

CLEVELAND MUNICIPAL COURT
HOUSING DIVISION
CUYAHOGA COUNTY, OHIO

ERICK WALTON

DATE: August 20, 2008

Plaintiff(s)

-VS-

CASE NO.: 2008-CVG-7298

CARITA GOODEN

Defendant(s)

JUDGMENT ENTRY

{¶ 1} This case is before the Court on defendant's Motion for Summary Judgment. For the following reasons, defendant's Motion is granted.

{¶ 2} Summary judgment shall be awarded if there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Civ. R. 56(C). Summary judgment shall not be rendered unless it appears from the evidence or stipulations that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion is made. *Id.* The party against whom the motion is made is entitled to have the evidence or stipulations construed most strongly in his favor. In this case, then, the Court is obligated to review the evidence in the light most favorable to the plaintiff, the non-moving party.

{¶ 3} Defendant asks for summary judgment with respect to plaintiff's Complaint for Forcible Entry and Detainer under R.C. 1923.01 *et. seq.* Defendant alleges, through her brief and accompanying affidavits, that plaintiff accepted rent payments by Cleveland Metropolitan Housing Authority (CMHA) on defendant's behalf for the months of March, April, May, June, and July 2008 after plaintiff served defendant with a three-day notice to leave the premise on March 18, 2008. Deft. Brief in Support of MSJ pg. 2; see Affidavit of Carita Gooden; Affidavit of Paulette Childs. Defendant argues that plaintiff's acceptance of the rent payments renders plaintiff's three-day notice void. *Id.*

{¶ 4} Under Ohio Law, if a landlord accepts future rent payments after serving the R.C. 1923.04 three-day notice to vacate, "the landlord is deemed to have waived the notice to vacate as a matter of law." *Associated Estates Corp. v. Bartell* (1985), 24 Ohio App.3d 6, 9, 492 N.E.2d 841, 845. (citing *Presidential Park Apts. v. Colston* (1980), 17 O.O.3d 220, 221). The term "future rent" used in *Bartell*, *Colston*, and a multitude of other cases "means payments for any period of occupancy which occupancy is after the date of acceptance by the landlord of the payment." *Cornerstone Companies v. Zipkin* (1989), 60 Ohio Misc.2d 14, 16, 573 N.E.2d 228, 231. The fact rent is subsidized does not alter this rule; acceptance of future rent after service of the three-day notice waives the landlord's notice to vacate the premises, regardless of whether the rent is paid by the tenant or a government agency on tenant's behalf. *Associated Estates*

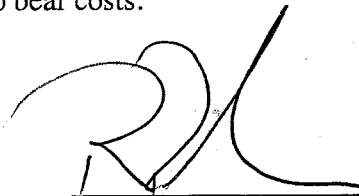
Corp. v. Bartell (Cuyahoga Cty. 1985), 24 Ohio App.3d 6, 492 N.E.2d 841; *Baker v. Wade* (Mun. Ct. Cleveland, Oct. 2, 2002) 2002-CVG-15892; *Classic A Properties v. Brown*, Scioto Cty. App. No. 02CA2868, 2003-Ohio-5850. Waiver of the R.C. 1923.04 notice renders this Court without jurisdiction to proceed on the plaintiff's first cause of action. *Bartell* at 8-9.

{¶5} In support of her motion, defendant submits sworn notarized affidavits that attest to plaintiff's acceptance of future rent after serving defendant with a three-day notice on March 18, 2008. See Affidavit of Carita Gooden; see also Affidavit of Paulette Childs.

{¶6} Plaintiff's response fails both in form and content and raises no genuine issue of material fact. "When a motion for summary judgment is made and supported... an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E); see also *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293-4, 662 N.E.2d 264, 274-5. Plaintiff's response to defendant's Motion for Summary Judgment does not address plaintiff's acceptance of future rent payments after service of the three-day notice. See Pltf. Motion for Denial; see also Deft. Brief in Support of MSJ. Instead, plaintiff's response addresses only the issue of fraud, an issue not raised by defendant in her motion. Pltf. Motion for Denial; Deft. Brief in Support of MSJ. Additionally, plaintiff attempts to oppose defendant's motion through the submission of a statement from Annie and Fatma Freeman. However, the statement is not notarized, and so cannot be deemed a sworn statement as contemplated by Civ. R. 56.

{¶7} In addition to his reply to defendant's Motion for Summary Judgment, plaintiff has filed what, in essence, is a reply to defendant's reply, or a "surreply." No provision in the Ohio Civil Rules governs the filing of a surreply by an opposing party to a Motion for Summary Judgment. *Re v. Kessinger*, Butler Cty. App. No. CA2007-02-044, 2008-Ohio-1622 (citing *Altvater v. Claycraft Co.* (Aug. 13, 1992), Wyandot App. Nos 16-91-32, 16-91-33). Thus, plaintiff's Reply to Defendant's Response of Denial of Summary Motion will not be considered. Even if this Court considers plaintiff's surreply, it is not on point as it fails to address the issue raised by defendant in her Motion for Summary Judgment.

{¶8} With respect to plaintiff's Complaint, the Court finds that there is no genuine issue of material fact, and that defendant is entitled to judgment as a matter of law. Accordingly, this Court grants defendant's Motion for Summary Judgment. Judgment is entered for defendant on the plaintiff's Complaint, plaintiff to bear costs.



JUDGE RAYMOND L. PIANKA
HOUSING DIVISION

SERVICE

A copy of this judgment entry was sent by regular U.S. mail to parties/counsel on

8 / 21 / 08

OPV

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