

ESSENTIALS OF EVICTIONS AND COLLECTIONS

AKRON BAR ASSOCIATION

SEPTEMBER 20, 2017



**Evictions – The Contested Case & The Tenant’s Perspective
and
Collections Beyond the Complaint**

presented by:

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DEFENDING AN EVICTION ACTION

I) 30 Day Notices

- a) Periodic Tenancy Defenses
- b) R.C. 5321.11 Notice of Termination (Health and Safety)
 - i) Must serve if violation of R.C. 5321.05 and is material health and safety violation
 - ii) Notice must specify date of termination
 - (1) *Doyle v. Richardson* (March 30, 1999), Akron Municipal Court #99CV01931
 - iii) Notice must *specify* the violation
 - (1) *Hood v. Kusior* (July 23, 1997), Akron Municipal Court #97CVG5586
 - (2) *Doyle v. Richardson* (March 30, 1999), Akron Municipal Court #99CV01931
 - iv) Must serve notice even if violation of lease
 - (1) *Parker v. Fisher* (1983), 17 Ohio App.3d 103
 - v) Tenant has a right to cure
 - (1) *Doyle v. Richardson* (March 30, 1999), Akron Municipal Court #99CV01931
 - (2) *Akron Metropolitan Housing v. Mayson* (May 5, 1998), Cuyahoga Falls Municipal Court #97CVG1293

II) 3 Day Notices

- a) Language
 - i) Statutory
 - ii) Correct Plaintiff
- b) Requirements if it is an AMHA voucher tenant
 - i) Notice must specify a reason for the eviction
 - (1) 24 CFR 982.310(e)(1)(i)
 - (2) *Mullinex v. Adkins* (September 28, 1999), Akron Municipal Court #99CVG7325
 - (3) *Hariani v. Rollin* (July 2, 1998), Akron Municipal Court #98CVG4980
 - (4) *Alloway v. James* (May 8, 2000), Akron Municipal Court #00CVG3063
 - (5) *Lawami Corporation v. Briggs* (November 29, 2001), Akron Municipal Court #01CVG9454

- (6) *Harris v. Moore* (June 11, 2001), Akron Municipal Court #01CVG4778
- ii) The three-day notice must be served on AMHA
 - (1) Service is a jurisdictional step
 - (2) Case will be dismissed
 - (a) *Hines v. Molmasterstauffer* (September 19, 2002), Case #02CVG7486
 - (b) *Putman Property Inc. v. White* (November 4, 2011), Case #11CVG9153

III) Filing/Complaint

- a) Real Party in Interest
- b) Unauthorized Practice of Law – LLC/Trust
- c) Fictitious Name
 - i) R.C. 1329.10

“(B) No person doing business under a trade name or fictitious name shall commence or maintain an action in the trade name or fictitious name in any court in this state or on account of any contracts made or transactions had in the trade name or fictitious name until it has first complied with [section 1329.01 of the Revised Code](#) and, if the person is a partnership, it has complied with [section 1777.02 of the Revised Code](#), but upon compliance, such an action may be commenced or maintained on any contracts and transactions entered into prior to compliance. – May not commence or maintain an action unless fictitious name has been registered with Secretary of State.”
 - ii) Secretary of State website:
<http://www2.sos.state.oh.us/pls/bsqry/f?p=100:1:3721714346812911>
 - iii) *Fisco v. Chisolm* (Ct. App. Cuyahoga County, May 7, 1987), 1987 Ohio App. LEXIS 6880
 - iv) *Frate v. Al-Sol* (1999), 131 Ohio App.3d 283
- d) Corporation must be registered in Ohio to file eviction action
 - i) R.C. 1703.29

“(A) The failure of any corporation to obtain a license under sections 1703.01 to 1703.31, inclusive, of the Revised Code, does not affect the validity of any contract with such corporation, but no foreign corporation which should have obtained such license shall maintain any action in any court until it has obtained such license. Before any such corporation shall maintain such action on any cause of action arising at the time when it was not licensed to transact business in

this state, it shall pay to the secretary of state a forfeiture of two hundred fifty dollars and file in this office the papers required by divisions (B) or (C) of this section, whichever is applicable.”

