[Cite as *Millennia Hous. Mgt., Ltd. v. Williams*, 2015-Ohio-1024.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101627

MILLENNIA HOUSING MANAGEMENT, LTD.

PLAINTIFF-APPELLANT

vs.

KEVIN WILLIAMS

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cleveland Municipal Court
Case No. 2013 CVG 007437

BEFORE: E.T. Gallagher, J., McCormack, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: March 19, 2015

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EILEEN T. GALLAGHER, J.:

{¶1} Plaintiff-appellant, Millennia Housing Management, Ltd. ("Millennia"), appeals an order of the Cleveland Municipal Housing Court that granted summary judgment in favor of defendant-appellee, Kevin Williams ("Williams"), on Millennia's complaint for forcible entry and detainer. Millennia raises one assignment of error for our review:

1. The trial court erred in granting appellee's motion for summary judgment.

{¶2} We find no merit to the appeal and affirm.

I. Facts and Procedural History

{¶3} Millennia is the landlord of an apartment building known as Abington Arms Apartments ("Abington Arms"), which is located on Mayfield Road in Cleveland. Abington Arms is subsidized by various programs provided by the United States Department of Housing and Urban Development ("HUD"). Williams executed a HUD Model Lease ("the Model Lease") with Millennia for an apartment at Abington Arms on January 1, 2008. The Model Lease states that it is covered by "[t]he Section 202 Program for Housing Elderly and Handicapped Individuals in conjunction with the Section 8 Housing Assistance Payments Program." [1] Paragraph nine of the Model Lease provides: "Unless terminated or modified as provided herein, this Agreement shall be automatically renewed for successive terms of one month each at the aforesaid rental, subject to adjustment as herein provided."

[1] "Section 8" refers to Section 8 of the Housing Act of 1937 (42 U.S.C. 1437f), and "Section 202" refers to Section 202 of the Housing Act of 1959 (12 U.S.C. 1701q).

{¶4} In May 2013, Millennia filed a complaint in forcible entry and detainer seeking restitution of Williams's apartment.[2] The complaint alleged that Williams violated the terms of the lease by engaging in a pattern of criminal and harassing behavior, and by failing to make rental payments on time. The complaint further alleged that despite receiving numerous warnings regarding his conduct, Williams refused to stop engaging in the behavior that violated the lease. However, while the eviction action was pending, Millennia and Williams executed a new Model Lease for the same apartment on September 4, 2013. This lease was effective from October 1, 2013 through September 30, 2014, and included an automatic renewal provision identical to that provided in the 2008 lease.

{¶5} Williams filed a motion to dismiss the eviction complaint, arguing that the execution of the new Model Lease on September 4, 2013, waived Millennia's eviction claim against him. The trial court converted the motion to dismiss into a motion for summary judgment, granted the motion, and dismissed the eviction action. After Williams voluntarily dismissed counterclaims he had filed with his answer, Millennia appealed the court's order granting Williams's motion for summary judgment.

II. Law and Analysis

Standard of Review

{¶6} We review an appeal from summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). The party moving for summary judgment bears the burden of demonstrating the absence of a genuine issue of material fact as to the essential elements of the case with evidence of the type listed in Civ.R. 56(C). *Dresher v. Burt*,

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[2] Millennia initiated a prior eviction action in the Cleveland Municipal Housing Court in August 2011, which was dismissed on procedural grounds.

75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). Once the moving party demonstrates entitlement to summary judgment, the burden shifts to the nonmoving party to produce evidence related to any issue on which the party bears the burden of production at trial. Civ.R. 56(E). Summary judgment is appropriate when, after construing the evidence in a light most favorable to the party against whom the motion is made, reasonable minds can only reach a conclusion that is adverse to the nonmoving party. *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201 (1998).

Waiver

{¶7} In its sole assignment of error, Millennia argues the trial court erred in granting Williams's motion for summary judgment. Millennia argues the parties' execution of the new lease during the pendency of the eviction action did not constitute a waiver of Millennia's eviction claim because HUD regulations mandated execution of the new lease between Millennia and Williams.

