Plaintiff's first cause of action is dismissed for lack of subject matter jurisdiction.



Judge W. Moná Scott
Housing Division

SERVICE

A copy of this judgment entry and order was sent by regular U.S. mail to the addresses of record for parties/counsel on 11/8/21 by Dr.

☒ Clerk to issue notice of Final Appealable Order

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MAGISTRATE'S DECISION

This matter came for virtual first cause hearing, on October 29, 2021 before Magistrate Edward Gregory, to whom it was assigned by Judge W. Moná Scott pursuant to Ohio Rule of Civil Procedure 53, to take evidence on all issues of law and fact regarding possession.

Earlier, Defendant filed *Defendant's Motion to Dismiss*, as well as an Answer and Counterclaims, on October 7, 2021 and Plaintiff filed *Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss* on October 26, 2021. Within this period, this matter was called for first cause hearing on October 12, 2021, continued to October 20, 2021 where Plaintiff appeared with counsel and the Court ordered the matter continued to October 29, 2021 to allow the parties to discuss possible settlement with Defendant's motion held in abeyance.

Case called for first cause hearing on October 29, 2021. Plaintiff appeared virtually represented by Attorney Gary Cook. Defendant appeared virtually represented by Attorney Luke S. Condon. Parties were unable to reach a settlement. Defendant's motion to dismiss and Plaintiff's brief in opposition reviewed prior to the hearing, but the hearing was held to take the testimony of the parties to obtain additional facts. Matter taken heard and submitted.

FINDINGS OF FACT:

- {¶1.} Plaintiff is the owner of the rental premises located at 17109 Hillsboro Rd Cleveland, Ohio 44112 ("premises"). Plaintiff attached to the Complaint evidence of current ownership, current rental registration, and the Affidavit of Lead Safe Certification Status for the premises.
- {¶2.} Defendant is the tenant residing in the premises pursuant to an oral month-to-month rental agreement, as the Complaint states the lease expired.
- {¶3.} Defendant attests she has resided in the premises for two years and seven months and when she moved into the premises with Christian Washington, she had a

written lease agreement, which recently expired and now her tenancy is month to month.

- {¶4.} Defendant offered a copy of a document captioned “Residential Lease” (“lease”) that contains only the Plaintiff’s name and was signed only by Plaintiff but was for a two year tenancy for the premises for a term beginning May 1, 2019 and ending May 1, 2021. A copy of this lease, attached to *Defendant’s Motion to Dismiss* as Exhibit B pp. 1 of 7, was admitted and marked as Defendant’s Exhibit 1.
- {¶5.} Clause 5 of this lease states that rent is \$850 and Landlord will pick up rent.
- {¶6.} Plaintiff attest he would regularly collect the rent from Christian Washington at the premises and not from Defendant.
- {¶7.} Christian Washington moved out of the premises sometime in May 2021.
- {¶8.} Plaintiff collected \$850 for rent for May 2021 in early June 2021 from Defendant by stopping by the premises.
- {¶9.} Defendant attests to paying Terminax for extermination services at the premises in the amount of \$160 in June 2021 with the understanding from Plaintiff that the \$160 could be deducted from the amount paid for June’s rent.
- {¶10.} Plaintiff collected \$690 for rent for June 2021 on July 6, 2021 from Defendant by stopping by the premises.
- {¶11.} Defendant attests she sent Plaintiff a text with a photo requesting Plaintiff send his worker to the premises to clean up what appears to be debris on the floor of a room in the premises left behind by the worker.
- {¶12.} Defendant attests Plaintiff responded to the text on July 29, 2021 with the following text response, “Susan your lease has expired it is in our best interest that you find another place art mckoy[.]”
- {¶13.} A copy of the text message Defendant sent to Plaintiff and Plaintiff’s July 29, 2021 response text, attached to *Defendant’s Motion to Dismiss* as Exhibit C pp. 1 of 1, was admitted and marked as Defendant’s Exhibit 2.
- {¶14.} Plaintiff did not stop by the premises in August 2021 to collect July 2021 rent.
- {¶15.} Plaintiff served Defendant with a R.C. 1923.04 *Notice to Leave Premises* (“R.C. 1923.04 notice”) on August 18, 2021 by posting it on the front door of the premises. A copy of the R.C. 1923.04 notice was attached to the Complaint, admitted and marked as Plaintiff’s Exhibit A.
- {¶16.} The stated reason for eviction in the R.C. 1923.04 notice was “Behind in Rent.”

{¶17.} Plaintiff did not serve Defendant with any other notices.

{¶18.} Plaintiff filed his Complaint alleging he was terminating Defendant's right to possession for nonpayment of rent; termination of month-to-month or other periodic tenancy or expiration of lease; and violation of tenant duties under R.C. 5321.05, specifically "ten people living in house."

{¶19.} Defendant resides in the premises with her six minor children.

{¶20.} Defendant attests she applied for rental assistance through CHN Housing Partners and has been approved if Plaintiff is willing to accept the funds.

CONCLUSIONS OF LAW:

{¶21.} Both parties acknowledge that the tenancy commenced pursuant to a lease with a term from May 1, 2019 until May 1, 2021. Clause 5 of the lease provided that the Landlord would pick up the monthly rent of \$850.

{¶22.} Following the expiration of the lease term, a month-to month tenancy was created when Defendant continued to occupy the premises and Plaintiff continued to stop by the premises and collect rent.

{¶23.} When Plaintiff stopped by the premises for two consecutive months, collecting rent for May in early June 2021 and rent for June on July 6, 2021, Plaintiff established a course of conduct that gave Defendant the expectation that she had a month-to-month tenancy, could pay rent for the previous month during the first week of the current month, and that Plaintiff would come by premises to collect the rent when due.

