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IN THE SIXTH APPELLATE DISTRICT, WOOD COUNTY, OHIO

Bowling Green Manor, : Case No. 94-WD-117
Limited Partnership, :
dba Bowling Green Estates. :

Plaintiff/Appellee, :

vs. :

Marc and Jody LaChance, :

Defendants/Appellants ; 'A' ' ' - :-

BRIEF OF APPELLEE

Steve Robins
Reg. No. 0028397
Attorney at Law
ABLE
1514 West State Street
Fremont, Ohio 43420
(419) 334-8908
Attorney for Appellant

* Thomas E. Teet
Reg. No. 0040332
Attorney at Law
MITCHELL, STEARNS & HAMMER
329 North Main Street
Bowling Green, Ohio 43402,
(419) 352-1581
Attorney for Appellee

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COUNTER STATEMENT OF CASE

Appellee filed its Forcible Entry and Detainer Complaint against Appellants on 10/14/94 with the matter being heard on 11/3/94. The Court Referee took the matter under advisement and on 11/10/94 filed his Report and Recommendation for eviction. Said Report and Recommendation was accepted by the trial court on 11/16/94. Appellants filed objections to the Report on 11/24/94, with the objections being overruled on 11/25/94.

Appellants requested a stay of execution and asked that a use and occupancy bond be established. Said motions were denied by the trial court and instead a supersedeas bond was established.

Appellee, on 11/29/94, filed a Praecipe for Writ of Restitution, and on the same day Appellants perfected their appeal. On 11/30/94, Appellants motioned this Court for a stay of execution and asked that a use and occupancy be established. by Decision and Journal Entry dated 12/7/94, this Court denied Appellants' motion for the use and occupancy bond, but granted a temporary of execution until 12/30/94.

Appellant again asked this Court to reconsider the issue of the supersedeas bond by motion filed 12/13/94. That motion was denied by this Court on 1/4/95.

Appellant vacated the premises on or about 1/8/95 as evidenced by the return of the writ filed on 1/11/95 by the court bailiff. Even though Appellants have surrendered possession of the premises, they continue their appeal.

STATEMENT OF FACTS

Appellee is a privately owned and operated apartment complex that provides housing for low to moderate income families. As stipulated, Appellee is not a public housing authority. (Tr.p. 7) and there are no federal regulations which specifically cover this type of project (Tr.p. 13).

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. 25). The complex is not a public housing project even though Appellants, in their argument, attempt 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 1). The initial term of the lease expired by its own terms on 8/31/94, and the tenancy continued on a month to month basis. The lease provided that either the landlord or the tenant could send the other thirty (30) day notice of termination of the lease after the initial one (1) year term.

The lease further provided that tenant was required to certify their income to landlord on an annual basis. In this case, Appellant stipulated that they failed to certify as required under the lease (Tr.p. 6).

Appellee, pursuant to the contract terms and pursuant to

O.R.C. s5321.17, served Appellants with a notice thirty (30) days in advance that the lease had expired and would not be renewed (See Plaintiff's Exhibit 2). Appellants stipulated that they received the notice of termination (Tr.p. 4).

When Appellant refused to surrender possession of the premises at the end of the term, Appellee served the statutory three (3) day Notice to Leave Premises (Tr.p.4).

Further, the parties stipulated that Appellants failed to pay rent to Appellee for September and October, 1994 after the lease terminated (Tr.p. 5). Further, no rent was paid by Appellants for the time period which they occupied the premises until vacating on or about 1/8/95.

ARGUMENT

First and foremost, Appellee submits that when Appellant surrendered possession of the premises on or about 1/8/95 the herein matter as it relates to possession of the premises was rendered moot. (See Bailiff's Return filed 1/11/95). It has been held that when tenants fail to post the requisite supersedeas bond and restitution of the premises is restored to the landlord, the issue pertaining to possession of the premises is moot. Reese Investments v. Tucker 89 AP-1181 (Ct. App. Franklin County, March 13, 1990); Martin v. Mohler 89 CA 1859 (Ct. App. Scioto County, February 12, 1991). Therefore, since the issue of restitution of the premises has been rendered moot, Appellants' appeal should be dismissed.

In Appellants' first assignment of error, Appellants urge

the Courts to use their equitable powers to subject Appellee to federal regulations which are inapplicable to Appellee's housing complex. Although Appellees would concur that the federal government has established certain restrictions for project based subsidy programs, commonly as referred to as "Section 8 Housing", those restrictions do not apply to Appellee's complex. Had Congress intended that housing complexes similar to Appellee's be governed by the restrictions which apply to public housing projects, then Congress would have so mandated. Appellant agrees that there are no federal regulations which impose restrictions requiring "good cause" to evict tenants from Appellee's complex (Tr.p. 13).

