IN THE JUSTICE OF THE PEACE COURT NO. 16

OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

CAPITOL GREEN APARTMENTS

PLAINTIFF

VS. **CIVIL ACTION NO. JP16-90-C0890**

RONALD ROBINSON

DEFENDANT

OPINION AND ORDER

Decided July 3, 1990

Edith Hull-Johnson, Esquire, for Plaintiff.

Michael McCrystal, Esquire, for Defendant.

Before Maybee, J.P.

Plaintiff seeks possession of the rental unit occupied by Defendant and the recovery of accrued rental payments and utility charges for the months of March thru June 1990. The rental payments are Federally subsidized, and the Defendant pays monthly rent in the assisted amount of $91.00 for a rental unit which has a HUD approved market value of $477.00. His lease requires that 90 days prior to its expiration he provide the Plaintiff with information necessary for his subsidy or rental assistance recertification. The lease conforms to a model form published by HUD and provides that failure to submit the above information, within the time limits established by the HUD regulations and the lease, will permit

the landlord to require him to pay the higher or "full market value rent" until his recertification for rental assistance is accomplished. The HUD regulations, it should be noted, do not require the landlord to invoke the penalty provision. Rather, the regulations permit such action by landlords in order to assist them in emphasizing to tenants the need for timely action concerning annual recertification.

Plaintiff notified Defendant, by First Class Mail, on February 1st, 120 days prior to the expiration of the lease, that he was required to request a recertification interview by February 10th; on February 11th, Plaintiff notified Defendant, by certified mail sent to the rental unit, that, if he did not schedule an interview within 10 days, he would lose his rental subsidy or assistance payment, effective March 1st, and become responsible on that date for the full market monthly rent of $477.00. On February 12th, Plaintiff received a letter, purportedly from Defendant, informing it that he would not be available for an interview until March 15th.

On March 6th, Plaintiff sent another certified letter (i.e. a "five day letter") to Defendant stating that unless the "full market rent" was received within five days the lease would be terminated. Again, the letter was addressed to the Defendant at the rental unit. Both certified letters were "unclaimed" by the Defendant, but, on March 3rd, he tendered to Plaintiff (by deposit in the Manager's mail drop) a money order in the amount of his share of the assisted monthly rent, less a credit which the Plaintiff admits he was due.

On March 19th, Defendant provided the information necessary for annual recertification, and, on March 28th, more than 60 days prior to the expiration of his lease, he was notified by Plaintiff that the review process had been completed and that there would be no adjustment to his rental assistance subsequent to the renewal of his lease. Under the HUD regulations, recertification renews a tenant's right to assisted rental payments. Therefore, concerning rent, the only issue is whether Plaintiff is entitled to the full market rent of $477.00 for the month of March. The Plaintiff has refused to accept tender of the assisted rent for March and each month thereafter, but it has not terminated the tenant's subsidy and has received assistance payments from HUD for the entire period in controversy. The disposition of the March assistance payment depends on the outcome of these proceedings.

At the commencement of the trial, Defendant moved to dismiss the action asserting that Plaintiff has not met the jurisdictional prerequisites necessary to bring a summary suit for possession. 25 Del. C., § 5502 requires 1) that the landlord give "notice" of his intention to terminate the lease if the rent is not paid within a period "not less than five days after receipt thereof", and 2) that the tenant must remain in default for the period set forth in the "notice". Defendant argues that a five day certified letter sent on March 6th to his rental unit, after Plaintiff had been informed that he would be elsewhere, does not constitute notice. He argues, by analogy from the law of constructive service of process that

notice of the pendency of proceedings must be "reasonably calculated to give actual notice and . . . an opportunity to be heard", citing Mullane v. Central Hanover Bank and Trust Co. 70 S. Ct. 652 (1950). Further, he argues, that a tenant who pays the assisted rent within the prescribed period is not in "default", as that term is used in 25 Del. C., § 5502.

The evidence establishes, however, that Defendant's mail was being picked up, and that Plaintiff was aware that it was being picked up, on a regular basis. The Court finds that it was reasonable for Plaintiff to assume that Defendant had designated an agent for the delivery or claim of certified mail. It should be noted that Defendant did not provide Plaintiff with any temporary address. The evidence also establishes that Defendant was on actual notice that Plaintiff might invoke the full market rent penalty provision if the recertification requirements were not met. This information was contained in Plaintiff's February 1st letter, the contents of which Defendant acknowledges were communicated to him by his son, who was picking up his mail at the rental unit. The Court thus finds that it was also reasonable for the Plaintiff to assert that the Defendant remained in default when it received, on March 3rd, a money order for the assisted rent only. Defendant is, therefore, entitled to bring this summary suit for possession of the rental unit as well as assert its claim for accrued rent, and Defendant's motion to dismiss is herewith denied.

