

CVG-09-22798



IN THE TOLEDO MUNICIPAL COURT
TOLEDO MUNICIPAL COURT
(HOUSING COURT)
TOLEDO, OHIO
FEB 11 1:26

Ottawa Cove Apartments II
Limited Partnership,

CLERK
VALLEE PAN ENGLISH
CASE NO CVG-09-22798

Plaintiffs,

-VS-

ORDER

Brittany Butts,

Defendants

This Matter came before the Court on December 3, 2009 when Plaintiff, Ottawa Cove Apartments II Limited Partnership, filed a Complaint in Forcible Entry and Detainer for Past Due Rent and Other Monetary Damages against Defendant, Brittany Butts. In the Complaint, Plaintiff asserted that Plaintiff and Defendant were parties to an Approved Lease for Subsidized Programs. Plaintiff asserted that Defendant failed to pay rent for the month of November 2009. Plaintiff claimed that it served Defendant with a Notice to Leave the Premises on November 12, 2009 and that Defendant has unlawfully and forcibly detained the leased premises since November 25, 2009. Plaintiff sought restitution to the premises, rent and late fees in the amount of \$71.00, and \$1.30 per day for past due rent from December 1, 2009 until possession was returned to Plaintiff.

A hearing was conducted before the magistrate on January 6, 2010. The magistrate entered judgment for possession to Defendant and found that Plaintiff had established a pattern of accepting late rent. The magistrate further found that Defendant had tendered full rent (through December 31, 2010) three days after notice. This Court adopted the magistrate's decision.

JURNALIZED TAL FEB 11 2010

On January 25, 2010, Plaintiff filed objections to the magistrate's decision. Plaintiff asserted that Defendant's rent was due on November 1, 2009 and that Plaintiff served Defendant with a 10-day notice to vacate on November 12, 2009. Plaintiff claimed that Defendant did not attempt to pay her rent until November 27, 2009. Plaintiff contested that Defendant did not tender the rent payment three days after the notice was served, but rather, three days after the 10-day notice period expired. Plaintiff asserted that it maintains a policy of accepting late rent payments during the 10-day notice period, but that once the 10-day period expires, late payments are not accepted absent special circumstances. Plaintiff contended that its actions were entirely consistent with this policy. Plaintiff admitted to accepting some late rent payments from Defendant, but said that it never accepted late payments beyond the 10-day notice period. Plaintiff cited *Schroeder Company v. Coates* (Ohio App 6th Dist 2007), 172 Ohio App 3d 254 and *Southgate Woods Apartments v. Brenda Lanier* (Ohio App 6th Dist 1983), 1983 WL 7006, which Plaintiff claimed supported its argument that it was permitted to institute the action against Defendant because of Defendant's failure to tender payment within the 10-day period.

On February 3, 2010, Defendant filed a Memorandum in Opposition to Plaintiff's Objections to Magistrate's Decision and Findings. In this Memorandum, Defendant asserted that the record indicated the magistrate made her decision based on equitable considerations. Defendant argued that it is well within the power of the trial court to deny restitution based on equitable grounds. Defendant cited *Heritage Hill, Ltd. v. Nusser* (Ohio App Ross County 1986), 1986 Ohio App LEXIS 7648, which Defendant argued supports the proposition that "a clause in a lease providing for a forfeiture for non-

payment of rent is only for the purpose of securing payment of rent, and that forfeiture will not be allowed if the rent is tendered and paid after the default.” Defendant further cited *Heritage Hills*, which said that “a lease will not be forfeited for mere non-payment of rent where the equities of the parties can be otherwise adjusted [i]t is only where the conduct of the Defendant is willful or malicious or where Plaintiff cannot be made whole otherwise than by forfeiture that equity will not relieve forfeiture.” *Heritage Hills*, 1986 Ohio App LEXIS 7648 Defendant asserted that her failure to pay rent on time was not willful or malicious, but due to circumstances beyond her control in that she was in Columbus caring for her ailing mother Defendant claimed that she attempted to pay her rent quickly upon her return from Columbus and informed Plaintiff’s property manager of this

The Court must address Plaintiff’s objections and determine whether to grant Plaintiff’s request to reverse the magistrate’s decision In considering these objections, the Court must conduct an “independent review as to the objected matters” as required by Ohio Rule of Civil Procedure 53(4)(d)


In reviewing the record, the Court finds that magistrate has properly determined the factual issues and appropriately applied the law The record indicates that the magistrate’s decision was based on equitable considerations and it is within the power of the trial court “to weigh all equitable considerations in determining whether a forfeiture is to be declared” *Southern Hotel Co. v. Miscott, Inc* (Ohio App Franklin County 1975), 44 Ohio App 2d 217 Defendant was out of town caring for her ailing mother She tendered her rent payment upon her return and only three days beyond the expiration of the 10-day period Defendant cares for her two young children and was capable of

making Plaintiff whole on the date of the hearing before the magistrate. Additionally, this Matter can be distinguished from *Southgate Woods* and *Schroeder*. In *Southgate Woods*, the tenant did not tender payment until after the following month's rent was due and an action for restitution had been initiated. While in this case, Defendant tendered payment only three days past the notice period and prior to any action being initiated. In *Schroeder*, the tenant did not tender payment until over a week after the notice period expired and never offered an excuse for non-payment. Here, Defendant tendered payment less than a week after expiration of the 10-day period and explained to Plaintiff's property manager that she had not been able to make a payment because she was out of town caring for her mother.

Based upon the equitable considerations and Plaintiff's repeated acceptance of late payments from Defendant, the Court affirms the magistrate's decision.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's objections are not well-taken and the magistrate's decision is AFFIRMED.

Clerk to notify parties


C. Allen McConnell, Judge

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CLERK OF COURT
TOLEDO MUNICIPAL COURT
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CVC-08-22798



Case No. _____

TOLEDO MUNICIPAL COURT

MAGISTRATE'S DECISION AND FINDINGS

Case called for hearing. Plaintiff present (with) (without) counsel. Defendant (present) (not present) (with) (without) counsel. JAN 11 11:38
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CLERK

- Defendant in default under (written) (oral) lease since _____
- Notice to vacate (was) (was not) lawfully served.
- With consent of Defendant

Magistrate finds It established pattern of accepting late rent - A tendered full rent 3 days after notice served (through 12/30/09)

Judgment to be entered for (Plaintiff) (Defendant) for possession, execution of writ stayed through _____

If paid, Plaintiff to move to vacate judgment and dismiss.

- Writ to issue at Plaintiff's request.
- Answer date 2nd Cause _____ or continued for completed service.
- Case called at _____ p.m. Plaintiff and Defendant failed to appear. First Cause dismissed for want of prosecution. Second Cause answer date: _____
- 1st Cause dismissed at Plaintiff's request. Second Cause answer date: _____
- Case (dismissed) (continued) as improperly filed by non-attorney.
- Plaintiff present (with) (without) counsel. Defendant (present) (not present) (with) (without) counsel. At request of (Plaintiff) (Defendant) (Both), 1st Cause continued. To Assignment Commissioner for new hearing on/or after _____. Second Cause answer date: _____

Case referred to Housing Specialist for report as to _____

and any other conditions which constitute Housing Code Violations. Report to be filed with Assignment Commissioner by _____. Notify Housing Specialist and parties.

1st Cause continued for lack of service. Plaintiff to request alias service by _____ or 1st Cause subject to dismissal for want of prosecution.

DATE: JAN 06 2010

Magistrate

JAN 11 2010