Appellant

Even if the provisions of Ohio Revised Code §175, Internal Revenue Code §42 and the Public Housing Regulations which Appellants refer to in their brief are liberally construed, in this instance the Appellees have demonstrated that they had "good cause" to evict Appellants. Appellants were in breach of their contractual lease obligation in that Appellants failed to certify their income (breach of Paragraph 15 of the lease); Appellants held over their term of tenancy (breach of Paragraph 18 of the lease); and Appellants failed to pay rent during their holdover.

The trial court determined from the stipulations and from the greater weight of the evidence that Appellee was not subject to federal regulations; that Appellants did not pay rent for September or October, 1994; that Appellants failed to certify their income pursuant to the lease agreement; and that Appellee

complied with its contractual and statutory obligations for bringing this eviction action. Although the Referee's report does not specifically use the term "good cause", the Referee's findings clearly establish that Appellants were in breach of their lease agreement with Appellee and that Appellee was entitled to judgment for eviction.

Appellants argue that the restrictive covenant which Appellee entered to qualify for the Internal Revenue Code tax credit require the element of "good cause" to evict a tenant; however, Appellants fail to recognize that their own refusal to certify their income to Appellee could have jeopardized Appellee's ability to qualify for the tax credit. Appellee views Appellants' refusal to certify as a material breach of the lease agreement, therefore Appellee elected not to renew Appellants' lease. This breach and Appellants subsequent breach of holding over the lease term is "good cause" for eviction.

The trial court's decision was proper and Appellants' first assignment of error should be overruled.

In their second assignment of error, Appellants ask this Court to again revisit the issue of the supersedeas bond. This Court has already clearly addressed Appellants assignment of error with its Decision and Judgment Entries dated 1/4/95 and 12/7/94. In those entries, this Court not only deferred to the trial court's discretion, but its own entry set the supersedeas bond for the purpose of this appeal. This Court's prior rulings on the matter should be dispositive of Appellants' second

assignment of error.

In its third assignment of error, Appellants assert the trial court erred in adopting the Report and Recommendation of the Referee claiming noncompliance with Civil Rule 53 (E).

Appellee submits that the Referee's report did conform with the rule in providing findings of fact sufficient for the court to make an independent analysis of the case. Appellants, in their efforts to analogize this privately owned and operated housing complex with a public housing project, fail to recognize their own violations of their lease agreement. In their efforts to convince the Court to apply an equitable remedy, Appellants refuse to acknowledge that Appellee is not governed by the federal regulations applicable to public housing; that Appellants were in material breach of their contract by failing to certify their income to Appellee; and that Appellants were in material breach by holding over their expired tenancy.

The Referee, in his report, properly recognized Appellants' breach of the lease, and based on his findings, recommended restitution of the premises. The trial court adopted the Referee's Report and Recommendation and ordered restitution of the premises. Appellants argue that the trial court violated Civil Rule 53 by its failure to make its own independent analysis of the issues and file its own report. However, the Supreme Court in the case of Housing Authority v. Jackson (1981) 67 OS 2d 129, has determined that Civil Rule 53 (E) is inapplicable to forcible entry and detainer proceedings. That holding was

recently affirmed in the case of Colonial American Co. v. Griffith (1990) 48 OS 3d 72, and also more recently followed in the case of Zelner v. Turner 92 CA 41 (Ct. App. Green County, 1-26-93), an appellate case which is remarkably similar to the case at bar.


Appellants' third assignment of error must be also be overruled.

CONCLUSION

This case is a simple matter of contract law relative to the lease agreement between Appellants and Appellee. Appellants were in material breach of the lease agreement for failure to certify their income; for holding over the term of the lease; and for failure to pay rent during the hold over tenancy. Appellee complied with the contractual and statutory requirements for maintaining the eviction action. Even though Appellee is not governed by the public housing "good cause" restrictions, Appellee has demonstrated that it had "good cause" to evict Appellants. Finally, after continuing to reside in the premises for more than three (3) months after expiration of the lease term, Appellants finally vacated and surrendered possession of the premises to Appellee, thereby rendering this appeal moot. Accordingly, the lower court's decision should be upheld and this appeal dismissed.

Respectfully submitted,

MITCHELL, STEARNS & HAMMER


-y-d*-

Thomas E. Teet, Atty. 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 11 day of April, 1995 to Steve Robins, ABLE, 1514 West State Street, Fremont, Ohio 43420.

MITCHELL, STEARNS & HAMMER

Thomas E. Teet
/s/ Thomas E. Teet, Atty. for Appellee

>
Reese Investments, Plaintiff-Appellee,
vs.
Sherri Tucker, and all other occupants,
Defendants-Appellants

No. 89AP-1181

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN
COUNTY

1990 Ohio App. LEXIS 943

March 13, 1990, Decided

APPEAL from the Franklin County Municipal Court.

COUNSEL

MR. JEFFREY L. McCLELLAND, for appellee.

THE LEGAL AID SOCIETY OF COLUMBUS, MS. DONNA C. MAYER and
MR. CLEMENT PYLES, for appellants.

JUDGES

YOUNG, J., WHITESIDE and MARTIN, JJ., *concur.* MARTIN, J.,
of the Carroll County Court of Common Pleas, sitting by
assignment in the Tenth Appellate District.

AUTHOR: YOUNG f

OPINION

DECISION

YOUNG, Ji-

This matter is before this court upon the appeal of Sherri Tucker, appellant, from a judgment of the Franklin County Municipal Court in favor of appellee, Reese Investments. Appellee filed an action in the trial court to evict appellant from her federally subsidized residence asserting that she had failed to pay for damages to the residence in the amount of \$ 111.63. After a forcible entry and detainer hearing, the trial court adopted the referee's recommendation and entered judgment for the appellee. Subsequently, appellant filed objections to the referee's report, which were stricken on the basis that the objections were not filed within rule. Appellant also requested that the trial court issue a stay of the writ of execution and that the court set a supersedeas bond pursuant to Civ. R. 62(B).

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The trial court granted appellant's request for a stay on the condition that appellant post a bond of \$ 1,112 and subsequently, denied appellant's motion to have the amount of the bond reduced. Appellant was physically evicted from her residence on August 3, 1989, and thereafter, on August 22, 1989, posted the bond with the Clerk of the Franklin County Municipal Court. On August 30, 1989, the trial court denied appellant's motion for an order restoring possession of the residence to her.

Appellant filed a motion with this court requesting enforcement of the August 1, 1989 stay order, which order was conditioned upon her posting bond. This court denied appellant's motion.

In the present appeal, appellant asserts that the trial court erred in denying her motion to enforce the August 1, 1989 stay order and restore possession of the residence to her. Appellant asserts the following sole assignment of error:

"THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR ENFORCEMENT OF THE STAY IN THAT OHIO REVISED CODE SECTION 1923.14 REQUIRES THAT A TENANT WHO HAS BEEN SET OUT OF THE SUBJECT PREMISES BE RESTORED TO POSSESSION OF SUCH PREMISES ON THE FILING OF AN APPEAL WHEN A STAY HAS BEEN GRANTED AND THE REQUIRED BOND HAS BEEN POSTED."

Upon reviewing the record in this case, it is apparent from the affidavit of D. Milton Reese, a partner of Reese Investments, that the residence, which is the subject matter of this appeal, has been sold to Faith Housing, Inc. Furthermore, the affidavit of Jon B. Weisheimer indicates that a writ of restitution was executed against appellant on August 3, 1989, and that the residence was rented to another tenant who began occupancy September 1, 1989. Since these facts have not been disputed by appellant, this court must necessarily sua sponte dismiss the matter herein on the basis of mootness.

DISPOSITION

Case dismissed.

FAYE C. MARTIN, Plaintiff-Appellee
vs.
DOUG AND SHARLENE MOHLER, Defendants-Appellants

No. 89CA1859

COURT OF APPEALS OF OHIO, FOURTH APPELLATE DISTRICT, SCIOTO
COUNTY

1991 Ohio App. LEXIS 914

February 12, 1991

COUNSEL

Faye Martin, pro se. &
Sharlene Mohler, pro se.

JUDGES

Earl E. Stephenson, Judge. Harsha, J., concurs. Stapleton,
J., concurs, (Sitting by Assignment from Brown County Common
Pleas Court).

AUTHOR: STEPHENSON

OPINION

DECISION AND JUDGMENT ENTRY 9

This is-an appeal from a judgment entered by the
Portsmouth Municipal Court granting a writ of restitution for
certain premises owned by Faye C. Martin, plaintiff below and
appellee herein, and occupied- by Doug and Sharlene Mohler,
defendants belo6 and appellants herein. The following error is
assigned:

"THE TRIAL COURT ERRED IN ORDERING THE EVICTION OF MOHLER FROM
THE PROPERTY."

The record reflects the following proceedings as pertinent
to this appeal. On September 20, 1989, appellee filed a petition
in forcible detention for certain described premises, the
petition averring therein that possession of the premises was
unlawfully detained by appellants.

