



Evictions Part II: Defenses, Counterclaims & Common Fact Patterns



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-EVICTION-

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Evictions Part II: General Defenses


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Agenda


1. Introduction
 2. Rights and Duties of Tenants and Landlords – a primer
 3. Eviction Process – *brief* review
 4. Defenses – in depth
 5. Escrow and Conditions cases – in depth
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Introductions

Matthew Fitzsimmons

- Staff Attorney with Legal Aid since 2018,
Housing Team & Consumer/Foreclosure Teams
- Previous private practice included
representation of landlords and tenants

Alpha Taylor

- Staff Attorney with Legal Aid since 2017,
Housing & Consumer/Foreclosure Teams
 - Headed the Eviction Prevention Project
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What are the Tenant's Obligations?

Including each of the following (R.C. 5321.05):

- ❖ Keep that part of the premises that tenant occupies and uses safe and sanitary.
- ❖ Dispose of all garbage and other waste in a clean, safe, and sanitary manner.
- ❖ Keep all plumbing fixtures as clean as their condition permits.
- ❖ Use and operate all appliances & fixtures properly.
- ❖ Comply with all applicable health, building and safety codes.
- ❖ Refrain, and forbid household members or visitors, from damaging, or removing any fixture, appliance, or other part of the premises.
- ❖ Maintain in good working order any appliances.
- ❖ Do not disturb the neighbor's peaceful enjoyment of the premises.

What are the Landlord's Obligations?

Including but not limited to the following (R.C. 5321.04):

- Must comply with all applicable building, housing, health, and safety codes that materially affects health and safety;
- Make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition;
- Provide and maintain receptacles for the removal of ashes, garbage, rubbish, and other waste
- Supply running water, reasonable amounts of hot water, and reasonable heat at all times with exceptions;
- Give tenant reasonable notice of his intent to enter, and enter only at reasonable times.
- Provide extermination services (Cincinnati - Mun. Code of Cincinnati, Title XI, 1117-45.7)

Landlord Prohibitions

- Cannot contract away duty to repair
- Cannot use self-help for evictions
- No unconscionable lease terms
- No retaliation
- No discrimination
 - Familial status protected class

Question #1

Can a landlord agree to assume a tenant's R.C. 5321.05 duties?

- a) Yes
- b) No

Grounds for Eviction

R.C. 1923.02

- Nonpayment of Rent
- Expiration of Lease
- Violations of Tenant Duties of R.C. 5321.05
- Breach of a Written Lease
- Certain Drug Violations

BUT NOW... an eviction has been filed

What that means -

- Summary Proceeding
 - Special services rules (nail & mail)
 - Hearing on possession scheduled in 18-21 days
 - Possession and Money claims are split

Common Defenses

(some double as Counterclaims)

1. Non-payment Defenses
2. Lack of Proper Notice
 - 3-Day
 - 30-Day
3. Right to Cure
4. Waiver
 - Acceptance of rent after knowledge of breach
 - Acceptance of rent after issuance of NTLF
5. Retaliation
6. Discrimination
7. Improper Party or Unauthorized Practice
8. Bad Conditions

1. Non-Payment Defenses

- Rent tendered & rejected
- Pattern of accepting late rent
- Absence of timely collection/demand
- Repairs in lieu of rent
- Counterclaim – R.C. 1923.061(B)

2. Lack of Proper Notice

R.C. 1923.04: Notice to Leave the Premises, aka “the Three Day Notice”

- Every notice given under this section by a landlord to recover residential premises shall contain the following language printed or written in a conspicuous manner:

"You are being asked to leave the premises. If you do not leave, an eviction action may be initiated against you. If you are in doubt regarding your legal rights and obligations as a tenant, it is recommended that you seek legal assistance."

- Must be given “three or more days before beginning the action” by certified mail with return receipt, by hand, or by “leaving it at the defendant’s usual place of abode or at the premises from which defendant is sought to be evicted.”

