Elyria Municipal Court
601 Broad Street
Elyria, Ohio 44035

VESTA CORPORATION, DBA
WESTWAY GARDENS,
Plaintiff

vs.

LACHANDRA J. JONES
Defendant

MAGISTRATE'S DECISION

Civil No. 2017CVG01908

Pursuant to Rule 53 this matter was referred to the Magistrate for hearing and decision. Plaintiff and Defendant appeared through counsel. This decision is based the evidence duly admitted at trial and the legal arguments made by the parties through a prior motion for summary judgment that was denied, at trial, and in memoranda filed afterwards.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant has been a tenant of Plaintiff of Defendant at 1015 Melvyn Lane, Elyria, Lorain County, Ohio, since October 7, 2013, under a written lease governed by HUD regulations. Her rent and utilities are subsidized by HUD in this project-based Section Eight housing complex. Her lease required her to undergo a "recertification" process to confirm her ongoing eligibility for this subsidy by October 1st each year. At the time of her last recertification on August 31, 2015, she acknowledged in writing her duty to again "meet with Management Office and supply the required information" in 2016 and that she understood that "[c]ooperation with the recertification requirement is a condition of continued program participation."

Pursuant to the terms of paragraph 15 of Defendant's 2015 lease as to recertification, Plaintiff at the beginning of June of 2019, provided her a "reminder notice" that she needed to begin her annual recertification. This notice and, when she did not respond, then a second and a third one warned that she had to "meet with Management Office... to supply the required information" and that her failure to "respond before 10/1/2016" would give Plaintiff the "right to terminate your assistance and charge... market rent." Instructions were given for what she had to bring when she "attend[ed] the interview." The third notice, dated August 1st, adds a warning that her rent would increase without further notice and that if the increased amount of rent was not paid that Plaintiff "may terminate your tenancy and seek to enforce termination in court."

Served: Graham
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Though not required by HUD, Plaintiff persisted in trying to contact Defendant after August 1st, delivering two more written alerts for her to recertify before her anniversary date. One, on August 15, 2016, said its contact efforts with her had been "unsuccessful" and that she "MUST come into our office in person" by August 30th under risk of "losing her rent subsidy" and becoming "responsible for full market value rent." The second was delivered on September 1st, advising her that if she did not complete her annual recertification, her subsidy would terminate September 30th, resulting in market rent of $672, which if unpaid, "will begin legal proceedings for non-payment." Defendant denies receiving *any* of the foregoing notices.

After the October 1st deadline passed, Plaintiff still pressed her to come in. On November 16th and 29th letters were delivered to her door with blank spaces for her to propose three different dates and times to meet for the recertification interview. Defendant acknowledges receiving these and filling out at least one. She ignored the request for specific dates and times to meet and wrote in the spaces: "any time." She had her friend take the "any time" response to the office and through her friend asked for and received papers to begin to fill out at home for recertification.

The friend was sent to avoid the risk of her encountering the project manager, Mary Jennice. A civil protection order prevented any communication by her with Jennice. This friend, Caption Dominquez, another tenant, became her "appointed contact person" and liaison with management, regularly carrying papers, like work orders and utility checks, back and forth.

About a week before Christmas in 2016,[1] Defendant had filled out the papers and sent Caption back to drop them off. The packet was incomplete. Though she had signed at all of the necessary spots, she did not write in the corresponding dates as required. She also did not send essential verification documents: a copy of her social security award letter, a public assistance statement, and six months of bank statements. Jennice testified that she specifically pointed out to Caption the various deficiencies to relay to Defendant, which she assumed that Caption did.[2]

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[1] When exactly she dropped the papers off was in dispute. Defendant remembers her tree at the time still in its box *before* Christmas. Plaintiff's manager says it was after New Year's Day in 2017. That Defendant signed where required but did not put the date next to the signature, Plaintiff urges was her deliberate attempt to conceal her delay. This is improbable. On the other hand, Plaintiff was unable to explain its lack of a record, as if no system was in place to record receipt of important papers like these. Section 7-6(B) of HUD Handbook 4350.3 required Plaintiff to "maintain a tracking system." Plaintiff failing in this, Defendant's date should control.

[2] Defendant attempted to introduce evidence that Caption told her that she was "all set" after Caption had met with Jennice, which is disregarded for its truth based on Plaintiff's hearsay objection. While this might have been confirmed by Caption if she testified, Caption may have corroborated the testimony of Mary Jennice instead. Her absence will be construed against the Defendant.

Without Defendant meeting with management, these documents properly dated, the necessary verification documents supplied, and her signing of a final "HUD-50059" form, Defendant's belated attempt to start the recertification process remained in limbo.

On June 20, 2017, Plaintiff served a "Ten (10) day Notice of Termination" on her, by mail and delivery to her door, to propose the termination of her tenancy due to her failure "to respond" to the recertification notices before her October 1, 2016 anniversary date. Her "failure to recertify" was described as "material noncompliance" with the Lease, so that her "rent has accrued at the rate of $672 per month since October 2016."

Defendant called Plaintiff the very next day on June 21, 2017, to express her surprise at receiving the termination notice, asserting that she had already completed recertification by submitting the paperwork in December. Some initial confusion seems to have ensued on the part of the Plaintiff whether Defendant had submitted those papers. A meeting was set for June 27th. Although Jennice was not going to be the one to meet with Defendant, when Defendant was a half an hour late, Jennice was the one to call Defendant to ascertain if she was still coming. Defendant emphatically refused, telling Jennice: "Go ahead and take me to court you fucking bitch. I love making an ass out of you in court." On June 28, 2017, Jennice sent a follow up letter to Defendant urging her to reschedule within the following three days. She did not.[3]

Plaintiff served the "three day notice" to leave the premises required by R.C. §1923.04 on Defendant on July 10, 2017 and filed this action on July 21, 2017 for eviction of Defendant.

