[Cite as *Eureka Multifamily Group v. Terrell*, 2015-Ohio-1861.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Eureka Multifamily Group, Successor to Intercoastal Group of Companies DBA Greenbelt Place Apts.

Appellee

v.

Elizabeth Terrell

Appellant

Court of Appeals No. L-14-1152

Trial Court No. CVG-14-01971

DECISION AND JUDGMENT

Decided: May 15, 2015

* * * * *

Douglas A. Wilkins and Michael O'Neill, for appellee.

Julita Varner, for appellant.

* * * * *

JENSEN, J.

{¶ 1} Defendant-appellant, Elizabeth Terrell, appeals the June 13, 2014 judgment of the Toledo Municipal Court affirming a magistrate's decision evicting her from an apartment managed by plaintiff-appellee, Eureka Multifamily Group, Successor to Intercoastal Group of Companies, DBA Greenbelt Place Apts. ("Eureka"). For the reasons that follow, we reverse the trial court's decision.

I. Background

{¶ 2} Terrell resided in apartment No. 175 at Greenbelt Apartments on 711 North Erie Street in Toledo, Ohio. The apartment was subsidized by the Department of Housing and Urban Development ("HUD"), and Terrell was required to make rental payments of $25 per month. Under the provisions of the lease agreement, tenancy could be terminated for a variety of reasons, including for drug-related criminal activity, illegal drug use, or other criminal activity on the premises.

{¶ 3} On May 10, 2013, the Toledo Police executed a search warrant at Terrell's apartment and found Percocet, leading to a charge of aggravated drug possession. On January 28, 2014, Eureka provided Terrell with a three-day notice of termination of her lease for failure to pay rent since November 2013, permitting illegal activity on the property, and committing an assault. On February 11, 2014, Eureka filed a complaint in forcible entry and detainer. It sought a writ of restitution for return of the premises.

{¶ 4} A hearing took place on March 26, 2014, in front of a magistrate in Toledo Municipal Court. Detective Eric Sweat testified as to the May 10, 2013 incident. Christina Dick, a property manager for Eureka also testified. She said that Eureka did not become aware of the May 2013 incident until January of 2014. On January 28, 2014, Eureka provided the three-day notice of termination of Terrell's lease. Dick conceded that at the beginning of February and the beginning of March 2014, Terrell submitted money orders for February and March rent. She said that she held those money orders

without cashing them, but did not return them or provide Terrell with notice that those rent payments would not be accepted.

{¶ 5} Terrell moved to dismiss. The magistrate denied the motion and on March 28, 2014, he found in favor of Eureka. That same day, the trial court adopted the magistrate's decision, ordering that a writ of restitution be issued and executed.

{¶ 6} Terrell filed objections to the magistrate's decision, arguing that Eureka's acceptance of the February and March 2014 rent checks after service of the three-day notice to vacate constituted a waiver of the notice and of the breach of the rental agreement. Eureka claimed that it had accepted the checks before it learned of the criminal activity, therefore, there could be no waiver. It also argued that HUD's zero tolerance policy required Terrell's eviction.

{¶ 7} In a judgment entry journalized on June 13, 2014, the trial court found that the evidence "clearly establishe[d] that the Plaintiff accepted the rent for the months of February and March, 2014 and failed to return the rent or advise the Defendant of non-acceptance of the rent." It also found that Terrell had allowed illegal activity to occur on the property. It concluded that Eureka's acceptance of the checks constituted waiver, but it found that the lease was breached. On the basis of the breach of the lease, it affirmed the decision of the magistrate.

{¶ 8} Terrell filed this timely appeal and assigns the following errors for our review:

FIRST ASSIGNMENT OF ERROR

The Trial Court erred when it did not dismiss Eureka's Complaint in Forcible Entry and Detainer because Eureka waived the R.C. 1923.04 Notice to Vacate by accepting future rent.

SECOND ASSIGNMENT OF ERROR

The Trial Court erred in denying Ms. Terrell's Objections to the Magistrate's Decision and upholding the Order for eviction by inconsistently finding waiver due to Eureka's acceptance of future rent with knowledge of the breach, yet failing to apply this finding to the facts of this case.

II. Law and Analysis

{¶ 9} Terrell claims that the trial court should have granted her objections to the magistrate's decision and should have dismissed the forcible entry and detainer action for lack of subject-matter jurisdiction because after learning of the breach of the rental agreement and after providing the three-day notice to vacate, Eureka accepted February and March 2014 rent payments from Terrell. She claims that acceptance of the rent payments waived the notice and the breach of the lease and that her due process rights were violated by the failure to comply with Ohio's eviction laws.

{¶ 10} The trial court found (1) that Eureka accepted rent for February and March 2014; (2) that this acceptance constituted a "waiver"; and (3) that the May 10, 2013 incident was a breach of the lease. Based on the breach, it affirmed the magistrate's decision. Terrell argues that upon concluding that Eureka accepted future rent payments and characterizing this as "waiver," the trial court was required to dismiss Eureka's complaint.

{¶ 11} "Proper service of a three-day notice to vacate the premises is a condition precedent to the commencement of a forcible entry and detainer action." *Colbert v. McLemore*, 8th Dist. Cuyahoga No. 81961, 2003-Ohio-3255, ¶ 6, citing R.C. 1923.04; *Stenberg v. Washington,* 113 Ohio App. 216, 221, 177 N.E.2d 525 (9th Dist.1960). Where a landlord waives service of the notice to vacate, the action has not been properly commenced, and the court lacks subject-matter jurisdiction over the action, thus rendering any judgment void ab initio. *MLR Properties, Inc. v. Hemmelgarn*, 6th Dist. Lucas No. L-94-349, 1995 WL 504629, *3 (Aug. 25, 1995).