At the trial, Defendant testified, to the apparent surprise

of Plaintiff, that he had not in fact been out of state as he claimed to be in his purported letter to Plaintiff. Rather, from December 15th, 1989 until March 17th, 1990, he had been held in the custody of the Department of Corrections, a fact which he had not previously disclosed to Plaintiff because of embarrassment and fear of the adverse effect of such disclosure on his property interest. The misrepresentation by Defendant could be relevant if this controversy were to be decided on equitable grounds, but this Court is bound to look initially to the statutory law in order to discern whether any provisions of the Landlord Tenant Code control the disposition and outcome of this proceeding.

Although Defendant argues that Plaintiff had waived its right to cause a forfeiture of the leasehold by applying for and accepting the March subsidy payments from HUD, the Court need not make such a finding. Here the statutes control. While the penalty provisions of the HUD regulations, as incorporated into the lease with Defendant, are discretionary, the provisions of the Landlord Tenant Code are not. 25 Del. C., § 5103 (a) states that any lease agreement "shall" be unenforceable insofar as any provision thereof "conflicts with any provision of this code and is not expressly authorized herein." Further 25 Del. C., § 5501 (e) requires the landlord to give the tenant 60 days notice of any increase in the rent "payable by the tenant." While the Court recognizes the legitimacy of the purpose behind the HUD penalty provision, it is bound to administor the Landlord Tenant Code in accordance with its

explicit provisions. This Court therefore holds that the provisions of the lease between Plaintiff and Defendant and the HUD regulations which authorize Plaintiff landlords to demand full market value rent for the period of non-compliance with the annual recertification for Federal rental assistance are unenforceable as being inconsistent with the above cited provisions of the Delaware Landlord Tenant Code.

In the event that a reviewing Court should hold otherwise as to the above HUD regulations, for whatever reason, it is appropriate for this Court to set forth the equitable considerations which compel it to deny judgment for Plaintiff in an amount representing the full market value of the March rent as well as possession of the rental unit. On March 19, 1990, the first working day subsequent to his release from custody, Defendant reported to the Landlord's office and supplied all of the information necessary for his recertification, which was completed on March 28th, more than 60 days prior to the expiration of his lease. Therefore Plaintiff had sufficient time to implement any increase in the rent which a change in the Defendant's financial status would have required, 25 Del. C., 5501 (e). Plaintiff therefore suffered no economic detriment.

Further, there is no evidence from which this Court could conclude that the conduct of Defendant was willful or malicious. He was, in fact, unavailable for a recertification interview and it was beyond his power to make himself available. Equity abhors a forfeiture and the Plaintiff can be made whole

without recourse to a penalty provision which the parties agree would lead to that result. 25 Del. C., § 5702 (2) requires the Plaintiff to prove, by a preponderance of the evidence, that Defendant "wrongfully failed to pay the agreed rent" in order to terminate the lease and recover possession of the premises. There is no evidence from which the Court could conclude that Defendant's failure to pay the full market rent, under the circumstances presented, was "wrongful".

Therefore judgment is entered for Plaintiff in the amount of $364.00, representing rent in the amount of $91.00 for the months of March, less a credit due, through June 1990 plus utility charges for the same period in the amount of $13.00. On the issue of possession, judgment is entered for the Defendant, with the $24.00 Court costs of this proceeding assessed to the Plaintiff.

IT IS SO ORDERED THIS 3 DAY OF July A.D., 1990.

JOSEPH WHITMORE MAYBEE
Justice of the Peace

Either party has 5 days starting on the date the judgment is signed, in which to appeal to a three-judge Justice of the Peace special court. To make an appeal, the appellant must appear in this Court and make the appeal in writing and post a bond or give other assurances that all court costs, money damages and other orders of the court will be met.

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Final Date To Appeal To Three Judge Panel

July 11, 1990

cc: Michael McCrystal, Esq.
Edith Hull-Johnson, Esq.
File

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