

IN THE COURT OF APPEALS OF CLARK COUNTY, OHIO

GORSUCH HOMES :
dba VILLA PARK LTD

Plaintiff-Appellee : CASE NO. 2856

vs. :

LINDA WOOTEN :

Defendant-Appellant : ENTRY

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Upon consideration of the motion of the Appellant for a reduction of the supersedeas bond set by the trial court the court finds said motion to be well taken.

It is therefore ORDERED that the writ of restitution ordered by the trial court be stayed upon the payment of all rent now due and the payment of all future rent as it comes due, and continued compliance with all orders, terms and conditions of the lease.

Mike Fain

MIKE FAIN, PRESIDING JUDGE

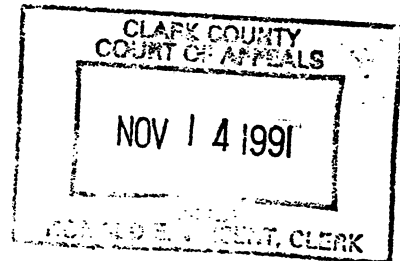
Thomas J. Grady

THOMAS J. GRADY, JUDGE

Copies mailed to:

Samuel J. Petroff
31 East High Street, Suite 500
Springfield, Ohio 45502

Frank P. Catanzariti
31 East High Street, Suite 300
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IN THE COURT OF APPEALS, CLARK COUNTY, OHIO
SECOND APPELLATE DISTRICT

GORSUCH HOMES,
dba VILLA PARK LTD.

PLAINTIFF-APPELLEE

-vs-

LINDA WOOTEN,

DEFENDANT-APPELLANT

:
: CASE NO. CA-2856

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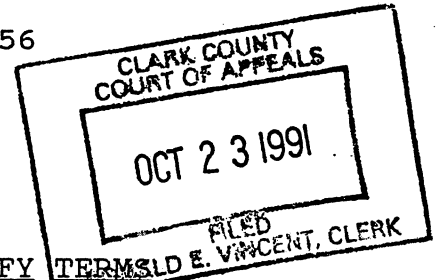
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MOTION TO MODIFY TERMS
OF SUPERSEDEAS BOND AND
TO STAY EXECUTION OF THE
WRIT OF RESTITUTION.



Now comes the Defendant-Appellant, Linda Wooten, by and through counsel, pursuant to Rule 7 of the Ohio Rules of Appellate Procedure, to modify the terms of the supersedeas bond and to stay execution of the writ of restitution which was ordered by the Clark County Municipal Court. On Tuesday, October 22, 1991, as reflected in the attached entry, the Clark County Municipal Court ordered Appellant to post bond in the amount of Two Thousand Dollars (\$2,000.00) in order to avoid being dispossessed on Monday, October 28, 1991. The grounds for this motion are that the bond ordered by the trial court is unreasonable, punitive, and deprives Appellant of her right to equal protection and due process of law.

Exigent circumstances exist to justify this motion being heard by a single appellate judge, as stated in Appellate Rule 7, in that appellant will be dispossessed on Monday, October 28, 1991, unless the stay is granted. These

circumstances also exist to justify the Court's hearing this motion ex-parte if the attendance of counsel for appellee cannot be arranged.

Counsel for appellee was notified by telephone and by letter on October 22, 1991 that Appellant would seek a modification of the bond.

Rural Legal Aid Society

by: Frank P. