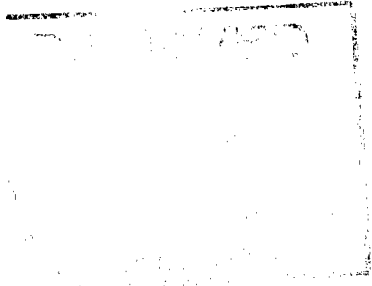


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WOOD COUNTY, OHIO
COURT OF APPEALS

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Rebecca E. Sheer Clerk

IN THE SIXTH APPELLATE DISTRICT, WOOD COUNTY, OHIO

Bowling Green Manor,
Limited Partnership,
dba Bowling Green Estates

Case No. WD-94-125

Plaintiff/Appellee,

vs.

Debbie Kirk,

Defendant/Appellant.

BRIEF OF APPELLEE

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STATEMENT OF FACTS

Appellee is a privately owned and operated apartment complex that provides housing for low to moderate income families. As stipulated, Plaintiff is not a public housing authority (Tr.p. 3).

Appellee's complex qualifies for a federal tax credit and is monitored by the Ohio Housing Finance Agency to assure that the complex provides housing for low to moderate income individuals. The complex receives no federal subsidies or other income from the Ohio Housing Finance Agency (Tr.p. 21). The complex is not a public housing project even though Appellant, in her argument, attempts to analogize Appellee to a federally subsidized housing project.

In August of 1993, Appellee entered into a one (1) year lease with Appellant (See Plaintiffs Exhibit A). The initial term of the lease expired by its own terms on 8/31/94. The lease provided that after the initial one (1) year term, the tenancy continued on a month to month basis and that either the landlord or the tenant could provide the other with a thirty (30) day notice of termination of the lease. In this instance, Appellee elected to exercise its option to terminate the tenancy after Appellant had repeatedly violated the terms of the lease by permitting her children to play football in an unauthorized area (Tr.p. 17, 18, and 26). Even though management on numerous occasions gave Appellant actual verbal notice of the violation and requested that Appellant have her children play in a

designated area, Appellant refused and continued to permit her children to violate the lease.

Pursuant to the contract terms and pursuant to O.R.C. 55321.17, Appellee served Appellant with a notice thirty (30) days in advance that the lease had expired, and that the tenancy was terminated. (See Plaintiff's Exhibit B). Appellant has stipulated that she received all necessary notices of the termination (Tr.p. 4). When Appellant refused to surrender possession of the premises at the end of the term, Appellee served the Three (3) Day Notice to Leave Premises pursuant to O.R.C. S1923.04. (See Plaintiff's Exhibit C). Again, Appellant stipulated that she received all necessary notices. (Tr.p. 4). Thereafter, this action was commenced in the Bowling Green Municipal Court, Wood County, Ohio.

FIRST ASSIGNMENT OF ERROR

In its First Assignment of Error, Appellant seeks to have the Court use their equitable powers to subject Appellee to federal regulations which are not applicable to Appellant's housing complex. Although the Federal Government has established certain restrictions for project based subsidy programs referenced as "Section Eight Housing", those restrictions do not apply to Appellee's private complex. Had Congress intended that housing complexes similar to Appellee's be governed by those restrictions, then Congress would so have mandated.

This case is not about violations of any federal housing law. Instead, it is a simple contract case; nothing more, nothing

less. The trial court determined from the stipulations and from the evidence that Appellee was not a public housing agency subject to federal regulations; that Appellant repeatedly violated the lease terms by allowing her children to play in a restricted area; and that Appellee was entitled to restitution of the premises based on the expiration of the lease.:

The referee correctly analyzed this case as a contract case and awarded Appellee restitution of the premises after clearly finding that the one (1) year lease had expired and that Appellee gave the proper notices of termination. Although the referee did not use the term "good cause" in his report, the referee did make a finding that the Appellant had repeatedly violated the terms of the lease. The referee's findings and conclusions are plainly sufficient to overcome Appellant's argument about the applicability of the "good cause" provisions contained in the restrictive covenant and federal low housing law.