- **Notice is jurisdictional. If the Plaintiff fails to serve the notice or serves a defective notice, the trial court lacks subject matter jurisdiction**

2(a) Notice To Leave Premises

Conspicuous, Required Language:

- Must be verbatim!
- Must be presented “so that a reasonable person against whom it is to operate ought to have noticed it.” *Chinnock v. Kokinda*, 2011 WL 860417, 10-CA-009863 (Ohio App. 9th Dist., Mar 14, 2011)
- Many interpretations:
 - Same type, color, font, case, is NOT conspicuous
 - All caps – not conspicuous; BUT all caps and off-set IS conspicuous
 - All caps, bolded – conspicuous
 - Letter form (mixed case), but surrounded by large, red box – IS conspicuous

3 Day Computation

- NOT a 72 Hour period
 - Excludes the day served – THEN 3 full days before filing.
- Districts are split on using Civil Rule 6(A) and ORC 1.14
 - Main difference is the Saturday/Sunday count
 - 1.14 Excludes the LAST day if a Sunday or legal holiday
- If Vacation date is stated on Notice – greater or three day OR vacation date

2(b) – 30 day notice

R.C. 5321.11: termination of tenancy for noncompliance by tenant, aka “the Thirty Day Notice”

If the tenant fails to fulfill any obligation that materially affects health and safety, the landlord may deliver a written notice of this fact specifying that the rental agreement will terminate upon a date specified in the notice, not less than thirty days after receipt of the notice.

If the tenant fails to remedy the condition specified in the notice, the rental agreement shall terminate as provided in the notice.

2(b) 30 day notice – cont'd

R.C. 5321.17: termination of periodic tenancies, another “Thirty Day Notice”

- The landlord or the tenant may terminate a month-to-month tenancy by notice given at least thirty days prior to the periodic rental date.
- Usually the “periodic rental date” is the end of the month.

3. Right to Cure

Can exist in Lease –

- Grace Period for payment in Lease

Conditions –

- R.C. 5321.11 Notice –
 - IF non-compliance with Tenant obligation under R.C. 5321.05, landlord must provide 30 days for tenant to cure

4. Waiver

- Landlord cannot accept rent AFTER the NTLP
 - Must dismiss if Rent is accepted

Landlord cannot accept rent after alleged breach

- Both month-to-month AND tenants with written lease

Notice cannot be conditional

- Arguably fails as sufficient notice under R.C. 1923.04
- Operates as a waiver


5. Retaliation

BRACE YOURSELF



5. Retaliation, cont'd - R.C. 5321.02

A landlord may not retaliate against a tenant by increasing the tenant's rent, decreasing services that are due to the tenant, or bringing or threatening to bring an action for possession of the tenant's premises because:

- The tenant has complained to an appropriate governmental agency of a violation of a building, housing, health, or safety code that is applicable to the premises, and the violation materially affects health and safety;
 - The tenant has complained to the landlord of any violation of the landlord's obligations under R.C. 5321.04;
 - The tenant joined with other tenants for the purpose of negotiating or dealing collectively with the landlord on any of the terms and conditions of a rental agreement.
- 

What are the Landlord's Obligations?

Including but not limited to the following:

- Must comply with all applicable building, housing, health, and safety codes that materially affects health and safety
- Make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition
- Provide and maintain receptacles for the removal of ashes, garbage, rubbish, and other waste
- Supply running water, reasonable amounts of hot water, and reasonable heat at all times with exceptions

If a landlord acts in violation of R.C. 5321.02(A), the tenant may:

- Use the retaliatory action of the landlord as a defense to an eviction action
- Recover possession of the premises; or
- Terminate the rental agreement

In addition, tenant may recover actual damages together with reasonable attorneys' fees.

Cinci.Mun. Code 871-9(a)(3)

- No landlord shall raise the agreed rent for the rental unit above the rent charged for comparable rental units, or otherwise increase the obligations of the tenant in any way, or terminate the tenancy, or bring an action for forcible entry and detainer, in retaliation for the tenant's pursuing any right or remedy under this chapter or because:
 - The tenant has complained in good faith to the landlord or their agent or employees of conditions in or affecting the tenant's rental unit which the tenant believes may constitute a violation of the Cincinnati - Ohio Basic Building Code, the Fire Prevention Code, the regulations of the board of health or any other law.
 - The tenant has complained in good faith to a body charged with the enforcement of the Cincinnati - Ohio Basic Building Code, the Fire Prevention Code, or the regulations of the board of health, or any other law of a condition in or affecting the rental unit which the tenant believes may constitute a violation of such codes, regulations or other laws; or
 - In response to a complaint of the tenant, the body charged with enforcement of the Cincinnati - Ohio Basic Building Code, the Fire Prevention Code, the regulations of the board of health or any other law has served a notice or complaint of a violation on the landlord, agents or employees of the landlord.