{¶8} A waiver is the voluntary relinquishment of a known legal right or the commission of an act that is inconsistent with enforcement of that right. *White Co. v. Canton Transp. Co.*, 131 Ohio St. 190, 2 N.E.2d 501 (1936); *Chubb v. Ohio Bur. of Workers' Comp.*, 81 Ohio St.3d 275, 278, 690 N.E.2d 1267 (1998). Conduct that is inconsistent with the terms of a contract amounts "to an estoppel on the party against whom the waiver is asserted." *White Co.* at paragraph four of the syllabus. The party asserting the defense of waiver bears the burden of proving, by a preponderance of the evidence, "a clear, unequivocal, decisive act by the party demonstrating the intent to waive." *Id.*

{¶9} Similarly, a landlord "waives the right to terminate a tenancy due to 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 (M.C.), ¶ 5, citing *Brokamp v. Linneman*, 20 Ohio App. 199, 202, 153 N.E. 130 (1st Dist.1923). This principle applies not only to breaches involving the nonpayment of rent, but also to cases involving breach of a non-monetary obligation. *Id.*, citing *Quinn v. Cardinal Foods, Inc*., 20 Ohio App.3d 194, 485 N.E.2d 741 (3d Dist.1984).

{¶10} Millennia concedes that it executed a new lease with Williams after filing the eviction action but asserts the new Model Lease did not constitute a waiver of its right to terminate the tenancy because federal regulations required that Millennia renew its lease with Williams. However, Millennia does not cite any HUD regulation or federal statute to support its argument. Instead it relies on *Owner's Mgt. Co. v. Madden*, 6th Dist. Lucas No. L-98-1371, 1999 Ohio App. LEXIS 2582 (June 11, 1999). In *Madden*, the court held that the execution of a new Model Lease while an eviction action was pending did not waive the landlord's right to terminate the tenancy because federal regulations mandated execution of the new lease. In reaching this conclusion, the *Madden* court reasoned that 24 C.F.R. 880.609 and 880.607(b)(iv) required that the landlord "recertify" the tenant. *Id.* at * 9.

{¶11} However, neither 24 C.F.R. 880.609 nor 880.607(b)(iv) are related to the recertification of tenants.[3] Further, the court in *Madden* cited no authority for its assumption that the mandated annual recertification of a tenant's eligibility for assistance under Section 8 or

[3] Chapter 7 of the HUD Multifamily Occupancy Handbook ("the handbook") explains the requirements for recertification of a tenant's eligibility for financial assistance under Sections 8 and 202 and directs landlords to conduct recertification of family income and composition at least annually. Handbook 7-4; *see also* 24 C.F.R. 886.124(a). We found no provision mandating the execution of a new Model Lease in order to comply with HUD recertification requirements.

Section 202 requires execution of a new Model Lease. In our view, the court's reasoning in *Madden* is flawed.

{¶12} Millennia argues the execution of a new Model Lease in 2013 was necessary because Millennia had applied for and received an increase in gross rentals from HUD and because HUD updated and modified the Model Lease. Millennia provided affidavits of two of its property managers who averred they never intended to waive their eviction claim when they executed the new lease with Williams in September 2013. However, their subjective intent is irrelevant.

{¶13} As previously stated, we have not found, nor has Millennia directed us to, any legal authority to support its claim that the execution of the new Model Lease in 2013 was mandated for recertification purposes or otherwise. As the dissent in *Madden* points out, the landlord in this situation has the option of creating an unsubsidized month-to-month holdover tenancy while the eviction action is pending in order to preserve the landlord's right to terminate the tenancy. *Madden* at *11-12.

{¶14} Moreover, even if the execution of a new lease was necessary, Millennia could have included a reservation of rights as an addendum similar to the pet addendum attached to Williams's lease. A reservation of rights expressly preserving Millennia's alleged right to restitution of Williams's apartment would have been consistent with its eviction action. Although Millennia asserts that HUD regulations prohibit landlords from making changes to the Model Lease, a reservation of rights under these circumstances would not modify the terms of the lease; it would merely preserve Millennia's eviction claim. Nevertheless, instead of preserving its eviction claim, Millennia took action that was inconsistent with the termination of Williams's

tenancy. Therefore, Millennia's act of executing a new Model Lease with Williams waived its right to pursue an eviction.

{¶15} Accordingly, the sole assignment of error is overruled.

Conclusion

{¶16} The trial court properly dismissed Millennia's claim for eviction because Millennia waived its right to seek termination of Williams's tenancy when it executed a new lease with Williams.

{¶17} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cleveland Municipal Court to carry this judgment into execution.

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

EILEEN T. GALLAGHER, JUDGE

TIM McCORMACK, P.J., and
MARY J. BOYLE, J., CONCUR