Defendant defends on grounds that Plaintiff violated various procedural requirements imposed by HUD as conditions precedent to terminating a subsidized tenancy. Even if disregard of these procedures had not been expressly raised by her as a defense, courts have a duty to ensure that notices and procedures leading up to an eviction comply with such standards. Our court of appeals in Summit Management Services v. Gough, No. 19714, 2000 WL 1226605 (Summit App. 8/30/00), explained that in cases like this one that a "magistrate must preliminarily determine whether the landlord complied with the procedural requirements of notice." All of the notices and procedures leading up to the termination of a subsidized tenancy must follow not only the dictates of the lease but applicable federal regulations. Cuyahoga Metro. Hous. Auth. v. Younger, 93 Ohio App.3d 819 (Cuyahoga 1994). Crossroads Summerset Ltd. v. Newland, 40 Ohio App.3d 20, 24 (Franklin 1987). Paragraph 23(b) of the parties' lease likewise states that any

[3] Defendant ultimately completed a certification while this case was pending, just before October 1, 2017. Defendant concedes that the eventual completion of this process is not a defense to the claims of the Plaintiff.

"termination of this Agreement by the Landlord must be carried out in accordance with HUD regulations, State and local law, and the terms of this Agreement." *See also* Natl. Church Residences of Worthington v. Timson, 78 Ohio App.3d 798, 805 (Franklin 1992).

Defendant relies mostly on HUD's Multifamily Occupancy Handbook 4350.3 Rev-1 ("the Handbook") that not only reiterates but considerably expands on the pertinent federal regulations to provide guidance for owners and subsidized tenants on matters including recertifications and terminations. The lease between the parties is in fact the "Model Lease" supplied by the Handbook, incorporating many though not all of its directives as lease terms. *See* Appendi x 4-A: Model Lease for Subsidized Programs (Form HUD-90105-A). The Handbook also provides owners with sample documents, like the "reminder notices" for recertification used by Plaintiff here. *See* Handbook Exhibits 7-1 to 7-4. When the notices and procedures required by the Handbook have been incorporated into a lease, they become contractually binding on the parties, whether or not the provisions originate in federal regulations.

A) Defendant breached her lease by failing to timely recertify and pay market rent

Paragraph 15 of the parties' "Model Lease for Subsidized Programs," governed the parties' respective duties as to "regularly scheduled recertifications." The lease plainly states that "every year around the first day of June" Plaintiff must ask Defendant to "report the income and composition" of her household by a specific date for "purposes of determining the Tenant's rent and assistance payment." By signing the lease, Defendant contracted "to provide accurate statements of this information and to do so by the date specified in the Landlord's request." The lease warns that Defendant's failure to "submit the required recertification information by the date specified in the Landlord's request" may result in a "penalty" of "higher, HUD-approved market rent," without any waiting period usually required for changes to a subsidy. *Id.*

Paragraph 23(d) of the lease describes "material noncompliance with the lease" to specifically include "failure of the tenant to *timely* supply all required information on the income and composition, or eligibility factors, of the tenant household" in addition to "[n]onpayment of rent or any other financial obligation under the lease." (emphasis added). When Defendant did not report to Plaintiff to begin recertification by her October 1, 2016 anniversary date, she was in breach. The lease authorized this breach to automatically raise her rent to $672. She then breached her lease by not paying market rent. The lease supports the relief requested by Plaintiff.

B) The terms of the HUD Handbook "obligated" Plaintiff to file this eviction

The provisions of the Handbook actually require an owner to pursue removal of its tenant in this situation. The evidence preponderates that Plaintiff properly served all required notices leading up to Defendant's annual recertification deadline, that is, following each "Recertification Step" in Figure 7-3 of Chapter 7 of the Handbook. Timely recertification was essential. Section 7-5(A) is clear that "[a]nnual recertifications *must be completed* by the tenant's recertification anniversary date." (Emphasis added). This does not mean that recertification cannot occur later. In fact, the Handbook offers scenarios for recertification to begin and be processed after the anniversary date has passed. Still, the indispensable event in the recertification process is the tenant's reporting for a "recertification interview." See Sections 7-8(C)(1)(b), 7-8(D)(2)(b), 7-8(D)(2)(a)(2), and 7-8(D)(3)(a)(2). In no uncertain terms, Section 7-8(D)(3)(d) of the Handbook mandates that "an owner is *obligated to evict* for nonpayment" after the tenant "fails to report for the recertification interview *and* fails to pay market rent." (emphasis added). Defendant never tried to report for that interview and never tendered market rent.

An eviction may be avoided only if Defendant is excused from reporting for her recertification interview, a basis exists to nullify the mandate that she pay market rent, or some other superseding factors inure to her benefit such as may arise in equity.

C) Defendant's denials of receipt of "reminders" were not credible and not a defense

Defendant denies receipt of and therefore contends that Plaintiff must not have ever issued any of the recertification notices required by Section 7-7(B)(1) of the Handbook before her October 1st anniversary date.[4] Plaintiff introduced the three "official reminders" as business records that its witnesses testified were prepared and delivered to her door on June 1st, July 1st, and August 1st in accordance with Section 7-7(B)(2) through (4) of the HUD Handbook. Each notice advised her to "contact Management Office... as soon as possible to schedule an appointment for an interview" and warned of the consequences of her failure to "respond," that is, "paragraph 15 of your lease gives us the right to terminate your assistance and charge you market rent: $672, effective 10/01/2016." She also denies receiving either of the two follow-up notices that Plaintiff issued as courtesy reminders on August 15th and September 1st. While the maintenance supervisor testified to delivery of each of these in the exact same way, that is, on

[4] She does not recall but does not dispute receiving the "initial notice" of her obligation to recertify with her prior year's recertification pursuant to Section 7-7(B)(1) of the Handbook.

her door, Defendant insists that Plaintiff could have only delivered the two notices in November *after* her anniversary date passed, because those are the only ones that she remembers receiving.

It is too coincidental that Defendant concedes receiving only the two notices that Plaintiff had their delivery notated and photographed. Defendant seems to ask this Court to believe that her manager, Jennice, (1) prepared but deceitfully withheld the three official reminder notices, (2) fabricated two more courtesy notices to look as if she was really trying to get her in before her anniversary date expired but which she never issued, and (3) finally, more than a month after her anniversary date, perhaps remorseful for withholding delivery of the five prior written communications, for the first time actually ensured that two more notices were prepared and delivered to her and documented. This argument is implausible. Defendant is not at all credible.