{¶ 12} Similarly, "a landlord waives the right to terminate a tenancy due to a breach of the lease if, after learning of the breach, he takes action inconsistent with the termination of the tenancy." *Cuyahoga Metro. Hous. Auth. v. Hairston,* 124 Ohio Misc. 2d 1, 2003-Ohio-3005, 790 N.E.2d 828, ¶ 5 (M.C.), citing *Brokamp v. Linneman*, 20 Ohio App. 199, 202, 153 N.E. 130 (1st Dist.1923). *See also Chillicothe Metro. Hous. Auth. v. Anderson,* 4th Dist. Ross No. 1406, 1988 WL 69118, *9 (June 28, 1988). The *Hairston* court rejected an argument that this general principle ceases to apply pursuant to

public policy where legislation provides for eviction of tenants who participate in drug activity on the premises of a government-subsidized housing unit. *Id.* at ¶ 8. It held that the defense of waiver remains available to the tenant, even under such circumstances. *Id.* at ¶ 11.

{¶ 13} Whether a landlord's conduct constitutes a waiver is a question of fact. *Colbert* at ¶ 7. A landlord who accepts future rent payments after serving a notice to vacate is deemed to have waived the notice to vacate as a matter of law because such acceptance is inconsistent with the notice to vacate. *Id.* Waiver will not be found, however, by a landlord's acceptance of *past* due rent. *Mecca Mgmt., Inc. v. Gouse*, 6th Dist. Lucas No. L-97-1185, 1997 WL 728635, *2 (Nov. 21, 1997). In addition, a landlord has not "accepted" a money order where he or she retains it for evidentiary purposes without cashing it, and tenders it back on the day of trial. *Associated Estates Corp. v. Bartell*, 24 Ohio App.3d 6, 9, 492 N.E.2d 841 (8th Dist.1985). But where the landlord retains a money order, fails to notify the tenant that the money order was not accepted in payment of rent, and fails to tender the money order to the tenant at or before trial, retention of the money order constitutes an acceptance. *Pace v. Buck*, 86 Ohio App. 25, 28, 85 N.E.2d 401 (2d Dist.1949).

{¶ 14} In the trial court, Eureka denied that it waived the three-day notice to vacate or the breach of the lease agreement because it merely held the money orders submitted by Terrell for February and March 2014 rent, but did not cash them. On appeal, however, Eureka admits that it accepted the money orders tendered to it, but

states that the amounts were accepted as payment for past due rent for the period of November 2013 to January of 2014. It contends that because the amounts were applied to past due rent and not to future rent, the acceptance of the money orders did not constitute waiver. Since Eureka did not file a cross-appeal from any of the findings or judgments of the trial court, the issue of whether holding and not cashing the money orders constitutes an acceptance of future rent is not before the court.

{¶ 15} Although the three-day notice provided by Eureka states that Terrell failed to pay rent since November of 2013, and although Eureka pled the failure to pay rent as an allegation in its complaint, it offered no testimony or evidence in the trial court to support this claim. Moreover, it conceded at trial that after providing the three-day notice to vacate on January 28, 2014, Terrell tendered money orders for February and March 2014 rent that Eureka did not return. On cross-examination by Terrell, Dick testified at trial:

> Q: You've testified that you served the Notice on January 28th; is that correct?
>
> A: Uh-huh.
>
> Q: And since then, my client has sent in February's rent, correct?
>
> A: Yes.
>
> Q: As well as March's rent, correct?
>
> A: And you are indicating that you are holding that? You have not returned it, correct?

A: Yes.

Q: You've also—have you sent my client Notice that that rent was not going to be received?

A: No, we are going to send everything to her received (unintelligible on recording.)

Q: Okay. So February's rent was paid beginning of February. March's rent was paid beginning of March. You have yet to send my client notification—

A: Yes.

Q: --that those rents were not going to be received, that they were going to be returned, correct.

A: Yeah, correct.

{¶ 16} There is no evidence that the money orders were ever returned to Terrell. In addition, Terrell testified that she consistently paid rent from May of 2013 through March of 2014. Eureka offered no evidence to dispute this.

{¶ 17} Based on the evidence presented at trial, the trial court made a factual finding that Eureka accepted future rent payments resulting in waiver. Having found a waiver, the trial court should have concluded that Eureka waived the three-day notice to vacate, thereby depriving it of subject-matter jurisdiction and necessitating dismissal. It should also have concluded that Eureka waived the breach of the lease agreement. The failure to do so renders its judgment void.

{¶ 18} Ohio courts have inherent power to vacate a void judgment. *MLR Properties, Inc.*, 6th Dist. Lucas No. L-94-349, 1995 WL 504629, at *3. Pursuant to that inherent power, we hold that the trial court's judgment in this case was void for lack of subject-matter jurisdiction and we vacate the trial court's order.

{¶ 19} We find Terrell's assignments of error well-taken.

III. Conclusion

{¶ 20} We find Terrell's assignments of error well-taken and reverse and vacate the June 13, 2014 judgment of the Toledo Municipal Court. This case is remanded for proceedings consistent with this decision. The costs of this appeal are assessed to Eureka pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE