

**IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
VAN WERT COUNTY**

JESSICA DENNEY, TRUSTEE,

PLAINTIFF-APPELLANT,

CASE NO. 15-14-10

v.

ROBERT CARROL, ET AL.,

OPINION

DEFENDANTS-APPELLEES.

**Appeal from Van Wert Municipal Court
Trial Court No. CVG 1400607**

Judgment Reversed and Cause Remanded

Date of Decision: May 4, 2015

APPEARANCES:

Steven P. Mielke for Appellant

SHAW, J.

{¶1} Landlord-appellant, Jessica Denney, Trustee (“Appellant”), appeals the November 21, 2014 judgment of the Van Wert Municipal Court finding that the trial court lacked jurisdiction to proceed on her Forcible Entry and Detainer (“FED”) complaint against tenants-appellees, Robert Carroll and Jason Gurwell (“Appellees”) because the thirty day tenancy termination notice had not expired prior to Appellant serving a three-day notice of eviction on Appellees and prior to her filing the complaint initiating the FED action.

{¶2} The parties entered into a written “Residential Lease Agreement” for the property located at 612 Carmean Street in Ohio City situated in Van Wert County. The terms of the residential lease specified a one year time period beginning on August 1, 2013 and expiring on July 31, 2014. According to the lease, Appellees were required to pay a monthly rent of \$500.00 on the first of each month. The lease further stated the following in bold, italicized, and underlined font on the front page of the document:

If resident’s full payment in good funds is not received by the 1st day of the month the terms of this lease have been broken. Beginning on the 2nd day of the month, eviction proceedings will begin and a late penalty of \$45 will be added to the amount owed.

(Doc. No. 1, ex. B).

{¶3} The lease also stated that after July 31, 2014, the tenancy would automatically convert into a month-to-month tenancy with all the other terms of the agreement remaining in effect. Contemporaneously to signing the lease, the parties also executed a separate document entitled “Option to Purchase Agreement,” which granted Appellees the option to purchase the property within a specified timeframe. Specifically, this agreement stated that Appellees’ option to purchase the property would remain in effect for a twelve month term expiring on July 31, 2014. Pursuant to the terms of the option agreement, Appellees paid a non-refundable sum of \$2,000.00 in consideration of the contract. The option agreement also set forth specific terms delineating Appellees’ responsibility to obtain financing to purchase the property.

{¶4} On August 1, 2014, the year timeframe specified in the residential lease and the option agreement had expired without Appellees obtaining the financial means to purchase the property. Appellees paid rent and continued their possession of the property, which by the terms of the lease had now converted into a month-to-month periodic tenancy. The option agreement was not renewed by the parties and was consequently no longer in effect.

{¶5} On September 1, 2014, Appellees tendered their rent to Appellant.

{¶6} On September 30, 2014, Appellant served Appellees with a notice informing Appellees that they must vacate the premises by October 31, 2014, if they could not find a lender to purchase the home by that date.

{¶7} On October 1, 2014, Appellees failed to pay rent. The next day, on October 2, 2014, pursuant to the terms of the lease, Appellant served Appellees with an eviction notice in compliance with R.C. 1923.04, which informed Appellees that they must vacate the property by October 5, 2014, to avoid the initiation of legal proceedings. The ground cited in the eviction notice was “Non-payment of Rent.” (Doc. No. 1, Ex A). Appellees subsequently refused to vacate.

{¶8} On October 14, 2014, Appellant filed a two-count complaint requesting the trial court grant her restitution of the property and money damages for back rent and other fees and expenses.

{¶9} On November 5, 2014, the case was heard before the trial court. The record indicates that Appellees continued to live on the property at the time of the hearing and the parties agreed that Appellees had not paid rent for the months of October and November 2014. Appellant appeared with her attorney and testified in support of her complaint. Appellee Gurwell appeared *pro se* and Appellee Carroll was not present at the hearing.

{¶10} On November 7, 2014, Appellant submitted a brief supporting her FED claim.