The cause was referred to a referee who filed, after a
hearing which was not recorded, on October 9, 1989, a "Referee's
Recommendation" which read, inter alia, as follows:

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"RECOMMENDATIONS:

* * *

Writ of Restitution issue X

Defendant admitted that rent was not paid for August Sept. & the parties negotiations re: lease & option never materialized.

DAVID W. KUHN

David W. Kuhn, Referee

On October 26, 1989, the court entered a judgment in favor of appellee by granting restitution of the premises. A writ of restitution was apparently issued on October 26, 1989, but was returned unexecuted on November 11, 1989. On November 13, 1989 a second writ of restitution was issued and executed on November 21, 1989.

On November 20, 1989, which was one day prior to execution of the writ, a motion was filed for the trial court to set a supersedeas bond pending appeal, a notice of appeal being filed on November 21, 1989. The court set a hearing on the motion for supersedeas bond for November 30, 1989 and, on that date, held the issue of supersedeas bond was moot because of the writ of restitution had been previously executed on November 21, 1989.
n2

Appellant's brief poses the issue in this appeal as follows:

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"The appeal his based upon the referee's failure to follow Rule 53(E)(1). After Mohler's testimony was taken, the referee took the matter under advisement. Although he was asked to prepare a report, so that objections could be filed, the referee never filed a formal report or recommendation as required by Rule 53(E)(1) of the Rules of Civil Procedure. Due to the referee's failure to issue a formal report of recommendation, Appellants were unable to make meaningful objections, as allowed by Rule 53(E)(6) of the Rules of Civil Procedure."

Civ. R. 53(E)(1) reads as follows:

"(E) Report.

(1) Contents and filing. The referee shall prepare a report upon the matters submitted by the order of reference. The referee shall file the report with the clerk of the court and shall mail a copy to the parties. In an action on the merits of an issue to be tried without a jury, the referee shall file with the report a

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transcript of the proceedings and of the evidence only if the court so directs."

The record refutes appellants' argument that no referee's report was filed. While the contents of the report were meager, it nevertheless was subject to the filing of exceptions under Civ. R. 53(E)(Z), but none was filed by appellants. Even if objections had been filed, the automatic stay provision of Civ. R. 53(E)(7) would not have applied under the holding in Colonial American Development Co. v. Griffith (1990), 48 Ohio St. 3d 72.

The assignment of error is overruled and the judgment is affirmed. n3

JUDGMENT AFFIRMED

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and Appellee recover of Appellants costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Portsmouth Municipal Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this Entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

NOTICE TO COUNSEL

Pursuant to Local Rule No. 11, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

DISPOSITION

JUDGMENT AFFIRMED

COUNSEL FOOTNOTES

n1 The parties were apparently represented by counsel in the trial court but not in this appeal.

OPINION FOOTNOTES

n2 While it is not assigned as error, it would appear that the court's delaying approval of an application for a supersedeas bond until execution is accomplished and then dismissing the application as moot is erroneous. Parties are entitled in a civil case, to a stay of execution as of right upon posting a supersedeas bond. The General Assembly anticipated the issuance of such stay after eviction in a forcible entry and detainer action by providing, inter alia, in R.C. 1923.14:

"If an appeal from the judgment of restitution is filed and if, following the filing of the appeal, a stay of execution is obtained and any required bond is filed with the court of common pleas, municipal court, or county court, the judge of that court immediately shall issue his order to the sheriff, police officer, constable, or bailiff commanding him to delay all further proceedings upon the execution. If the premises have been restored to the plaintiff, the sheriff, police officer, constable, or bailiff shall forthwith place the defendant in possession of them, and return the writ with his proceedings and the costs taxed thereon." (Emphasis added.)

n3 An entry of this court dated December 18, 1989 reflects that appellant had filed a motion for a stay of the eviction and a more detailed memorandum was ordered. A memorandum was filed but the motion for a stay was apparently filed in App. No. 1857 and this was not ruled upon by this court in this appeal. Whether a stay should have been granted, it was not, and, inasmuch as the eviction occurred on November 21, 1989 and no stay granted, the appeal would now appear to be moot. *M\$lineaux v. Gray* (1956), 79 Ohio Law Abs. 31 (App.), *Allison v. Braunlin* (1961), 113 Ohio App. 511 cf. *State v. Berndt* (1987), 29 Ohio St. 3d 3. See also discussion 4 Ohio Jurisprudence 3d (1978) 861, Appellate Review, Sections 478, et seq.