The Bowling Green Municipal Court's decision is supported by case law. As reasoned by the Court in the case of Zellner v. Turner, 92 CA 41 (Ct. App. Green County 1-26-93), there is nothing in the contract (here, the lease agreement) or under the federal law that requires the landlord to renew every lease simply because the tenant so desires. In this case, the tenant was permitted to remain in the premises for the full one (1) year lease term. After the lease expired, Appellee decided not to renew the lease because Appellant had repeatedly violated the terms of said lease.

Because of Appellant's repeated violations of the lease, and because of the expiration of the one (1) year term, the trial court determined that Appellee was entitled to judgment against Appellant. Appellant's First Assignment of Error should therefore be overruled.

SECOND ASSIGNMENT OF ERROR

In its Second Assignment of Error, Appellant asserts that the trial court erred in adopting the report and recommendation of the referee, claiming noncompliance with Civil Rule 53. Appellee submits that the referee's report did fully conform in that the report provided findings of facts and conclusions of law sufficient for the court to make an independent analysis of the case. The referee, in his report, properly recognized that Appellant breached the lease; that the initial term of the lease had expired; and that Appellee had a contractual right to terminate the tenancy upon given thirty (30) days notice. The referee found from the stipulations that all appropriate notices of termination were given and that Appellee was entitled to restitution of the premises.

The argument that the trial court failed to comply with Civil Rule 53 carries no merit as it has been determined by the Supreme Court and followed recently by Appellate Courts that Civil Rule 53 (E) is inapplicable to forcible entry and detainer actions. Colonial American Development Co. v. Griffith (1990) 48 OS 3d 72; Housing Authority v. Jackson (1981) 67 OS 2d 129; Zellner v. Turner, 92 CA 41 (Ct. App. Green County 1-26-93).

Since there was a proper report and recommendation which was adopted by the trial court, the Appellant's Second Assignment of Error should be overruled.

THIRD ASSIGNMENT OF ERROR

In its Third Assignment of Error, Appellant relies on the old maxim that "...equity abhors a forfeiture...". However, there are other contrary maxims of equity which would apply where, as in this case, the Appellant was in breach of her contractual obligations. Appellee submits that the maxims of "...he who seeks equity must do equity..." and "...he who comes into equity must come with clean hands..." should be given due consideration in this case. (See generally, 41 O Jur 3d, Equity, S66 and S67). Appellant knowingly and intentionally violated the terms of the lease by allowing her children to play in a restricted area. (See Appellant's Testimony at Tr.p. 32, 33, 43, 44, and 45). In fact, such violations were the reason that Appellee elected not to renew Appellant's lease (Tr.p. 26). Instead, the lease expired by its own terms and Appellee exercised its contractual option not to continue the lease.

The trial court, after weighing all the facts and equitable considerations, ruled properly when it determined that Appellant had violated the lease; that the lease had expired; that Appellee served proper notice upon Appellant of the lease termination; and that Appellee was entitled a judgment for eviction and restitution of the premises. Appellant's Third Assignment of

Error must be overruled.

CONCLUSION

This forcible entry and detainer case is a simple matter of contract law. Appellant's have repeatedly breached the lease agreement. Because of the breach, Appellee elected to exercise its contractual rights to not renew the lease after the expiration of the initial one (1) year term. Appellee complied with its contractual and statutory requirements in initiating this action. The trial court, after due consideration of all the evidence, made appropriate findings of fact and conclusions of law. The lower court's decision granting Appellee judgment and awarding restitution of the premises should be affirmed and this appeal dismissed.

Respectfully submitted,

MITCHELL, STEARNS & HAMMER

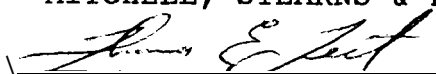
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Thomas E. Tea
Attorney for Appellee

CERTIFICATION OF SERVICE

The undersigned does hereby certify that a true and correct copy of the foregoing was forwarded by ordinary U.S. mail on this **10th** day of April, 1995 to Steve Robins, ABLE, 1514 West State Street, Fremont, Ohio 43420.

MITCHELL, STEARNS & HAMMER



Thomas E. Teet
Attorney for Appellee