

GUESTS

Illegal Lease

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NATIONAL CARRIAGEHOUSE
FOR LEGAL SERVICES

IN THE MUNICIPAL COURT OF CHILlicothe, ROSS COUNTY, OHIO

HERITAGE HILLS, LTD.

Plaintiff

Case No. 78-CV-G-268

vs

MARGARET A. SMITH

Defendant

MOTION TO DISMISS

Now comes the Defendant, by and through her attorney, pursuant to Civil Rule 12(B)(6), and moves this Court to dismiss Plaintiff's Complaint for failure to state a claim upon which relief can be granted.

Respectfully submitted,

SOUTHEASTERN OHIO LEGAL SERVICES

BY: Rita S. Fuchsman

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MEMORANDUM IN SUPPORT OF MOTION

I. PLAINTIFF'S FAILURE TO COMPLY WITH THE NOTICE PROVISIONS MANDATED BY FEDERAL LAW REQUIRES DISMISSAL OF THE COMPLAINT.

On March 17, 1978, Plaintiff's agent handed Defendant a notice to vacate the premises located at 547 Plyley's Lane, Apt. #41 on the grounds of "The failure to comply with rules and regulations." On April 12, 1978, the Sheriff of Ross County handed a copy of Plaintiff's complaint to Defendant's fifteen year old daughter. The Complaint cites as reason for the action, "Defendant has breached an obligation imposed on her by said written rental agreement in that she has permitted overnight guests without reporting to or securing permission from the Resident Manager." The Defendant has received no other notices of termination of the tenancy.

Heritage Hills, in which Defendant resides, is a housing project with a mortgage insured under Section 221(d)(4) of the

National Housing Act which receives rent subsidies under Section 8 of the United States Housing Act of 1937. As a federally "subsidized project" [see, 24 C.F.R. §450.2(e)], the provisions of 24 C.F.R. §450 et. seq. must be followed when a tenant is evicted. In Ivywood Apts. v. Bennett, 51 Ohio App. 2d 209 (Franklin County 1976), the appellee landlord operated a housing project under the National Housing Act. The Court held, at 214:

[The landlord] is required to comply with federal requirements concerning notice and just cause terminating appellant's tenancy. If one accepts the subsidies, he also accepts responsibility for compliance with rules and regulations. Fundamentally, appellant may be evicted only after timely and adequate notice detailing the reasons for termination, and an adequate hearing.

24 C.F.R. §450.4, Termination notice, states in part:

(a) Requisites of termination notice. The landlord's determination to terminate the tenancy shall be in writing and shall (1) state that the tenancy is terminated on a date specified therein; (2) state the reasons for the landlord's action with enough specificity so as to enable the tenant to prepare a defense; (3) advise the tenant that if a judicial proceeding for eviction is instituted, the tenant may present a defense; and (4) be served on the tenant in the manner prescribed by paragraph (b) of this section.

(b) Manner of service. The notice provided for in paragraph (a) of this section shall be accomplished by (1) sending a letter by first class mail, properly stamped and addressed to the tenant at his address at the project, with a proper return address, and (2) by serving a copy of said notice on any adult person answering the door at the leased dwelling unit, or if no adult responds, by placing said notice under or through the door. Service shall not be deemed effective until both notices provided for herein have been accomplished. (Emphasis added).

Notice in this case is faulty for several reasons. While both the March 17th and April 12th notices inform the Defendant that she may seek legal assistance, neither notice tells her she may present a defense, as required by 24 C.F.R. §450.4(a)(3).

Additionally, the notice in this case is ineffective because the Plaintiff did not serve the Defendant in the manner required by 24 C.F.R. §450.4(a)(4) and 24 C.F.R. §450.4(b). According to these sections, the landlord must first serve the tenant with the termination notice by sending a letter via first class mail. The Defendant in this case has not received a notice by mail. The landlord must also serve the tenant by serving a copy of the notice on any adult person answering the door at the leased unit or, if no adult responds, by placing the notice under or through

the door. While the first notice was handed to the Defendant, the Complaint was given to her fifteen year old daughter. Ohio Revised Code §2151.011 defines an "adult" as "an individual eighteen years of age or older".