Moreover, the Handbook is written to only guarantee a tenant's *actual receipt* of only *one* notice about the annual recertification process, that is, an "initial notice." This is delivered to the tenant upon her signing the original lease and *again and again* at the completion of each annual recertification. Section 7-7(A). It is a not a "reminder notice." Every tenant must "sign and date the *initial notice* to *acknowledge receipt*" which notice shall"(1) Refer to the requirements in the HUD model lease regarding the tenant's responsibility to recertify annually [and] (2) Specify the cutoff date... by which the tenant must contact the owner and provide the required information and signatures necessary for the owner to process the recertification." Handbook Section 7–7(B)(1) (emphasis added). She did not dispute at hearing having received a copy of this notice, likely because the August 31, 2015 recertification paper with her signature on it was introduced into evidence. HUD could have but has not required more.

D) Defendant was not entitled to additional "termination of assistance" procedures

Defendant argues that the Handbook entitled her to receive additional notice and process before her rent increased to a market rate on October 1st. After all, this increase was effectively the same as a termination of her subsidy. She argues that Plaintiff had to provide her with the same procedural steps connected with a "termination of assistance" found at Section 8-6(A) of the Handbook. Chapter 8 has separate dedicated provisions covering "terminations of assistance" and cautions that "[o]wners are authorized to *terminate assistance* only in limited circumstances and after following required procedures to ensure that tenants have received proper notice and an opportunity to respond." Section 8-1(A) (emphasis added). Indeed, the language in Chapter 7 of the Handbook that covers the recertification process and that directs the third reminder notice to also operate as a notice of termination makes reference to Chapter 8, at least parenthetically:

"(See Chapter 8 for information on the termination of assistance)." This parenthetical reference in Chapter 7 could be read to fully incorporate that Chapter 8's procedures for "termination of assistance." *See* Section 7-7(B)(4).

No question exists that Defendant here received less "process" than would have occurred under this "termination of assistance" section in Chapter 8. The last official notice before her October 1st increase of her rent to the market rate, the August 1, 2016 "Third Reminder Notice/Notice of Termination," did lead to the termination her subsidy without the same right for her to request an administrative review hearing within ten days as comes with "terminations of assistance" at Section 8-6(A)(3)(e) and without the same delivery to her of notice both by mail and to her door, as required for notices of "termination of assistance" at Section 8-6(A)(4).

However, the Handbook's language and procedure does not support Defendant's argument. Section 7-7(B)(4)(a) dictates that the third recertification reminder notice warn that *it* "serves as a 60-day notice to terminate assistance, and as a 60-day rent increase notice." Its wording is drawn from "Exhibit 7-4" of the HUD handbook, referenced at Section 7-7(B)(4)(d), to be HUD's official "sample" of the third notice. Unlike the prior letters that are just reminders, this third notice adds details about the consequences of failing to timely respond, that is, an "increase in rent will be made *without providing you additional notice*" and that "[i]f you fail to pay the increased rent, *we may terminate your tenancy and seek to enforce termination in court.*" (emphasis added). This language is from Sec. 7-7(B)(4)(b)(2). This language unequivocally signals that HUD did not intend for the tenant to have any other notice or opportunity to be heard before loss of her subsidy.

In the present case, Defendant actually received two more chances to be heard about loss of her subsidy, through the "ten day notice" termination procedure and this eviction action. To declare this "Third Reminder notice/Notice of Termination" inadequate as notice or the ten day notice" termination procedure and this state court forum insufficient as a meaningful opportunity to be heard would require no less than a finding aspects of the HUD regulatory scheme offend the minimum standards of due process under the Fifth and Fourteenth Amendments to the United States Constitution. That is not called for and would be extreme.

Defendant insists a different outcome is merited based on this Court's decision in Independent Mgmt. Svcs of Ohio, Inc. v. Davis, Case No. 2014CVG01244 (Elyria Mun. 7/18/14). There, the owner was required to follow Section 8-6(A) procedures for "terminations of assistance" before increasing the tenant's rent, after delays in completing the recertification

led the owner to abruptly end the process with only a few days' notice to the tenant. Davis is distinguishable. That tenant *timely* responded to the recertification notices *before* her anniversary date. The process became confounded by a surprise audit of the owner by HUD, leading the owner to ask for more information from a tenant already hindered in responding due to her health. Unlike the present case, the increase in her rent to market rate there had nothing to do with her failure to respond to any of the Handbook's notices, but subsequently evolving events. The warning in her "Third Reminder Notice/Notice of Termination" that rent would increase if she did not respond before her anniversary date was moot. She was entitled to additional notice and process before loss of her subsidy due to a *subsequent* problem, albeit a failure "to provide required information at the time of recertification." Sections 8-5(A), (B) & (G). *See also,* Hidden Meadows Townhomes v. Ross, No. C–120045, 2012 WL 6674412 (Hamilton App. 12/21/12).

In the present case, the increase in rent to market rate arose exclusively from Defendant's inaction *before* her anniversary date. She received all of the process due to her by the plain language of the "Third Reminder Notice/Notice of Termination" warning that she would *not* receive "additional notice" of the increase of her rent to the market rate of $672 if she did not respond before her anniversary date and that her tenancy would end if she did not pay.

Finally, engrafting further layers of due process on the existing scheme, whether notice or opportunity to be heard, makes no sense *at the time* of delivery of the Third Reminder Notice/Notice of Termination. Apart from the fact that most of the same information in the disclosures at Sec. 8-6(A) for terminating assistance is *already* incorporated into this notice, *adverse action* is *not* yet contemplated *nor will be taken* unless and until the tenant totally fails to respond during the following *sixty days*. In any case, the tenant's recertification interview is itself a type of hearing. No reasonable grounds can be imagined for a tenant to need additional notice or an opportunity to be her heard when this notice is given.

E) Dual service was not required of the last reminder notice

Independent from the above argument, Defendant asserts that the potential devastating loss of her subsidy if she did not respond by her anniversary date required the Section 7-7(B)(4) "Third Reminder Notice/Notice of Termination" issue both by mail and delivery to her door.