- ii) *Quality International Enterprises, Inc. v. IFCO Systems North America* (2006), Ninth District No. 23131, 2006 Ohio 5883; 2006 Ohio App. LEXIS 5822
- iii) *L & W Supply Col, Inc. and Springwood Corporation v Construction One, Inc.* (2000), Third District No. 5-99-55, 2000 Ohio App. LEXIS 1414

IV) Defenses

- a) Limited to Reason in 3 Day Notice
- b) Waiver
 - (1) Once R.C. 1923.04 notice is served landlord may not accept future rent.
 - (a) *Associated Estates Corporation v. Bartell* (1985), 24 Ohio App.3d 6
 - (b) *National Corporation for Housing Partnerships v. Chapman* (1984), 18 Ohio App.3d 104
 - (c) *Presidential Park Apartments v. Colston* (1980), 17 Ohio Op.3d 220
 - (2) Landlord may accept past due rent
 - (a) *Sholiton Industries Inc. v. Royal Arms Ltd.* (1999), 2nd Dist. No. 17480, 1999 WL 355898
 - (b) *Marks v. Young* (1996), 9th Dist. No. 2456-M, 1996 WL 63033
 - (3) Waiver is not limited to nonpayment of rent cases. An eviction case will result in waiver if landlord accepts future rent
 - (a) *Cipolla v. McCloskey*, (1998), 9th Dist. No. 97-CA-6866, 1998 Ohio App. LEXIS 5851
 - (b) *Cornerstone Companies & Fairlawn Ventures, Ltd. V. Zipkin* (Akron Municipal Court 1989), 60 Ohio Misc. 2d 14; 573 N.E.2d 228
 - (4) What constitutes future rent
 - (a) Notice to vacate must specify a date after the expiration of the term for which rent is already paid. *Summit Management Services v. Gough* (2000), 2000 Ohio App. LEXIS 3897 (9th District Court of Appeals)
 - (b) Payments for any period of occupancy which occupancy is after the date of the acceptance by the landlord of the payment. *Cornerstone Companies & Fairlawn Ventures, Ltd. V. Zipkin*

(Akron Municipal Court 1989), 60 Ohio Misc. 2d 14; 573 N.E.2d 228

(5) What constitutes acceptance of rent

(a) Check or Money Order

(i) It is acceptance if you cash the check. You may not tender another check back to tenant.

1. *Associated Estates Corporation v. Bartell* (1985), 24 Ohio App.3d 6

2. *Miami Valley United Methodist Mission Society v. White-Dawson* (2000), 2nd Dist. No. 17873, 2000 WL 234712

(ii) If you retain check, it will be viewed as acceptance unless:

1. Notify tenant check is not accepted and is being held for evidentiary purposes; **AND**

2. Return check on or before day of trial

a. *Pace v. Buck* (1949), 86 Ohio App. 25

b. *Cipolla v. McCloskey*, (1998), 9th Dist. No. 97-CA-6866, 1998 Ohio App. LEXIS 5851

c. *Simco Management Corporation v. Snyder* (2000), 7th Dist. No. 98-CA-210, 2000 WL 309396

(b) Payment by Third Party

(i) Acceptance of social service agency voucher – may be a non-eviction provision

(c) Payment by Bank Deposit – Deposit constitutes acceptance

(i) *Kachelmacher v. Laird* (1915), 92 Ohio St. 324

(ii) *Associated Estates Corporation v. Bartell* (1985), 24 Ohio App.3d 6

(d) Payment by Mail

(i) Timely mailing rent (with proper address and postage) constitutes acceptance

1. *Townhomes Management v. Carter* (1985), 10th Dist. No. 84AP-851, 1985 WL 9874