The termination notice requirements of 24 C.F.R. §450.4 are mandatory when the tenant lives in a subsidized project defined in 24 C.F.R. §450.2(e); that the landlord may have complied with the notice requirements of the applicable state law is not sufficient in an eviction from federally subsidized project. It is clear that the Plaintiff has not complied with the federal regulations on termination notices. Defendant, therefore, submits that because proper notice is lacking in this case, Plaintiff's Complaint must be dismissed.

II. PLAINTIFF'S FAILURE TO CITE A MATERIAL NON-COMPLIANCE WITH THE RENTAL AGREEMENT, MATERIAL FAILURE TO CARRY OUT OBLIGATIONS UNDER THE OHIO TENANT-LANDLORD ACT, OR OTHER GOOD CAUSE REQUIRES DISMISSAL OF PLAINTIFF'S COMPLAINT.

24 C.F.R. §450.3 states:

(a) General. The landlord may not terminate any tenancy in a subsidized project except on the following grounds:

- (1) Material non-compliance with the rental agreement;
- (2) Material failure to carry out obligations under any state landlord and tenant act, or
- (3) other good cause.

Defendant submits that the reason set forth by the Plaintiff for terminating the tenancy, to-wit: permitting overnight guests without reporting to or securing permission from the Resident Manager, constitutes neither material non-compliance with the rental agreement nor other good cause. Therefore, Plaintiff's Complaint should be dismissed.

A. Material Non-compliance

24 C.F.R. §450.3(c)(1) defines material non-compliance to include "one or more substantial violations of the rental agreement." Plaintiff is relying on number 24 of the Rules attached to Defendant's lease as the basis of this action. That rule reads in part, "Overnight guests are welcome, but shall be reported to the Resident Manager by the Resident." For reasons which shall be set forth more fully in Part III of this Memorandum Defendant submits that this rule is both unconstitutional under the federal Constitution and an unconscionable clause of the

lease under the Ohio Tenant-Landlord Act. As such, any alleged failure to comply with the rule cannot amount to a substantial violation of the rental agreement.

24 C.F.R. §450.3(C)(2) goes on to define material non-compliance as including:

...repeated minor violations of the rental agreement which disrupt the livability of the project, adversely affect the health or safety of any person or the right of any tenant to the quiet enjoyment of the leased premises and related facilities, interfere with the management of the project or have an adverse financial affect on the project.

Defendant submits that an alleged failure to report overnight guests cannot even be considered a "minor" violation of the lease since the reporting requirement is both unconstitutional and unconscionable.

Even if this Court should hold that the alleged failure to report overnight guests is a "minor" violation of the rental agreement, Plaintiff has not alleged that the violation has occurred repeatedly, as required by 24 C.F.R. §450.3(C)(2); nor has Plaintiff alleged that any of the adverse or disruptive consequences of the alleged violation previously cited have occurred.

Because the Plaintiff has failed to state any material non-compliance with the rental agreement, the Complaint must be dismissed.

B. Other Good Cause

24 C.F.R. §450.3(C)(3) allows the landlord of a federally subsidized project to terminate a tenancy for "other good cause". As previously stated, the sole reason for termination given by the Plaintiff in this case is the Defendant's alleged failure to report or secure permission for having overnight guests. As shall be set forth more fully in Part III of this memorandum, this Rule is both unconstitutional and unconscionable and, accordingly, cannot be a basis for terminating a tenancy.

Even if this Court should hold that failure to report overnight guests is "other good cause", Plaintiff's Complaint should be dismissed for failing to comply with the requirements of 24 C.F.R. § 450.3(b). This section states:

The conduct of a tenant cannot be deemed other good cause under §450.3(a)(3) unless the landlord has given the tenant prior notice that said conduct shall henceforth constitute

The Supreme Court most recently re-affirmed the constitutionally protected right to privacy in Zablocki v. Redhail, 46 U.S. L.W. 4093 (Jan. 18, 1978). In Zablocki, the Court, at 4096, cited the holding of Carey v. Population Services International, ___ U.S. ___ (1977):

"While the outer limits of [the right of personal privacy] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interferences are personal decisions relating to marriage, Loving v. Virginia, 388 U.S. 1, 12 (1967); procreation, Skinner v. Oklahoma, 316 U.S. 535, 541-542 (1942); contraception, Eisenstadt v. Baird, 405 U.S., at 453-454; id., at 460, 463-465 (White J., concurring in result); family relationships, Prince v. Massachusetts, 321 U.S. 158, 166 (1944); and child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, [262 U.S. 390, 399 (1923)]." Id., at ___, slip op., at 5 quoting Roe v. Wade, 410 U.S. 113, 152-153 (1973).