Neither the lease nor regulations nor the Handbook directs any particular manner of service of *any* of the "reminder notices." Section 7-7(A) only requires owners at the outset to "inform" their subsidized tenants about the annual recertification process. As to delivery of each reminder notice, the Handbook uses the verb, "provide." Section 7-7(B)(1) - (4). Its examples

describe owners that "send" the notices, meaning mailing is clearly acceptable.[5] *See e.g.,* Figure 7-4. These examples, though, do not preclude delivery to her door as an alternative method.

HUD knows very well how to craft service requirements. Dual notice is required for the notice to terminate assistance under Sections 8-6(A)(4) and (5) of the Handbook, to serve a notice to terminate a tenancy "for other good cause" under 24 C.F.R. § 247.3(b), and to deliver the "ten day notice" terminating the tenancy under 24 C.F.R. §247.4(b). That HUD chose to dictate such methods of delivery in these other situations means HUD obviously did not intend any specific method of service of the various reminder notices, including this last one. Nothing in the Handbook, regulations, or the lease required service different than done here.

F) The ten day notice to terminate the tenancy was valid

Defendant objects that her tenancy cannot be terminated because the "termination notice" served on her on June 20, 2017, pursuant to Section 8-13(B)(2) of the Handbook and paragraph 23(e) of the parties' lease lacked two disclosures, *i.e.,* a specific balance due and its computation date for unpaid rent and her right to request reasonable accommodation based on disability.

The Handbook cautions at Section 8-1(B), an "owner may only terminate a tenancy in limited circumstances as prescribed by HUD regulations and the lease *and must follow HUD* and state/local *procedures."* Under Section 8-1(C), the policies and procedures that "must be followed when initiating a termination" include "proper notices and documentation." Section 8-13(B) of the Handbook explicitly includes its "termination notice" among "the minimum standards required by HUD" to end a subsidized tenancy. It thus initially seems that an owner must not only strictly comply with the dictates of the lease and federal regulations, but those of the Handbook. *See* discussion and cases cited at Ishkin, Ohio Eviction and Landlord –Tenant Law (5th Ed.) pp. 198-208 (citations omitted). After all, a potential lifetime tenancy protected by federal law with rent based on income is a property right with a value that cannot be overstated.

On the other hand, a survey of the case law suggests that dismissals based on breaches of the dictates of the Handbook almost always *also* involve a breach of a regulation or lease provision. *See Id.* That the missing disclosures in this case lack corresponding mandates either in a federal regulation or the Model Lease must be seriously taken into account.

The federal regulations themselves do not require owners follow the Handbook. They set out certain "requisites of [the] termination notice" at 24 C.F.R. § 247.4(a), which, pursuant to 24

[5] The Ohio Supreme Court has said that the word "send" in a statute does mean that receipt must be proven. Ford Motor Credit v. Potts, 47 Ohio St.3d 97 (1989) (return receipt not needed for certified mail notice of repossession).

C.F.R. § 247.3, must be included to make a "termination... valid," *i.e.*, ensuring that the notice conveys with specificity reasons for the termination and advises of the right to defend. She must also be told of her "opportunity to respond to the owner." 24 C.F.R. §880.607(c)(1). These were duly achieved by Plaintiff's notice to Defendant. While the Model Lease demands an owner's adherence not only to the federal regulations but to "administrative procedures...specified in HUD's...handbooks and instructions" as to matters like calculating rent and recertification, *see* ¶¶4, 15(a), 16(c), it *omits* "handbooks" from what must be followed when an owner ends a tenancy: "Any termination of this Agreement by the Landlord must be carried out in accordance with HUD regulations, State and local law, and the terms of this Agreement." ¶23(b). This omission is "glaring." *See discussion at* Bridgeport Towers, LLC v. Berrios, 57 Conn. L. Rptr. 108, 2013 WL 6171376 (Conn.Super.Ct. Nov. 1, 2013). The Model Lease basically incorporates the applicable federal regulations, adding some phrasing and setting times, such as "10 days within which to discuss the proposed termination." *See* ¶ 23(e). Owners are bound to use this Model Lease which purports to have *all* of the applicable "terms required by HUD for the program under which the project was built." *See* HUD-90105a (12/2007) ref. HB 4350.3 Rev. 1.

Another problem is that the U.S. Supreme Court in dicta seems to have minimized "the various 'handbooks' and 'booklets' issued by HUD [to] contain mere 'instructions,' 'technical suggestions,' and 'items for consideration.'" Thorpe v. Hous. Auth. of City of Durham, 393 U.S. 268, 275, 89 S.Ct. 518, 21 L.Ed.2d 474 (1969) (comparing non-binding HUD publications with manuals). The key question for some courts has been why have the Handbook's directives not yet been published as regulations, as if not meant to be "binding" but only offering "guidance." U.S. v. East River Housing Corp., 90 F.Supp.3d 118, 133 (S.D.N.Y. 2015). The Handbook "by itself does not impose any legal obligations." Boardwalk Glenville Apts. v. Cage, No. 2007-CVG-3065, sli op. at 5 (Ohio Mun. Cleveland Hous. Div. 7/13/07). Most courts, though, give HUD handbooks "substantial weight as an official interpretation of statutes or regulations when the handbook at issue is not in conflict with a statute or regulation." Dobbs Crossing Associates, LP v. Hicks, No. TTDCV124018172, 2013 WL 3871361, at *3 (Conn. Super. 7/5/13)

The added notices prescribed by the Handbook thus should be viewed as facilitating those objectives of HUD that are explicit in the regulations or lease, that is, ensuring adequate notice and a meaningful opportunity to be heard before the disabled and destitute for whom these very provisions were promulgated lose their subsidies. Ignoring these omissions could lead to inequitable and unjust results. Their absence from Plaintiff's ten day notice here was presumably

inadvertent, as disclosure would have required negligible time or expense. Questions should be asked, not only whether Defendant may have been harmed by Plaintiff's noncompliance, but whether she may have been helped by Defendant's adherence. The answer to both here is "no."