VICKI L. BROADNAX ZELLNER, Plaintiff-Appellee
vs.
REGINA TURNER, Defendant-Appellant

NO. 92 CA 41

COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT, GREENE
COUNTY

1993 Ohio App. LEXIS 279 . .T/;"

January 26, 1993, Rendered

T.C. CASE NO. X91 CVG 696 ,1

- T

COUNSEL

DAVID W. COX, 85 W. Main Street, Xenia, Ohio 45385, Atty.
Reg. No. 0003200, Attorney for Plaintiff-Appellee.

C. DOUGLAS MORT, 275 S. Allison Avenue, Xenia, Ohio 45385,
Atty. Reg. No. 0012641, Attorney for Defendant-Appellant.

JUDGES

WOLFF, BROGAN, FAIN

AUTHOR: WOLFF

OPINION f

WOLFF, J.

Regina Turner appeals a judgment of the Greene County Court of Common Pleas, which adopted the report and recommendation of the referee recommending that Turner make restitution to Vicki Zellner of the premises located at 436 East Church Street in Xenia, Ohio.

In September of 1986, Turner entered into a lease agreement with Thelma Harper for the Church Street premises. At the time the lease was executed, Harper had executed a Housing Assistance Payments Contract ("HAP") with Greene Metropolitan Housing Authority ("GMHA"). In accordance with the terms of the HAP contract, GMHA would pay a rent subsidy to Harper as long as Harper rented the premises to a qualifying low income tenant. Turner was a qualified low income tenant.

Harper subsequently sold the premises to Zellner. Turner and Zellner executed a lease for the premises in December 1989.

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The lease was in effect from December 1, 1989 through December 1, 1990. The lease stated that if the lessee continued to occupy the premises after the lease had expired, the tenancy would be on a month to month basis.

In December of 1989, Turner became ineligible for financial assistance from GMHA. She was reinstated in April of 1990 and GMHA paid the rental subsidy to Zellner although Zellner had not entered into a separate HAP contract with GMHA. However, because Turner had previously qualified for financial assistance at the property, and Zellner desired to participate in GMHA's subsidy program, GMHA simply transferred Harper's subsidy contract to Zellner. The subsidy agreement was later extended through October 1991.

On May 20, 1991, GMHA sent a "Notification of Anniversary Date" letter to Zellner, acknowledging that the HAP contract was due to expire on October 1, 1991 and requesting Zellner to inform GMHA whether she intended to continue with the program. Zellner indicated that she did not intend to continue with the subsidy program because of Turner's poor attitude and because she could receive a higher rent for the premises than she was currently receiving under the GMHA program. On June 11, 1991, GMHA sent a written notice to Turner indicating that Zellner did not intend to renew her lease and that she did not intend to participate in the GMHA subsidy program. The notice also stated that Turner could transfer her subsidy upon written request.

On August 27, 1991, Zellner sent a thirty day notice to Turner that she was terminating the tenancy. On October 3, 1991, Zellner served Turner with a three day notice to vacate the premises. On October 8, 1991, Zellner filed a complaint for forcible entry and detainer. Turner counterclaimed on December 23, 1991. A hearing was held on count one, i.e. restitution of the premises of Zellner's complaint, on January 30, 1992. The matter was heard by a referee. On March 26, 1992, the referee submitted his report to the trial court, recommending that Turner make restitution of the premises. The trial court adopted the referee's report and recommendation on March 26, 1992. Turner did not have the opportunity to file objections to the referee's report before the trial court entered judgment. Turner timely filed her notice of appeal on April 27, 1992. She also filed a motion for stay of execution and posted an appeal bond. The motion was granted. Turner raises five assignments of error.

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED BY ENTERING JUDGMENT WITHOUT A REPORT AND RECOMMENDATION OF THE REFEREE CONTAINING FINDINGS OF FACT PURSUANT TO CIVIL RULE 53 (E) AND THIS ERROR PREJUDICED APPELLANT BY DEPRIVING HER OF THE RIGHT TO HAVE THE TRIAL COURT MAKE AN INDEPENDENT ANALYSIS OF THE ISSUES AS REQUIRED BY CIVIL RULE

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53(E). -

The trial court adopted the referee's report without filing a separate opinion stating its rationale for adopting the report. On appeal, Turner argues that, pursuant to Civ. R. 53 (E), the trial court was required to file its own opinion, separate from the referee's report, stating its findings of fact and conclusions of law. Turner also objects to the court's failure to wait fourteen days, the time limit for filing objections, before entering judgment. Finally, Turner contends that the information contained in the referee's report was insufficient for the trial court to have made an independent analysis of the issues as required by Civ. R. 53.

Civ. R. 53(E)(7) permits the trial court to enter judgment on the referee's report without waiting for timely objections by the parties. Moreover, there is nothing in the rule which precludes the trial court from adopting the referee's report simply by signing the referee's report instead of filing its own opinion and entry.