To require a tenant to report to the landlord an overnight guest is a violation of the right to privacy as flagrant as the actions prohibited by the Supreme Court in the previously cited cases.

Because the Defendant in this case is a tenant in a federally subsidized housing project, her rental agreement must comport with not only state law, but with federal law as well, including the fundamental rights of due process and privacy. See, Ivywood Apts. v. Bennett, 51 Ohio App 2d 209 (Franklin Co. 1976), at 214; Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973); Lopez v. Henry Phipps Plaza South, Inc., 498 F.2d 937 (2nd Cir. 1974).

There is clearly the requisite state action in this case for the Defendant to claim that her federal constitutional rights of due process and privacy are violated by the overnight guest provision of the rental agreement. The Plaintiff landlord is a mortgager under a mortgage insured under §221(d)(4) of the National Housing Act; the mortgagee, according to the rental agreement, has entered into a contract with the Secretary of Housing and Urban Development; the Plaintiff landlord and the Secretary of HUD have entered into an agreement which establishes the rent paid by the Defendant. See, Joy, supra, at 1239; Lopez, supra, at 943.

If the purpose of Rule 24 is to insure that the tenant's rent is based on the income of all persons residing in the apartment, its broad prohibition of all overnight guests who have not been reported to the Resident Manager does little to effectuate this purpose. The rule, on its face, includes friends of

a basis for termination of occupancy. Said notice shall be served on the tenant in the same manner as that provided for termination notices in §450.4(b).

Plaintiff has not, in the manner provided for termination notice in §450.4(b), notified the Defendant that her alleged failure to report overnight guests shall constitute a basis for termination of occupancy. Therefore, the Plaintiff cannot terminate the tenancy on this basis and the Complaint should be dismissed.

III. PLAINTIFF'S COMPLAINT, BASED ON THE DEFENDANT'S ALLEGED FAILURE TO REPORT OVERNIGHT GUESTS, FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND SHOULD THEREFORE BE DISMISSED IN THAT THE REQUIREMENT TO REPORT OVERNIGHT GUESTS IS AN UNCONSTITUTIONAL VIOLATION OF THE RIGHT TO PRIVACY AND IS AN UNCONSCIONABLE CLAUSE OF THE RENTAL AGREEMENT

Paragraph two of Plaintiff's Complaint states:

Defendant has breached an obligation imposed on her by said written rental agreement in that she has permitted overnight guests without reporting to or securing permission from the Resident Manager.

Number 24 of the Rules attached to the rental agreement states
Overnight guests are welcome, but shall be reported to the Resident Manager by the resident. Special permission may be granted by the Resident Manager for extended visitations of more than 48 hours.

Plaintiff has given no other reasons for bringing this action than Defendant's alleged failure to report overnight guests.

A. The Requirement in a Rental Agreement of Reporting Overnight Guests Is an Unconstitutional Violation of the Right To Privacy.

In the landmark case of Griswold v. Connecticut, 381 U.S. 479 (1965), the Supreme Court for the first time clearly recognized a constitutional right to privacy. The Court found this right to privacy to derive from several fundamental constitutional guarantees, including the First Amendment's "freedom to associate and privacy in one's associations," NAACP v. Alabama, 357 U.S. 449, 462 (1958); the Fourth Amendment's prohibition of unreasonable searches and seizures; the Fifth Amendment's prohibition of self-incrimination which enables one to create a zone of privacy which government may not force one to surrender to one's detriment; and the Ninth Amendment's provision that the enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people. See, Griswold, supra at 484.

of tenants' small children, out of town relatives visiting for a weekend, and overnight babysitters. None of these person's incomes can arguably be included in determining the amount of a tenant's rent. The requirement of reporting their stays to the Resident Manager, therefore, serves only to infringe upon the privacy rights of the tenant.

If the landlord has reason to believe that the rent paid does not truly reflect the income of the tenant, paragraph 5 and 7 of the rental agreement allow the landlord to recertify the the tenant's income and adjust the rent accordingly. Defendant submits that the blanket requirement of reporting all overnight guests go the Resident Manager, which grossly restricts her right to privacy, is not the proper method of determining whether she is paying the proper amount of rent. An eviction action based on alleged failure to so report an overnight guest is a constitutionally impermissible ground for an eviction and Plaintiff's Complaint must therefore be dismissed.