(1) Nonpayment was disclosed with sufficient specificity

Section 8-13(B)(2)(e) of the Handbook directs that "[i]n the case of the tenant's nonpayment of rent, *the notice must include* the dollar amount of the balance due on the rent account and the date of such computation." (Emphasis added). The termination notice here states: "Effective October 1, 2016, you were obligated to pay market rate rent in the amount of $672 per month. Rent has accrued at the rate of $672.00 per month since October 2016."

Defendant is correct that the notice does not calculate a total balance on a date around the time of the ten day notice. On the other hand, it plainly states that Defendant owes $672, if only for October of 2016, an amount with a corresponding date. Defendant does not argue that she was ever prepared to pay that amount, so as to estop Plaintiff from evicting her for owing more.

The source for the language in the Handbook is actually the HUD regulation, 24 C.F.R. § 247.4(e), but the regulation itself does not *require* the disclosure as in the Handbook:

> (e) Specificity of notice in rent nonpayment cases. In any case in which a tenancy is terminated because of the tenant's failure to pay rent, a notice stating the dollar amount of the balance due on the rent account and the date of such computation shall satisfy the requirement of specificity set forth in paragraph (a)(2) of this section.

The wording at 24 C.F.R. § 247.4(e) thus indicates that this is only *one* of the ways to satisfy the overarching imperative at 24 C.F.R. § 247.4(a)(2) that the termination notice "state the reasons for the landlord's action with enough specificity so as to enable the tenant to prepare a defense." *See, e.g.,* P.R. Scott Co. v. Manasseh, 1985 WL 263988, at *2 (Conn. Super., 1985). The Handbook's directive is not in conflict with the regulation *unless* read that specificity as to nonpayment of rent may be achieved *only* in this way, even if and when the calculation is simple and applicable dates are as obvious as in the present case. In the absence of a regulation or a lease term otherwise – or showing a benefit to be had from more information – Plaintiff stating "rent has accrued at the rate of $672 per month since October 2016" was sufficiently specific.

After all, this eviction is not a typical "rent nonpayment case," where a tenant does not pay that which HUD's guidelines establish she can afford, but market rate rent was imposed as a "penalty" due to her failure to recertify. *See* Model Lease ¶15(e)[6] The ten day notice sufficiently

[6] "Penalty" is not used in the Handbook. This can be reversed by "extenuating circumstances." *See infra* Sec. G.

details that her inaction after receiving the notices led to her rent increase. Neither "failure to recertify" nor "nonpayment of rent" stands alone as a basis to terminate. The facts are conveyed with enough specificity for her to prepare a defense under these circumstances. *Cf.* Independent Mgmt. Svcs of Ohio, Inc. v. Davis, Case No. 2014CVG01244 (Elyria Mun. 7/18/14).

(2) Nondisclosure of her right to request reasonable accommodation became moot

Under Section 8-13(B)(2)(c)(5) of the Handbook, the ten-day notice of termination "*must*... [a]dvise that persons with disabilities have the right to request reasonable accommodations to participate in the hearing process." (Emphasis added). Plaintiff did not. This omission could be highly prejudicial to a tenant with a disability, whether or not known to an owner, undermining her "opportunity to respond to the owner" under 24 C.F.R. §880.607(c)(1).

The only two cases found that focus on this particular issue happen to be from Connecticut courts in 2013. They separately analyze the law and both reject this omission from a notice as jurisdictional – but neither precludes it from being raised as a defense. In Bridgeport Towers, LLC v. Berrios, 2013 WL 6171376, at *2, the court held that subject matter jurisdiction of a court is unaffected, "because the landlord... otherwise complied with *codified* state and federal termination of lease notice requirements." *Id.* at *1 (emphasis added). In Dobbs Crossing Associates, LP v. Hicks, 2013 WL 3871361 (Conn. Super. 7/5/13), a "default" eviction against a subsidized tenant with "severe mental illness" was vacated, with this omission from the notice of termination held to be a colorable defense. *Id.* at *1. The court seemed incredulous that the HUD Handbook would squarely mandate this notice among its "minimum standards... for the termination of a tenancy," without a regulation enacted or a provision incorporated into HUD's Model Lease, remanding this very issue to the trial court to determine "the propriety of the pretermination notice" in light of the confusing HUD authorities. *Id.* at 4.

Defendant here has dyslexia and ADHD, which she testified interfered with her ability to read and deal with a lot of paperwork at one time, so that it took "weeks" to fill out the papers for recertification and deliver them yet incomplete. Plaintiff obviously knew that she had some kind of disability based her SSI income.[7] Not only this section, but others in the Handbook demand owners' vigilance to inform tenants with disabilities of their rights, "strongly recommend[ing] that owners include statements about the right of individuals with disabilities to request

[7] No evidence was offered that Defendant ever requested accommodation or that Plaintiff even knew the nature of her disability. It is not permitted to ask questions about the nature of the disability. See Handbook Sec. 2-31(E).

reasonable accommodations in all written notices given to applicants and tenants." Sec. 2-38(C). In fact, one of Plaintiff's notices to Defendant, the third reminder notice for recertification, has this disclosure. It is absent from its other notices, as it is from other HUD sample notices.

Here, though, neither Defendant's disability nor Plaintiff's omission of this disclosure from the ten day notice of termination impeded her from *immediately* calling to set a hearing date after getting the notice and, after not showing up, emphatically *repudiating* the opportunity for a hearing in favor of litigation. Defendant has not implied a connection between her disability or this defect in the notice and her unambiguous repudiation. Defendant had been to court against the owner before and clearly chose litigation, a waiver of any defect or irregularity here.

Had she never requested a hearing, requested a hearing but not shown up without the communication here, or shown up for the hearing and had any problems at all, she may have had some argument.[8] In sum, she was not in any manner prejudiced by Plaintiff's omission of the "reasonable accommodation" language from the ten day notice nor has any argument that she might have received any benefit here from its inclusion.