Presumption of Retaliation Under Cinci. Muni. Code 871-9(a)(4)

Within six months after the occurrence of any event referred to in this paragraph 871-9(a)(3), an action for forcible entry and detainer shall be presumed to be in retaliation for that event and the landlord shall not be entitled to recover possession unless landlord proves by a preponderance of the evidence that:

- The tenant is committing waste, creating a nuisance, using the rental unit for an illegal purpose or for other than living or dwelling purposes, or substantially impairing the quiet enjoyment of the property by the other occupants of the property; or
- The landlord desires possession of the rental unit for immediate use as landlord's own abode; or
- The rental unit must be vacated in order to make necessary repairs; or
- The landlord plans permanently and immediately to remove the rental unit from the rental market.

Question #2


In Ohio, can a tenant recover actual damages and attorney's fees for a retaliatory eviction?

- a) True
- b) False


6. Discrimination

Fair Housing Act: prohibits discrimination on the basis of “protected classes”:
race, color, religion, sex, disability, national origin and familial status

Protects Persons with Disabilities:

- Reasonable accommodation/modification
 - Landlord must permit modification, tenant pays
 - What do you have to do to request accommodation or modification?
- 

7. Improper Party/ Unauthorized Practice (R.C. 4705.01)

- Only a licensed Ohio attorney can represent another person or an artificial entity such as an LLC in court
 - The unauthorized practice of law is the rendering of legal services for another person not admitted to practice law in Ohio
 - Non-attorney cannot file complaints for forcible entry and detainer and recovery of unpaid rent or other money damages on behalf of a property owner.
 - Non-attorney cannot sign the eviction complaint on behalf of another person or an artificial entity.
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8. Bad Conditions

(negligence, negligence per se,
breach of warranty of habitability, breach of contract)

- **Assess severity of conditions**
- **Create timeline**
- **Are bad conditions a defense to the eviction?**

(related to retaliation or rent payment?)

- **Do bad conditions merit counterclaims?**

*(keep in mind – matters emanating from this
landlord-tenant relationship must be dealt with as
compulsory counterclaims)*



Question #3

How much time must a tenant give the landlord to make repairs prior to escrowing rent?

- a) 3 days
- b) 30 days
- c) Reasonable amount of time
- d) None of the above

Rent Escrow Process (R.C. 5321.07 - .10)

- ✓ Current with rent
- ✓ Notice
- ✓ Reasonable opportunity to remedy
- ✓ Deposit rent with Clerk
- ✓ Landlord can file Complaint to get money
 - ✓ Complaint can/should be answered, etc.
- ✓ Tenant can file motion requesting:
 - Rent abatement
 - Order of Repairs
 - Lease termination
- ✓ If Landlord files eviction → move to consolidate
- ✓ If Landlord files AFTER Tenant escrows → counterclaim retaliation!



Rent Escrow Process – *Caveats*

- Must be current in rent!
- Notice in writing OR actual knowledge
- R.C. 5321.07(C)

“This section does not apply to any landlord who is a party to rental agreements that cover **three or fewer dwelling units and who provides notice of that fact** in a written rental agreement or, in the case of an oral tenancy, delivers written notice of that fact to the tenant at the time of initial occupancy by the tenant.”
- R.C. 5321.09(D):

“If the court finds that the condition contained in the notice given pursuant to division (A) of section 5321.07 of the Revised Code was the result of an act or omission of the tenant, or that the tenant intentionally acted in **bad faith** in proceeding under section 5321.07 of the Revised Code, the tenant shall be liable for damages caused to the landlord and costs, together with reasonable attorney's fees if the tenant intentionally acted in bad faith.”

Review:

Defenses

&

Counterclaims

1. Non-payment Defenses
2. Lack of Proper Notice
 - 3-Day
 - 30-Day
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Client Interview

INFORMATION NEEDED:

- People in the household
- Dates of tenancy
- Rent
 - Amount
 - When paid
 - Method of payment
- Type of lease
- Interactions with landlord/property mgr.
 - Any issues? (this is where you learn about bad conditions, retaliation, discrimination)

DOCUMENTS REQUESTED:

- Lease, current and past versions
- Notice(s)
- Proof of rent payments
- Pictures (bad conditions)
- Government agency docs.
(building, health, sewer, trash, police, fire)
- Text messages & emails



Questions?

VLP Volunteer Lawyers can always consult with Legal Aid housing attorneys,

including Housing Team Managing Attorney Nick DiNardo

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