{¶11} On November 21, 2014, the trial court issued a judgment finding that it lacked jurisdiction to hear the case because Appellant's FED action failed to comply with the notice requirements for terminating a month-to-month tenancy. The trial court dismissed the complaint finding the action untimely.

{¶12} On December 19, 2014, Appellant filed this appeal asserting the following assignment of error.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DISMISSED APPELLANT'S FORCIBLE ENTRY & DETAINER ACTION FOR LACK OF JURISDICTION BASED UPON THE FINDING THAT THE CASE WAS NOT TIMELY FILED.

{¶13} In her sole assignment of error, Appellant argues that she complied with the proper notice requirements to initiate her FED action and that the trial court erred in dismissing her complaint.

{¶14} The facts in this case implicate two separate and distinct statutory procedures and notice requirements involving landlord-tenant law.

Termination of a Periodic Tenancy

{¶15} First, R.C. 5321.17 sets forth the procedures for termination of periodic tenancies. Specifically, R.C. 5321.17(B) provides the notice requirements for terminating a month-to-month tenancy and states that "the landlord or the tenant may terminate or fail to renew a month-to-month tenancy by notice given the other at least thirty days prior to the periodic rental date." Thus,

in order to terminate a month-to-month tenancy either the landlord or the tenant must give at least thirty days' notice to the other party in compliance with R.C. 5321.17(B).

{¶16} The thirty day notice is the first of “three separate jurisdictional steps” that a landlord must follow before a court will order a tenant to vacate the premises subject to a periodic tenancy. *Voyager Vill. Ltd. v. Williams*, 3 Ohio App. 3d 288, 291 (2d Dist. 1982). “These three steps are: (1) service upon defendant of proper notice of termination of tenancy under R.C. 5321.17(B); (2) service upon defendant of a proper R.C. 1923.04(A) three-day notice; and (3) filing by plaintiff of a complaint in forcible entry and detainer.” *Id.* “Thus, when a tenant is living by a month-to-month tenancy, a minimum of 33 days must be allowed before the landlord may initiate proceedings for ejectment.” *Siegler v. Batdorff*, 63 Ohio App. 2d 76, 83 (8th Dist. 1979). Notably, this three-step process contemplates that the tenant has failed to vacate the premises and instead has held over possession beyond the parties' agreement once the thirty day time period pursuant to R.C. 5321.17(B) had expired, thereby necessitating service of the three-day eviction notice under the Forcible Entry and Detainer statute.

Forcible Entry and Detainer

{¶17} The second statutory procedure implicated in this case is set forth in Chapter 1923, which governs Forcible Entry and Detainer actions. Section

1923.02 of the Revised Code enumerates the persons subject to FED actions. Specifically, R.C. 1923.02(A)(9) states that an FED action may be brought “[a]gainst tenants who have breached an obligation imposed upon them by a written rental agreement.” Notably, there are two categories of “obligations” imposed upon parties subject to a written residential lease: (1) obligations which are outlined by statute, *see e.g.*, R.C. 5321.05 “Obligations of tenant” and, R.C. 5321.04 “Obligations of landlord;” and (2) obligations arising from the parties’ written rental agreement.

{¶18} The notice required to be given a tenant for vacating the premises differs depending on the type of obligation breached. If the tenant breaches one of the statutory obligations stated in R.C. 5321.05, the landlord is required to give at least thirty days’ notice under R.C. 5321.11 before terminating the rental agreement.¹ “On the other hand, if there is a breach of an obligation imposed by a written rental agreement which obligation is not included in R.C. 5321.05, there is no requirement that there be the thirty-day notice called for in R.C. 5321.11.” *Parker v. Fisher*, 17 Ohio App. 3d 103, 105 (9th Dist. 1984); *see also* R.C. 5321.17(D)(expressly stating that “[t]his section does not apply to a termination

¹ There is an exception in the case of a tenant’s breach of the statutory obligation stated in R.C. 5321.05(A)(9) which imposes a duty upon the tenant to “[c]onduct himself, and require persons in his household and persons on the premises with his consent to conduct themselves, in connection with the premises so as not to violate the prohibitions contained in Chapters 2925. and 3719. of the Revised Code, or in municipal ordinances that are substantially similar to any section in either of those chapters, which relate to controlled substances.” Chapters 2925 and 3719 govern drug offenses and controlled substances respectively. *See* R.C. 5321.11

based on the breach of a condition of a rental agreement * * *”). Thus, a landlord only needs to comply with the three-day notice stated in R.C. 1923.04(A) when pursuing an FED action based upon a tenant’s breach of a non-statutory obligation imposed by a written rental agreement. *See* R.C. 1923.04(A) and R.C. 1923.02(A)(9).