This court has previously considered the role of Civ. R. 53 in forcible entry and detainer actions. In *Colonial American Development Co. dba Georgetown Village Apt. v. Daniel Griffith* (October 5, 1988), Montgomery App. No. 10879, unreported, affirmed (1990), 48 Ohio St.3d 72, we held, relying on *Housing Authority v. Jackson* (1981), 67 Ohio St.2d 129, that Civ. R. 53(E) "is clearly inapplicable to proceedings in forcible entry and detainer."

Forcible entry and detainer, as authorized in R.C. Chapter 1923, is a summary proceeding in which 'any judge of a county court' may make inquiry into disputes between landlords and tenants, and, where appropriate, order restitution of the premises to the landlord. This is a civil remedy provided by statute and intended to affect only the question of the present right to possess real property. 'The purpose of the forcible entry and detainer statutes is to provide a summary, extraordinary, and speedy method for the recovery of possession of real estate in the cases especially enumerated by statute. 24 Ohio Jurisprudence 2d 455, Forcible Entry and Detainer, Section 2.

The purpose of the forcible entry and detainer statutes is to provide immediate possession of real property. *Haas v. Gerski* (1963), 175 Ohio St. 327, 330. Given its summary nature, the drafters were careful to avoid encrusting this special remedy with time consuming procedure tending to destroy its efficacy. In a recent case, this court refused to allow the pendency of a collateral action in Municipal Court in forcible entry and detainer. *State ex rel. Carpenter v. Court* (1980), 61 Ohio St.2d 208.

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Given the summary nature of this proceeding, and recognizing that the crowded dockets common to Municipal Courts in Ohio require the use of referees, we find no need to compel strict adherence to Civ. R. 53 governing referees. Rather, the trial court need only comply with the forcible entry and detainer statute provisions requiring a judge, and not the referee, to make the final judgment entry, as the trial court did in this case. Civ. R. 53(E), requiring a 14 day delay between the filing of the report by the referee and the final judgment entry by the judge, by its nature is clearly inapplicable since it would destroy the summary nature of forcible entry and detainer proceedings. Jackson, supra, at 130-132.

However, this is not to say that the requirement of a report and recommendation may entirely be dispensed with. This court has held that:

. . . Civ. R. 1(C) has not yet been authoritatively interpreted to hold that in forcible entry and detainer cases, we dispense with the requirement that only judges shall grant judgments, Jackson, supra, and only on the basis of their independent analysis. Thus, where courts utilize referees in forcible entry and detainer actions, the requirement of a report and recommendation cannot be entirely dispensed with.

The court in Zacek v. Zacek (1983), 11 Ohio App.3d 91, 93-94, stated:

We have previously held that Civ. R. 53(E) contemplates a report from the referee which includes a statement of the basis of his findings of fact and recommendations in order that the trial court can make its own independent analysis of the report's validity. Accordingly, the report must include sufficient information to enable the trial judge to render his own decision. Obviously, if the report does not include a statement of the facts forming the basis for the referee's recommendation, the trial court cannot adopt the recommendation as an order of the court since the report lacks the necessary information upon which an independent analysis of questions of law raised by the controversy can be based. This is not to say that the referee's report is an equivalent of, and must comply with the detail and formal requisites of, separate findings of fact and conclusions of law. (Citations omitted.) Shewman v. Coons (March 29, 1990), Montgomery App. NO. 89 CA 46, unreported.

Although it is of no consequence that Turner did not have the opportunity to file objections to the referee's report before the trial court entered judgment, see Civ.R. 53(E), we must still determine whether the referee's report contained sufficient facts for the trial court to make an independent evaluation of the issues of the case.

The pertinent portion of the referee's report and recommendation are as follows:

There is no lease agreement to violate. The payments are voluntary and merely satisfy the Defendant's legal obligation to pay damages for holding over.

What we do not have in the case at bar is a problem with notice. It is clear that at alltime (sic) since the eviction action was filed that there was not taken, by either (sic) side, the notion that the tenancy was being extended by the acceptance of \$ 7.00 per month by the landlord. It is not unfair to expect the tenant to vacate after the expiration of the lease in this case.

In the case at bar the lease was not renewed. There was no lease agreement in effect between the parties. The landlord evidenced an intent not to renew the lease agreement by serving notice on Greene Metropolitan Housing Authority. The parties in this case were on a month to month tenancy.

For the above reasons, the Referee recommends the Court grant the Plaintiff's prayer in the First Claim for Relief, and orders restitution of the premises . . .