G) Plaintiff had no duty to ask about "extenuating circumstances" until the interview

Defendant argues that she was deprived of the benefit of additional procedures at Section 7-8(D)(4) that "an owner must inquire whether extenuating circumstances prevented the tenant from responding prior to the anniversary date." Plaintiff admits that it never asked. Defendant asserts that such inquiry should have followed her delivery of the incomplete recertification packet in December of 2016. This would have opened the door to her complaining that she did not receive any of the recertification notices as well as explored "the disability related difficulties Ms. Jones had with the packet," possibly leading to her rapid completion of the recertification process. Extenuating circumstances" are only those "beyond the tenant's control." Section 7-8(D)(4)(a). However, "[i]f the tenant is a person with disabilities, the owner must consider extenuating circumstances when this would be required as a matter of reasonable accommodation." Section 7-8(D)(4). If extenuating circumstances exist, any increase in market rent is retroactively reversed back to the tenant's anniversary date. Section 7-8(D)(5).

A protocol exists. The owner must first ask if any such circumstances exist, but the burden then shifts to the tenant to "indicate[] that extenuating circumstances were present" and to

[8] Plaintiff did not indicate how her disability could have received accommodation if she had requested any. Sec. 2-39(C) of the Handbook states: "To show that a requested accommodation may be necessary, there must be an identifiable relationship, or nexus, between the requested accommodation and the individual's disability."

"promptly provide the owner with evidence of their presence." Section 7-8(D)(4)(b)(2). The owner must then provide "written notice of the decision," with "notice of [the] right to appeal the owner's decision" and an "opportunity" for a hearing within ten days to review "the decision to raise the rent to market rent" to be conducted by a previously uninvolved arbiter. Section 7-8(D)(4)(c) through (e). Important to remember is that this is part of the "recertification" section of the Handbook. Unlike the termination-of-tenancy process, paragraph 15(a) of the Model Lease expressly binds owners to comply with the requirements of the "handbooks and instructions" as to recertifications. Plaintiff admits that it never asked at the relevant times in this case.

When this occurs seems to be key. The Handbook says the inquiry is made "[a]t the time the tenant submits the required recertification information." Section 7-8(D)(4)(b).[9] Defendant argues that an owner should ask about extenuating circumstances on receipt of *any* of the "required recertification information." After all, the circumstances preventing a tenant from timely responding might likewise be interfering with her providing all of the information. Plaintiff argues that *all* of the "required recertification information" should be submitted before the owner needs to ask. No point would seem to lie in starting this process if the tenant's complete information might render her subsidy ineligible for renewal on other grounds.

The prescribed course of communications between the owner and tenant in this process reveals the obvious context for this exchange. Consider that the owner is not directed by HUD to pose this question in writing or make a written record of the answer. When the question is asked, the duty falls on the tenant *both* to "indicate[] that extenuating circumstances were present" *and* then "promptly provide the owner with evidence of their presence." This question and answer scenario suggests no less than face-to-face contact. In practical terms, this must occur as part of the recertification *interview*. The only case found on this subject was troubled that the inquiry did not occur when the parties "met... to confirm her continued eligibility for the subsidy." Somerset Homes v. Woodard, No. LT-021118-13, 2014 WL 2574037 at *5 (N.J. Sup. Ct. 5/22/14). At that time, *most* of the "required recertification information" likely has been or will be soon submitted. Implicit also is that the tenant will more likely than not be eligible for renewal of her subsidy, because only if there is *no* evidence of "extenuating circumstances" does HUD prescribe any record be prepared, that is, the "notice of decision." Sections 7-8(D)(4)(b) and (d).

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[9] Plaintiff's memorandum misquotes Section 7-8(D)(4)(b) to explicitly reference the "recertification interview."

Though every notice that she received alerted her of the importance of the recertification interview, she never responded to schedule one. Her own neglect to schedule a recertification interview forfeited her right to expect this inquiry.[10]

Also not to be forgotten is the very restricted scope of inquiry into "extenuating circumstances," that is, covering only the "circumstances [that] prevented [her] from submitting the information *prior to the recertification anniversary date*." Section 7-8(D)(4)(b)(1) (emphasis added). Defendant's denials that Plaintiff delivered the three formal and two courtesy reminder notices were the only evidence offered and not credible. Circumstances *after* her anniversary date, such as may have delayed her returning and completing the packet, are wholly irrelevant. In other words, Defendant's evidence was not persuasive that extenuating circumstances existed.

H) The prohibition against eviction does not apply until the tenant meeting occurs

Defendant contends that another section of the Handbook as to annual recertifications prohibited this eviction after she submitted the papers in December of 2016, relying on Section 7-8(D)(3)(f) which states: "The owner may not evict the tenant for failure to pay market rent after the tenant reports for the interview and the owner is processing the certification." This section was written to apply to "out of compliance" tenants like Defendant who have not started the recertification process before their anniversary date. Nothing in the regulations, the handbook or the lease excuses a tenant from reporting for an interview if papers have been submitted to the owner. Rather, her initial notice, every official reminder notice, and most of the letters to her, stressed that she had to meet with Plaintiff to accomplish the recertification. When she was offered fill-in-the-blank options to schedule, her writing down "any time" in the blank spaces was counterproductive. When she spoke with Jennice in June of 2017, she clearly stated that she had no intention to meet but would prefer to go to court.

The language and operation of this prohibition against eviction actually reinforces the above analysis of Section 7-8(D)(4) as to "extenuating circumstances." Only after the "out-of-compliance" tenant ultimately reports for the interview *and* the information supplied tends to indicate likely eligibility for renewal of the subsidy are "extenuating circumstances" *ripe* for inquiry. An eviction would be plainly premature until circumstances are explored whether the delay in timely recertification was beyond the control of the tenant. The clock may be turned

[10] At best, Plaintiff's duty to inquire about extenuating circumstances only arose after her subsidy was eventually certified anew which was long *after* this case was filed.

back to erase all market rate rent and excuse her breach. Even without that, a payment plan for the past due rent could be established. "Terminations represent only one of the tools available to owners for lease enforcement." Section 8-1(C). An eviction may become moot.