2. *Norskog v. Atha* (1951), 61 Ohio Law Abstracts 604, 102 N.E.2d 907

(ii) Tenant is not responsible for proper delivery

ii) Actions Inconsistent

(1) Signing Lease

(2) Aware of Actions

c) Collection of Rent

i) Premises v. Lease Requirements

- d) Debtor-Direction/Lease Requirements for Application of Payments
- e) Accepting partial payments from month-to-month tenants renews tenancy for that month
 - i) *Fairborn Apartments v. Herman* (1991), 2nd Dist. No. 90-CA-28, 1991 WL 10962
 - ii) *FMJ Properties v. Hinton* (1986), 8th Dist. No. 50314, 1986 WL 4396
- f) If a landlord establishes a practice of accepting past due rent, it can modify the rental due date
 - i) Tenant must have repeated payments of late rent/pattern
 - ii) If a pattern is established it waives the landlord's right to collect the rent by the due date
 - iii) Landlord breaks the pattern by serving a notice of strict compliance
 - iv) Case law
 - (1) *Fairborn Apartments v. Herman* (1991), 1991 Ohio App. LEXIS 333
 - (2) *Crossroads Somerset Ltd. v Newland* (1987), 40 Ohio App.3d 20
 - (3) *Finkbeiner v. Lutz* (1975), 44 Ohio App.2d 223
 - (4) *Lauch v. Monning* (1968), 15 Ohio App.2d 112
 - (5) *Bates & Springer v. Nay* (1963), 187 N.E.2d 415
 - (6) *AMHA v. Young*, (2005) Akron Municipal Court # 05 CVG 8646
- g) Even though grounds exist to evict, equity may prevent the eviction
 - i) Equity abhors a forfeiture
 - ii) "Unless a lessee's conduct is willful or malicious or if compensation for the breach cannot be made due to the lessor, a court exercising its equity powers will grant the lessee relief from forfeiture." *Zanetos v. Sparks* (1984), 13 Ohio App.3d 242
 - iii) *DeVore v. Higgins* (8/24/99), Akron Municipal Court #99CVG6094
 - iv) *Kamvouris v. Banks* (7/24/00), Cuyahoga Falls Municipal Court #00CVG1586
 - v) *Cincinnati Metropolitan Housing Authority v. Green* (1987), 41 Ohio App.3d 365
- h) Housing Choice Voucher Program Issues
 - i) If landlord fails to make repairs, AMHA may abate unit
 - (1) AMHA will no longer pay its portion of rent
 - (2) Landlord may not charge for rent not paid by AMHA
 - (3) Landlord may not evict tenant for nonpayment of AMHA's portion of the rent
 - (a) HAP Contract- Tenancy Addendum, paragraph 5
 - (b) 24 Code of Federal Regulations 982.310(b)

- ii) Landlord may only collect rental amount approved by AMHA.
 - (a) HAP Contract- Tenancy Addendum, paragraph 5

V) Landlord Actions Prohibited by Law

- a) No Self-help -Must evict Tenant in court
 - i) R.C. § 5321.15
- b) No Utility shutoffs or Lockouts
 - i) R.C. § 5321.15
- c) No Repeated entry to harass Tenant
 - i) R.C. § 5321.04 (A)(7)
- d) May Not Remove Tenant property without court action
 - i) R.C. § 5321.15
- e) May not evict Tenant who reports Landlord to health or building department (Can file eviction if Tenant behind in rent)
 - i) R.C. § 5321.02
 - ii) R.C. § 5321.03

VI) Prohibited Provisions of the Lease – R.C. §5321.13

- a) Tenant May Not Assume Landlord's Responsibilities
- b) No Warrant of Attorney To Confess Judgment
- c) No Agreement To Pay Landlord's Attorney's Fees
- d) No Agreement to Exculpate or Limit Liability of Landlord
- e) Landlord May Assume Tenant Responsibilities

Collections Beyond the Complaint

I. Civ.R. 10(D)

- a. "A defendant who fails to file a motion for a more definite statement before filing his answer has waived the right to assert the plaintiff's failure to attach a copy of a written instrument as a basis for dismissing the complaint." *McInnis v. Spin Cycle-Euclid, LLC*, 8th Dist. No. 91905, 2009-Ohio-2370, ¶8, quoting *Castle Hill Holdings, LLC v. Al Hut, Inc.*, Cuyahoga App. No. 86442, 2006 Ohio 1353, ¶29.

II. Dispositive Motions

a. Default

b. Summary Judgment

- i. “Summary judgment shall be rendered forthwith if the **pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact**, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule.” Civ.R. 56(C).
- ii. “The requirement that a party seeking summary judgment disclose the basis for the motion *and support the motion with evidence* is well founded in Ohio law.” *Mitseff v. Wheeler*, 38 Ohio St. 3d 112, 115, 526 N.E.2d 798 (1988) (emphasis added).
- iii. “A document may be authenticated by testimony that it is what it is claimed to be.” *State Farm Mut. Auto. Ins. Co. v. Anders*, 10th Dist. Franklin No. 11AP-511, 197 Ohio App. 3d 22, 2012-Ohio-824, ¶30, *citing* Evid.R. 901(B)(1).
- iv. There is no default in summary judgment. Even if the non-moving party fails to file a response, summary judgment cannot be granted if the moving party does not meet its evidentiary burden. *See U.S. Bank, N.A. v. Detweiler*, 191 Ohio App.3d 464, 946 N.E.2d 777, 2010-Ohio-6408, ¶57 (5th Dist. Stark).