{¶19} Turning to the instant case, Appellant filed the complaint for a FED against Appellees based on their failure to pay October 2014 rent. The payment of rent is *not* a statutory obligation. Moreover, numerous courts have held that “neither R.C. 5321.11 nor 5321.17 obligates a landlord to provide a thirty-day tenancy termination notice to a tenant where the only alleged breach involves failure to pay rent pursuant to a rental agreement.” *See e.g., Georgetown Park Apt. v. Woernley*, 112 Ohio App.3d 428, 431 (1996); *Timbercreek Vill. Apts. v. Myles*, 2nd Dist. Montgomery No. 17422, at *6 (May 28, 1999). The record indicates that the only ground stated in support of Appellant’s three-day notice to vacate the premises and Appellant’s FED complaint was Appellees’ failure to pay rent pursuant to the terms of the lease. Notably, Appellant filed her FED complaint well after the expiration of the three-day notice.

{¶20} Nevertheless, it appears the trial court determined that Appellant’s failure to comply with the three-step procedure for terminating a periodic tenancy deprived the court of jurisdiction to hear the FED complaint because Appellant did

not allow the thirty day timeframe stated in her September 30, 2014 notice to terminate the month-to-month tenancy to expire before Appellant served Appellees with the three-day eviction notice and before the filing of the FED complaint. The trial court stated that “[s]ince an action in forcible entry and detainer *other than one involving breach of the agreement* cannot be commenced until the tenancy is terminated, which in this case would be October 31, 2014, a court will be without jurisdiction to proceed until both the termination notice and the three day notice are properly served.” (Doc. No. 5 at 3) (emphasis added).

{¶21} The trial court appears to have focused exclusively upon Appellant’s September 30, 2014 thirty-day notice to terminate the periodic tenancy as controlling over any subsequent FED action. However, the trial court failed to recognize that the record establishes that Appellant also filed a valid FED action involving a breach of the agreement—i.e., non-payment of rent—and that Appellant’s September 30, 2014 thirty-day notice, and the reasons contained therein, became irrelevant when Appellees failed to pay rent on October 1, 2014.

{¶22} In sum, Appellees’ failure to pay rent triggered a separate course of action available for Appellant to pursue based upon Appellees’ breach of the obligation to pay rent on the first of the month which was imposed upon them by the terms of the written rental agreement. *See* R.C. 1923.04(A) and R.C. 1923.02(A)(9). Accordingly, once Appellees committed this breach, Appellant

was no longer required to allow the thirty days to run before initiating the FED procedure. We note that the trial court cites a number of cases in its judgment entry dismissing Appellant's FED complaint in support of its decision. However, these cases simply set forth the procedure and notice requirements discussed above and none of them address the specific facts presented in this case.²

{¶23} Accordingly, the trial court erred when it dismissed Appellant's FED complaint on the basis that it lacked jurisdiction to hear the case. The record demonstrates that Appellant complied with the notice requirements for initiating an FED action against Appellees as stated in R.C. 1923.04(A) and, therefore, the case was properly before the court. As such, the assignment of error is sustained and the judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

*Judgment Reversed and
Cause Remanded*

ROGERS, P.J. and PRESTON, J., concur.

/jlr

² The trial court also relies on R.C. 1923.02(A)(6)(a)(ii) in support of its position that Appellant was required to comply with the thirty-day notice procedure outlined in R.C. 5321.17(B). However, the scenario described in that particular statutory section does not apply to the facts in this case.