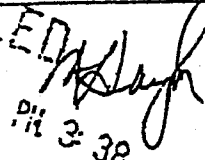


SMALL CLAIMS DIVISION

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Countrybrook Apartments

Plaintiff,

-v-

Case No. M'86CVG 20896

Rhonda Forsythe,

Defendant.

This matter came on for hearing before Referee Julius J. Nemeth. Plaintiff was represented by Attorney Kevin Durkin and defendant by Clem Pyles of the Legal Aid Society. The parties, by counsel, stipulate that the lease in question is admitted as Joint Exhibit A, and that the four notices which were served on defendant, and which are marked Plaintiff's Exhibits 1-4, are likewise admitted. Exhibits 1 and 2 are 3-day notices to leave premises required by O.R.C. Section 1923.04, and exhibits 3 and 4 are notices of termination prescribed by applicable federal regulations. In addition to the exhibits, the Referee received the testimony of defendant Rhonda Forsythe, apartment manager Kevin Manning, maintenance man John Savage, postman Gerald Hoosier, and Rhonda Forsythe, the mother of defendant. Based on the stipulations, the testimony, and other evidence presented, the Referee makes the following Findings of Fact, Conclusions of Law, and Recommendation:

FINDINGS OF FACT

1. The plaintiff apartment complex is a Section 236 subsidized housing project, and its tenants, including the

defendant, receive Section 8 rental subsidies. In November 1984, defendant's share of the rent was \$22.00 per month which was reduced to \$20.00 per month at the time of her recertification in November 1985. (See ledger, Plaintiff Exhibit 7).

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 WASHINGTON, D.C.

2. Because of the status of the apartment complex as a subsidized project, and defendant's eligibility to receive Section 8 subsidies, the proposed termination of her tenancy is governed not only by state law but also by federal regulations, specifically 24 CFR Part 886, Sub-Part A and 24 CFR Section 247.4.

3. Title 24 CFR Sub-Part A, Part 886, Section 886.128(a) states in part that "The owner shall give the family a written notice of the proposed eviction, stating the grounds and advising the family that it has 10 days or such greater number, if any, that may be required by local law within which to respond to the owner." 24 CFR Section 247.4(a) requires that a notice of termination shall (1) state that the tenancy is terminated on a date specified therein; (2) state the reason for the landlord's action with enough specificity so as to enable the tenant to prepare a defense; (3) advise the tenant that if he or she remains in the lease unit on the date specified for termination, the landlord may seek to enforce the termination only by bringing a judicial action at which time the tenant may present a defense.

4. In addition to the above quoted federal regulations, the situation in this case is governed by

repeats the language of the regulations with respect to the contents of a notice of termination, and paragraph 23(d) adds the following: "If an eviction is initiated, the owner or its agent agrees to rely only upon those grounds cited in the termination notice required by paragraph (c)".

5. The first notice of termination at issue, which is dated April 10, 1986 and was served on or about that date states as the reason for the proposed termination of the tenancy that defendant allowed a Steven Skaggs to reside in her apartment without prior written approval from management. The concluding paragraph of this notice reads: "In the event you fail to vacate the premises legal proceedings for eviction may be filed against you. If such proceedings are brought you will have the right to appear at such proceedings, be represented by counsel, if you desire to present a defense." (Plaintiff's Exhibit 1).

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6. The second notice of termination at issue is dated May 6, 1986 and was served on or about that date. The reason stated for the proposed termination in this notice was alleged non-payment of rent due May 1, 1986. This notice states in pertinent part: "In the event you fail to vacate the premises by May 10, 1986 and in the further event a lawsuit is filed to evict you, you will be entitled to attend any hearing before the Court and present a defense."

7. The third notice served on defendant, which is a notice to leave premises dated May 12, 1986 and which was served on or about that date (Plaintiff's Exhibit 3), requests

... subject premises on or before May

22, 1986 and states as the grounds for the proposed eviction: "13/General Restrictions allowing other persons to live in your apartment without prior written approval from our office. Also No. 13 B and C - Using 821 Hillview Court and Countrybrook Project grounds for unlawful activity. Non-payment of May rent." The concluding paragraph of this notice reads: "Your compliance with this notice within such time will prevent proceedings from being taken by Countrybrook Apartments to obtain possession of the same, agreeably to law." The notice does not contain the statutory language for a 3-day notice prescribed by O.R.C. 1923.04.

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8. The fourth notice served on defendant, which is a notice to leave the premises dated June 3, 1986 and served on or about that date (Plaintiff's Exhibit 4) lists essentially the same grounds as the notice to leave premises dated May 12, and adds "You have (10) ten days to speak to the manager to discuss this matter". In addition, this notice does contain the language prescribed for a 3-day notice by O.R.C. 1923.04.

CONCLUSIONS OF LAW

A. This Court has in previous cases held that a landlord must comply strictly with the notice requirements for terminating a tenancy governed by the Code of Federal Regulations. See, for example, Wildwood Village v. Eckard, Franklin County Municipal Court Case No. M'84-CVG-28561, decided December 12, 1984. Neither of the notices of termination (Plaintiff's Exhibits 1 and 2) in this case comply with the requirement of 24 CFR 247.4(a)(3) that the notice advise the tenant that if he or she remains in the leased unit on the date

specified for termination, the landlord may seek to enforce the termination only by bringing a judicial action, at which time the tenant may present a defense. In its memorandum contra defendant's motion to dismiss (which motion was before the Referee and is now before the Court), plaintiff by counsel argues that defendant has the burden of proving that she was prejudiced by the aforementioned omission, but this Referee is not aware of any reported case in which the burden of proving prejudice is placed on a defendant in similar circumstances as the defendant in the case under discussion. The Referee concludes that the omission alone is sufficient to require dismissal of the complaint.

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B. In addition to the foregoing conclusion, the Referee also concludes that the notice to leave premises dated May 12, 1986 (Plaintiff's Exhibit 3), which was intended for use for commercial property only, is not valid as a notice to leave premises for residential property, because it lacks the language prescribed by O.R.C. 1923.04. And, while the notice to leave premises dated June 3, 1986, does contain the requisite language, it cannot serve as a basis for an eviction in this case because it was not preceded by a valid notice of termination.

C. Since the motion to dismiss which is before the Court was renewed at the conclusion of the testimony, it appears appropriate to comment on the evidence as it relates to the merits of the matter, specifically the allegations that (1) defendant failed to pay May 1986 rent, (2) that she permitted Steven Skaggs to reside in her apartment and (3) that she

... apartment to be used for unlawful purposes.

With respect to the first of these contentions, plaintiff's testimony was that she deposited a money order in a mail slot next to the office door on May 2 or 3. The Referee finds in accordance with this testimony. Mailman Gerald Hoosier testified that he found a money order (which was purchased by defendant and was payable to plaintiff) in a post office box located on the sidewalk 10 to 20 feet from the office door. He could not remember the date, but stated that when he tendered the money order to the manager after finding it, the manager refused to accept it. No explanation was offered as to why and how the order was placed into the post office box, and the Referee would have to conclude that plaintiff had failed to prove by a preponderance of the evidence that the May rent was, in fact, not timely paid, in view of the fact that paragraph 5 of the lease, in effect, provides a five-day grace period.

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With respect to the allegations that defendant permitted Steven Skaggs to reside in her apartment, defendant's testimony was that Skaggs was her boyfriend and frequently stayed on weekends and sometimes on weekdays, but lived with his father in Springfield, Ohio. Plaintiff's testimony with respect to this question consisted of the observations of the apartment manager and the maintenance man over several months, who sighted Skaggs in the subject apartment and on the grounds of the apartment complex many times over a period of months. This testimony, also, would fall short of proof by a preponderance of the evidence, even when combined with defendant's own admission that she permitted Skaggs to use her address for the purpose of

that Skaggs was arrested for breaking and entering or burglary in March 1986, while visiting at the subject premises. However, no testimony or other evidence was adduced from which it could be found that defendant condoned Skaggs' activities or knew about them, or that any stolen property was found on the subject premises. Thus, it would be difficult to conclude that plaintiff had proven by a preponderance of the evidence that defendant had permitted her apartment to be used for illegal activities.

REFEREE'S RECOMMENDATION

The Referee recommends that the motion to dismiss made by defendant at the conclusion of the evidence be sustained, and that the case be dismissed at plaintiff's costs.

Julius J. Nemeth
REFEREE JULIUS J. NEMETH

All parties notified

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F.I.L.E.D.
[Signature]