B. Rule 24 of the Rental Agreement Is An Unconscionable Clause Pursuant to Ohio Revised Code §5321.14.

Ohio Revised Code §5321.14(A) states:

If the Court as a matter of law finds a rental agreement, or any clause thereof, to have been unconscionable at the time it was made, it may refuse to enforce the rental agreement or it may enforce the rental agreement, without the unconscionable clause as to avoid any unconscionable result.

See, Laster v. Bowman, 52 Ohio App. 2d 379 (Cuyahoga Co. 1977)

Because of her indigency, the Defendant in this case is severely limited in her selection of housing. Her selection being limited to certain subsidized projects, she is forced to accept rental agreement provisions that tenants in private housing need not accept, including provisions such as Rule 24.

In Note: Public Landlords and Private Tenants: The Eviction of "Undesirables" from Public Housing Projects, 77 Yale L.J. 988 (1968), the author noted that the congressionally announced policy underlying the public housing program is to provide "decent, safe, and sanitary dwellings for families of low income." Defendant submits that this policy is greatly undermined when landlords are able to evict tenants for alleged violations of such unconscionable lease provisions as Rule 24.

Because Rule 24 is an unconscionable clause of the rental agreement, Defendant submits that this Court, pursuant to Ohio Revised Code §5321.14, should refuse to enforce it and dismiss Plaintiff's Complaint.

IV. CONCLUSION

The Plaintiff in this case has not complied with the termination notice provisions as required by 24 C.F.R. §450.4. In addition, the reason given by the Plaintiff for bringing this action, failure to report an overnight guest or secure permission from the Resident Manager for having an overnight guest is both an unconstitutional violation of the Defendant's right to privacy and is based on an unconscionable clause of the rental agreement. Accordingly, Plaintiff's Complaint should be dismissed.

Respectfully submitted,

SOUTHEASTERN OHIO LEGAL SERVICES

BY: Rita S. Fuchsman
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Telephone: 614-773-0012

PROOF OF SERVICE

A copy of the foregoing Motion and Memorandum was served on Richard Ward, Attorney for Plaintiff, by personal service at his place of business, 18 Foulke Blk, Chillicothe, Ohio 45601, on April 20, 1978.

SOUTHEASTERN OHIO LEGAL SERVICES

BY: Rita S. Fuchsman
Rita S. Fuchsman
Attorney for Defendant

IN THE MUNICIPAL COURT OF CHILLICOTHE, ROSS COUNTY, OHIO

HERITAGE HILLS, LTD.

Plaintiff

vs

MARGARET A. SMITH

Defendant

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MAY 16 1978 Case No. 78-CVG-208 lp

NATIONAL CLEGGHOUSE
FOR LEGAL SERVICES

E N T R Y

This matter came on for hearing on May 1, 1978, on the Motion of the Defendant to dismiss Plaintiff's Complaint in Forcible Entry and Detainer.

The Court heard evidence and argument on Branch II of the Motion, namely Plaintiff's failure to cite a material non-compliance with the rental agreement, material failure to carry out obligations under the Ohio Tenant-Landlord Act, or other good cause; and Branch III of the motion, namely that the requirement to report overnight guests is an unconstitutional violation of the right to privacy and is an unconscionable clause of the rental agreement.

Upon consideration of the evidence and argument, the Court found that the Plaintiff failed to show a material non-compliance with the rental agreement; that no material provisions of the State Tenant-Landlord Act apply, and that there was no showing of other good cause.

The Court further found that Rule 24 of the rental agreement, namely, requiring tenants to report overnight guests is unconscionable.

It is therefore ORDERED, ADJUDGED and DECREED that Rule 24 of the rental agreement is unconscionable.

It is further ORDERED, ADJUDGED, and DECREED that Plaintiff's Complaint be, and it hereby is, dismissed, with costs to Plaintiff.

David A. Cutright
 DAVID A. CUTRIGHT, JUDGE

APPROVED:

WARD & KEMLENSPGER

Richard G. Ward
 RICHARD G. WARD
 Attorney for Plaintiff

SOUTHERN OHIO LEGAL SERVICE

Bill S. Patterson
 BY: BILL S. PATTERSON
 Attorney for Defendant