I) Plaintiff was not required to pursue Defendant to complete the paperwork

Defendant complains that Plaintiff never alerted her in writing that the recertification packet that she had dropped off was incomplete and what needed to be fixed. She asks this Court to reject the testimony of the manager that she detailed these deficiencies to Caption, but offers no reason to doubt her. Caption was not present to testify otherwise. Jennice testified that she normally reaches out to a tenant if problems occur and could not explain why she did not do so here. Of course, Defendant made no effort to try to meet with Plaintiff after the many notices delivered to her told her that she must *and* as she had done each prior year for recertification. Plaintiff argues that efforts to reach out to Defendant were not mandated by the regulations, lease, or Handbook to advise her that the packet was incomplete. The Magistrate agrees.

Important to remember is that Defendant's status was different from a tenant who has reported by her anniversary date. The Handbook describes a landlord's processing of the paperwork for the retention of an "out of compliance" tenant under the criteria at Section 7-8(D)(3)(c), that is, *not* as a "recertification... [but] as an *initial certification*." Section 7-8(D)(3)(g) (emphasis added). This wording suggests that the tenant who has missed her anniversary date is in some respects little different from a new applicant for subsidized housing. Similar wording is at Section 7-8(D)(3)(f) where the word "certification" instead of "recertification" is used to prohibit filing an eviction "after the tenant reports for the interview and the owner is processing the *certification*." (Emphasis added). The Handbook does not seem to impose on an owner a duty to follow up an incomplete application submitted by a potential *new tenant* asking for initial certification. Ms. Jennice testified that no such obligation exists.

Even if Defendant had not been "out of compliance," nothing in the Handbook required any written notice in this situation, because the Handbook does not anticipate a situation where the tenant sends in the paperwork and has ignored repeated requests to meet with the owner.

On the other hand, the Handbook at Section 8-1 "encourages owners to work with tenants and utilize other corrective actions... to resolve program/lease issues." For example, in the recertification process, an owner is instructed to obtain third party verifications of employment and income for the tenant. Sec. 7-4(A)(4). One court of appeals has looked at the word "obtain" that is assigned to an owner's responsibility in Chapter 7 to get a tenant signature on the final

recertification papers and borrows the Webster definition, "to get hold by effort," to require the owner to have done more to be sure that the recertification was complete. Hidden Meadows Townhomes v. Ross, No. C–120045, 2012 WL 6674412 at *5 (Hamilton App. 12/21/12). That case, though, presented a very different situation, where rent was raised to a market rate though that tenant timely met with the landlord, submitted all required information, and also received written notice that "her recertification was complete." Her rent was raised because she did not sign the file HUD form. The only communication for her "to come in to sign your annual recertification papers" was a handwritten note in the corner of a form letter telling her that her recertified rent was zero. The court reversed the eviction because "[n]othing... expressly informed [her] that the recertification was incomplete without her signature on the HUD–50059 or that her rent would increase." *Id.* at *4. In stark contrast, Defendant in the present case never reported for the interview and received absolutely nothing from Plaintiff to remotely suggest to her that she had fully completed the recertification process.

Defendant argues that Plaintiff's obligation to contact her in writing about her incomplete recertification may arise under another section of the Handbook, that is, the "procedures for addressing discrepancies and errors." Section 8-18(C) orders an owner to cease all adverse action against the tenant until able to "independently verify" "discrepancies" or "errors" when the owner has discovered "*inaccurately* supplied or *misrepresented* information." (emphasis added). These procedures pertain to a situation where an owner happens upon evidence that implicates "program violations" while an owner acquits its ongoing duty to "investigate and research" its tenants' information. The owner must verify and give notice and an opportunity to be heard to the tenant. The "program violation" here arose not from misinformation but Defendant's inaction. When her certification information was submitted, it was not "inaccurate" or "misrepresented," but incomplete. Section 8-13(A) notably lists information that is "inaccurate" as not necessarily the same as that which is "incomplete." These procedures do not apply.

J) There was no prejudice to Defendant by the delay in terminating this tenancy

Defendant argues that she should not be evicted because nearly nine months passed between missing her recertification anniversary date and the service of ten day notice of termination on June 20, 2017. While Jennice could not supply any particular reason for the delay, nothing in the regulations, lease, or case law required Plaintiff to serve the ten day notice of termination within a certain time after breach. The authorities cited by Defendant are not pertinent, each involving a landlord's acceptance of rent with knowledge of the tenant's breach

along with other conduct inconsistent with an intent to end the tenancy. *See* Petropoulos v. Clinical Pathology Facility, Inc., No. 87AP-685, 1988 WL 24397, at *5 (Franklin App.,1988) (ongoing negotiation) and Brokamp v. Linneman, 20 Ohio App. 199, 202 (Hamilton 1923) (acquiescence to an assignment). Defendant can point to no act or omission by Plaintiff "with knowledge of the breach, which can be considered as an acknowledgment of a tenancy, still subsisting... to have waived the forfeiture." Quinn v. Cardinal Foods, Inc., 20 Ohio App.3d 194, 196 (Shelby 1994) (citation omitted). Defendant showed no prejudice to her by this delay. She conceded that the eventual processing of her recertification *after termination notices were given and this case was filed* was not a waiver nor rendered this case moot. It was required by HUD.

Finally, the Handbook at Section 7-8(D)(3)(d) places the burden on the "out of compliance" tenant to undertake the initiative to "make arrangements to pay market rent" to avoid the severe decree that "an owner is obligated to evict for nonpayment" after the tenant "fails to report for the recertification interview and fails to pay market rent."

K) Equitable considerations do not favor the Defendant

The appropriateness of the application of equity to evictions is beyond question, because "equity abhors a forfeiture." Akron Metropolitan Housing Authority v. Speegle, No. 12757, 1987 WL 6193, *1 (Summit App. 2/4/97). "Ohio courts have the power, and often exercise it, to relieve a tenant from the consequences of forfeiture of a leasehold interest" for equitable reasons. David v. Edwood Development Co., No. 19252, 2000 WL 46107 (Summit App. 1/12/00). The Magistrate weighs the equities in this case as follows:

For the Defendant:

a) She and her family has a compelling need for this type of housing, as she is eligible for a federal subsidy that reduces her rent to zero;

b) A record of her eviction will diminish her prospects to again access subsidized housing;

c) The restraining order restricted her from having any contact with Jennice, presumably putting her at risk of criminal prosecution for a violation, thereby inhibiting fluid communication with Plaintiff and leading to real inconvenience and frustration;

d) Defendant eventually picked up the recertification packet and returned it; and

e) In past years, she testified that she had received follow up communications from Plaintiff to "come in" if any problems arose related to the recertification process.