While we cannot deny that the report is conclusory, it nevertheless contained sufficient facts upon which the court could have relied to make an independent evaluation of the issues. Unlike the cases upon which Turner relies, this case does not involve a situation in which the referee completely failed to submit a report and recommendation, or in which the report merely stated that the facts of Plaintiff's complaint were true. See, *Shewman, supra*; *Town Center Limited Partnership v. Murray* (April 1, 1988), *Montgomery App. No. 11120, unreported.*

-While we are concerned with the conclusory language of the report, and its "near fatal lack of detail, the scant factual findings were sufficient to permit the court to exercise an independent review of the issues. For example, the report stated that there was no lease between the parties, that the landlord had informed GMHA that she did not intend to renew the lease, that Turner's continued occupation of the premises and continued payment of the rent did not transform the month to month tenancy into a more permanent tenancy. The trial court could have reasonably concluded from these facts that Turner had no right to occupy the premises, thereby warranting her eviction.

We also reject Turner's contention that the trial court could not have conducted an independent review of the referee's report because the trial court did not have objections before it. The trial court is not required to have objections before it in

order to exercise its independent review. Rather, the report and recommendation must contain enough facts for the trial court to independently evaluate the referee's report.

The first assignment is overruled.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED WHEN IT FAILED TO DIRECT THE CLERK TO SERVE ALL PARTIES, NOT IN DEFAULT FOR FAILURE TO APPEAR, NOTICE OF THE JUDGMENT, AND TO SERVE THE PARTIES IN A MANNER PRESCRIBED BY CIVIL RULE 5(B). THIS ERROR PREJUDICED APPELLANT BY DENYING HER THE CHANCE TO REQUEST A NEW TRIAL.

Turner maintains that because the judgment entry did not contain a formal notice to the Clerk of Courts to serve all parties with a copy of the judgment entry, she did not receive notice of the entry within fourteen days and thus was precluded from filing a motion for a new trial. Assuming arguendo that service was defective, Turner was not prejudiced.

In the context of a forcible entry and detainer action, a consequence of a motion for new trial, as well as of objections to a referee's report and recommendation, is the forestalling of restitution of the premises.

In *Colonial American Development Co. v. Griffith* (1990), 48 Ohio St.3d 72, the Ohio Supreme Court affirmed its holding in *Jackson*, supra, that Civ. R. 53(E), including the automatic stay provision of (E)(7), is inapplicable to forcible entry and detainer actions. The court recognized that its holding in *Jackson* was based on the "potential for delay of what is intended to be a summary proceeding." Id. at 73. To hold otherwise would compromise the-summary nature of the proceedings. In our view, a motion for new trial in the context of forcible entry and detainer is analogous in terms of consequence to an objection to a referee's report. Both delay the eviction. Thus, we find the analysis of *Coliinial* to be equally applicable to a discussion of whether Turner was prejudiced because she did not have the opportunity to file a motion for new trial due to untimely notice of the judgment.

Colonial held that Civ.R. 53(E) was inapplicable to forcible entry and detainer actions in order to protect the summary nature of forcible entry and detainer actions. The summary nature of such proceedings would also be frustrated by a motion for new trial.

Absent a right to move for a new trial in forcible entry and detainer proceedings, Turner was not prejudiced by her inability to do so.

The second assignment is overruled.

THIRD ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED BY ABUSING ITS DISCRETION AND THIS ERROR PREJUDICED APPELLANT.

In this assignment, Turner argues that the court abused its discretion by limiting the presentation of her case. Most of the argument advanced in this assignment is a reiteration of the argument advanced in support of the second assignment. We have already rejected those arguments.

The record--fails to support a claim of abuse of discretion. The referee made it quite clear during the hearing on January 30, 1992 that the focus of the hearing was whether restitution of the premises was warranted. Turner was given the unrestricted opportunity to present evidence on this issue. She offered her own testimony and that of Cynthia Cosby, the employee at GMHA who coordinated Turner's benefits with the agency. It does not appear from the record that she was prevented from offering any evidence.

Turner also argues, without any supporting authority, that Zellner's complaint should have been dismissed because a copy of the lease was not attached to the complaint. The record discloses, and Turner does not deny, that she was ultimately supplied with a copy of the lease before the hearing on January 30, 1992 commenced. If the complaint had been dismissed, Zellner no doubt would have immediately refiled her complaint with a copy of the lease properly attached. Since Turner received a copy of the complaint before the hearing commenced, we find no prejudice in the failure to dismiss, given the likelihood that Zellner would have simply refiled the complaint.

The third assignment is overruled.

FOURTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED WHEN IT FAILED TO FIND APPELLANT'S ACCEPTANCE OF FUTURE RENT, WAIVED THE NOTICE OF TERMINATION, AS WELL AS THE NOTICE TO LEAVE THE PREMISES AND RESULTED IN RENEWAL OF THE TENANCY.

Turner argues that because Zellner accepted rent from her after the lease had expired that the notice of termination and the notice to leave the premises were waived. Turner also argues that because the notices were waived, the necessary jurisdictional prerequisites for bringing a forcible entry and detainer action were not satisfied. We disagree.

Proper service of the notice to vacate is a condition

precedent to the commencement of a forcible entry and detainer action. Associated Estates Corp. v. Bartell (1985), 24 Ohio App.3d 6,9. If the lessor waives the notice to vacate, the action has not been properly commenced and the trial court errs if it proceeds on the merits of the case. Id. If the landlord accepts future rent payments after serving the three day notice to vacate, the landlord is deemed to have waived the notice as a matter of law because the acceptance is inconsistent with the landlord's notice to vacate. Id. If, however, the landlord only accepts the rent for liability already incurred by the tenant, then the notice to vacate is not waived. Presidential Park Apts. v. Colston (1980), 17 O.O.3d 220, 221.

The record reasonably supports the trial court's determination that the October rent payment made by Turner and GMI-IA did not constitute the payment of future rent. As of December 1, 1990, there was no lease between the parties. The lease clearly stated that if Turner held over after the lease expired she would become a month to month tenant. Thus, Turner was a month to month tenant from December 1, 1990 until October 1, 1991, at which time the month to month tenancy terminated. Turner had no right to possess the premises after October 1, 1991. Any money paid after October 1, 1991 could only constitute the voluntary payment of damages sustained by virtue of Turner's unlawful holding over. Zellner's acceptance of the payment did not transform the character of the payment from owed rent to future rent.

The fourth assignment is overruled.

FIFTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED WHEN IT FOUND; NO LEASE AGREEMENT BETWEEN THE PARTIES AND THIS ERROR PREJUDICED APPELLANT BY DENYING HER THE PROTECTIONS OF THIS LEASE.

As we previously discussed in connection with the disposition of the fourth assignment of error, the lease between Turner and Zellner expired on December 1, 1990. Moreover, the month to month tenancy terminated on October 1, 1990. Despite these facts, Turner claims that the trial court erred by finding that there was no lease. She contends that because the court erroneously concluded that there was no lease, she was unfairly denied the protection of the lease which, she alleges, stated that she could only be evicted for very limited reasons.

Turner relies on the self styled "addendum to lease" attached to the original HAP contract between Harper, the original owner of the property, and GMHA. The HAP contract required the landlord to inform the tenant within thirty days of the "anniversary date" of the landlord's intention not to continue the lease. Paragraph H of the addendum to the HAP

contract stated that the landlord could not terminate the tenancy unless the tenant had: repeatedly or seriously violated the terms and conditions of the lease; violated federal, state, or local laws pertaining to the occupancy or use of the dwelling: or, for good cause. Turner argues that nonrenewal of the lease, cited by Zellner as the reason for the termination of the tenancy, was not, under the terms of the HAP contract, a proper justification for the termination of the tenancy.

There is nothing in the language in the HAP contract or its addendum stating that a landlord must renew every lease if the tenant so desires. The restrictions cited by Turner appear to refer to the landlord's ability to terminate an active lease, not to the landlord's decision not to renew the lease once it has expired. The language of the HAP contract supports this conclusion. Paragraph C states that the lease period for the Church Street premises began on October 1, 1986 and was to continue until the landlord terminated the lease, not the tenancy, in accordance with paragraph H or until the tenant terminated the lease.

Given these facts, and the fact that the lease had expired, the trial court did not err by holding that no lease existed between Turner and Zellner at the time Turner received proper notice to vacate the premises.

We also find no merit to Turner's argument that a contract dated April 21, 1991, and executed between Zellner and the Supporting Counsel of Preventative Effort ("SCOPE"), and signed by Turner, somehow created as a one year lease between Turner and Zellner. The contract provided that SCOPE would weatherize the premises in exchange for a one year freeze on a rent increase. The weatherization contract was between Zellner and SCOPE. Turner was not a party to the contract notwithstanding that her name was on the contract. Moreover, the contract had nothing to do with Turner's tenancy. It merely provided for the weatherization of the premises in exchange for a freeze on rent increases. These conditions were fulfilled without obligating Turner.

The fifth assignment is overruled.

The judgment of the trial court will be affirmed.

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BROGAN, J. and FAIN, J., concur.

DISPOSITION

The judgment of the trial court will be affirmed.