{¶24.} Generally, when a landlord seeks to terminate a month-to-month tenancy, notification must be in a manner consistent with R. C. 5321.17 (B), which requires a notice be given at least thirty days prior to the periodic rental date and notifies the tenant that the tenancy will terminate on a certain date.¹ If a tenant is still occupying the premises after the termination date provided in the notice of termination, then the landlord shall serve an R.C. 1923.04 notice to leave the premises before the commencement of any eviction action.²

{¶25.} On July 29, 2021, after Defendant had earlier complained about a condition in the premises created by Plaintiff's worker that Defendant perceived was hazardous to her children, Plaintiff sent Defendant a text stating "your lease has expired [and] it is in our best interest that you find another place."

¹ Likewise, if a Landlord seeks to modify the terms of a month-to month tenancy, notification of the proposed modified terms will also require advance notice of at least thirty days.

² *Indian Hills Senior Cmty., Inc. v. Sanders*, No. 78780, 2001 WL 958055, at *2 (Ohio App., 8th Dist., Aug. 23, 2001), citing *Siegler v. Batdorff*, 63 Ohio App.2d 76, 408 N.E.2d 1383 (8th Dist. 1979).

{¶26.} After sending the July 29, 2021 text, Plaintiff did not stop by in early August to collect rent for July 2021, as he did the previous two months, nor did Plaintiff provide Defendant with a written notice informing her of the termination of the month-to-month tenancy. Instead, on August 18, 2021, Plaintiff served a R.C. 1923.04 notice that simply stated “Behind in Rent.”

{¶27.} Several lower courts have held that the R.C. 1923.04 notice is not required to state the reason for the eviction³. However, if such a notice includes a statement of the reason for the eviction, it may preclude the landlord from asserting any other reasons in the eviction action⁴.

{¶28.} The allegations Plaintiff chose to raise in his Complaint are not the same as the stated reason in the R.C. 1923.04 notice. Plaintiff filed the Complaint alleging nonpayment of rent; termination of month-to-month or other periodic tenancy or expiration of lease; and violation of tenant duties under R.C. 5321.05, specifically “ten people living in house.”

{¶29.} Besides the fact that the R.C. 1923.04 notice does not state nonpayment of rent, the Court would not recognize this as a valid claim against Defendant as Plaintiff appears to have created the nonpayment situation by not attempting to collect rent in early August 2021, as Plaintiff had done consistently in the months of June and July 2021.

{¶30.} In addition, the termination of a month-to-month tenancy, which requires the issuance of a termination notice pursuant to R.C. 5321.17 (B), or the termination for an alleged violation of a tenant’s R.C. 5321.05 obligations, which requires a written termination notice specifying the alleged violation pursuant to R.C. 5321.11, require a written notice that notifies the tenant that the tenancy will terminate on a certain date.

{¶31.} If a tenant is still occupying the premises after the termination date provided in the notice of termination, then the landlord shall serve an R. C. 1923.04 notice to leave the premises, a prerequisite before the commencement of any eviction action.

{¶32.} Plaintiff did not serve Defendant with a notice of termination effectively notifying Defendant that the tenancy would terminate on a date certain. As such, Plaintiff could not serve the R.C. 1923.04 notice on Defendant until after the tenancy has been terminated. Without proper service of the R. C. 1923.04 notice, this court lacks jurisdiction to proceed with this matter.

³ *Venetta v. Battle*, 10th Dist. No. 88AP-1044, 1990 WL 157344 (Oct. 18, 1990); *N.W. Ohio Food Marts, Inc. v. Mugg*, 6th Dist. No. L-86-115, 1987 WL 7791 (Mar. 13, 1987); *Gerber v. Bistor*, 9th Dist. No. 1795, 1982 WL 2806 (Oct. 27, 1982); *Hawkins v. Collier*, Portsmouth M.C. No. 87-CVG-884 (Sept. 10, 1987).

⁴ *Venetta v. Staples*, Franklin M.C. No. M88-CVG-12477 (May 13, 1988). *Cf. Milbourn v. Aska*, 81 Ohio App. 79, 82, 77 N.E.2d 619, 620 (3rd Dist. 1946).

RECOMMENDATION:

{¶33.} Defendant's *Motion to Dismiss* should be granted and the Plaintiff's first cause of action dismissed for lack of subject matter jurisdiction.


H. Edward Gregory III
Magistrate, Housing Division

ATTENTION: A PARTY MAY NOT ASSIGN AS ERROR ON APPEAL ANY MAGISTRATE'S FINDING OF FACT OR CONCLUSION OF LAW UNLESS THE PARTY TIMELY AND SPECIFICALLY OBJECTS TO THAT FINDING OR CONCLUSION AS REQUIRED BY CIV. R. 53(D)(3)(b). ALL OBJECTIONS TO THE MAGISTRATE'S DECISION MUST BE FILED IN WRITING WITHIN FOURTEEN DAYS OF THE JOURNALIZATION OF THIS DECISION. OBJECTIONS MUST BE FILED EVEN IF THE TRIAL COURT HAS PROVISIONALLY ADOPTED THE MAGISTRATE'S DECISION BEFORE THE FOURTEEN DAYS FOR FILING OBJECTIONS HAS PASSED. OBJECTIONS MUST COMPLY WITH THE OHIO RULES OF CIVIL PROCEDURE, AND THE LOCAL RULES OF THIS COURT. FOR FURTHER INFORMATION, CONSULT THE ABOVE RULES OR SEEK LEGAL COUNSEL.

SERVICE

A copy of this Magistrate's Decision was sent by regular U.S. mail/email to the parties on 11/18/21. 