Against the Defendant:

1) Defendant already established a means to readily communicate with management through Caption Dominquez, she could have used the mail to contact Plaintiff or left a letter at the office that was almost within sight of her home,[11] and if Jennice called her or picked up her calls, Defendant could have asked Jennice to transfer the phone to the others who she admitted that she knew also worked in the office;

2) Defendant apparently never told Jennice not to contact her due to the restraining order;

3) The evidence offered did not remotely support that Jennice was executing some devious scheme to deprive her of notice so as to have her ousted or to set her up for criminal prosecution for violating a protection order;

4) Defendant ignored the warnings in the "initial notice" that she signed on August 31, 2015, and in the official reminder notices and two unofficial ones delivered to her door to contact Plaintiff to schedule her 2016 recertification meeting before October 1, 2016;

5) After Plaintiff delivered the courtesy notices in November of 2016, she more likely than not was making sport of, if not outright mocking, Plaintiff by writing in "any time" where she was instructed to write down dates and times, as these requests were plainly made to accommodate her and arrange for someone other than Jennice to interview her;

6) Defendant directly rejected Plaintiff's invitation to a recertification interview as part of or in addition to the hearing on the termination;

7) Defendant taunted Jennice with obscenities to ask for litigation to be filed against her;

8) Defendant's keen awareness of her potential jeopardy in communicating with Jennice and any suspicion that Jennice might trying to get her into trouble should have reasonably led her to greater vigilance to ensure that all of her communications with Plaintiff were unambiguous and that all of her obligations as a tenant were timely and fully satisfied;

9) Defendant was not prejudiced by the clerical error in the November 29, 2016 notice that she had until December 31, 2016 to recertify, because this letter was not required by the lease or by regulation and she does not claim that she changed her position in reliance, such as if it had been received prior to her actual anniversary date and caused her to delay reporting for her interview until after October 1st ; and

10) More likely than not, a waiting list exists of persons similarly situated economically for subsidized housing who will equally benefit from the availability of this housing.

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[11] Her home is close enough to the office that she dismissed the idea that Caption might not have gone to the office on her behalf, because she said that she could see her go there. Perhaps she could have determined if Jennice was there as well.

Against the Plaintiff:

a) Plaintiff has other employees, so that Jennice should not have personally contacted Defendant in light of the restraining order, though the precise limitations on communication and conduct in the restraining order were never put into evidence and Defendant was not prejudiced here; and

b) Plaintiff should have provided clarity in written communications that Mary Jennice would not be the one to conduct any meetings with Defendant, although the precise limitations on communication and conduct in the restraining order were never put into evidence and Defendant was not prejudiced here.

For the Plaintiff:

1) Plaintiff was sensitive to the inconvenience of the restraining order to Defendant, with Mary Jennice reminding Defendant in one notice to be sure to use Caption Dominguez or "another third party person of your choosing" to contact Plaintiff;

2) Unless Mary Jennice was specifically ordered by a court otherwise, she had the right and duty to perform her job to carry out the official business of Plaintiff;

3) Plaintiff went beyond the requirements of HUD regulations, the lease, and the Handbook by issuing not only the required notices but additional courtesy notices before and after her 2106 anniversary date, as well as a follow up letter on June 28, 2017, to try to avoid executing a termination of Defendant's tenancy; and

4) Plaintiff is a business enterprise that should not have to further expend its resources on a tenant who has ignored communications as well as her contractual and legal responsibilities and scorned the considerations shown by Plaintiff to accommodate her.

The equities significantly favor the Plaintiff over the Defendant.

RECOMMENDATION

JUDGMENT SHOULD BE ENTERED FOR THE PLAINTIFF AND WRIT OF RESTITUTION SHOULD ISSUE FOR HER PUT OUT AT THE CONVENIENCE OF THE BAILIFF.

Richard K. Schwan

Magistrate

A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).

COPIES TO COUNSEL FOR PARTIES

IN THE ELYRIA MUNICIPAL COURT

ELYRIA, OHIO

FILED

2019 JAN -2 PM 3:54

CLERK OF
ELYRIA MUNICIPAL COURT

BY: _____

VESTA CORPORATION, DBA
WESTWAY GARDEN APARTMENTS

Plaintiff,

CASE NO. 2017CVG01908

v.

LACHANDRA JONES,

Defendant.

JUDGMENT ENTRY

01/02/2019

The court has fully reviewed the record of the proceedings in this matter. After a complete, independent review of the proceedings, the court hereby overrules the objections filed by the Defendant and adopts the Magistrate's Decision.

The Plaintiff did, in fact, serve Defendant the necessary notices pursuant to the applicable HUD regulations and the terms of the Lease prior to filing the eviction action in this case. The additional notices which Defendant argues were mandated by Chapter 8 of the HUD Handbook were not required. Defendant's contention that she completed recertification while this case has been pending does not defeat Plaintiff's right to terminate the tenancy.

Judgment is entered for the Plaintiff. The findings, conclusions and recommendations of the Magistrate are hereby adopted and incorporated by reference as if fully rewritten herein.

Writ shall issue for the restitution of the premises ten days from the date of the filing of this judgment for physical put out of the Defendant at the convenience of the bailiff.

ELYRIA MUNICIPAL COURT

JAN -2 2019

Judge Robert C. White

RELEASE

CLERK TO SERVE ALL PARTIES WITH NOTICE OF JUDGMENT ENTRY AND DATE OF ENTRY UPON THE JOURNAL

BAILIFF TO POST A COPY OF THIS JUDGMENT ENTRY ON THE DEFENDANT'S DOOR.

Cpys: Graham
Dendrinos
Bailiff Larry
1/2/19 Ai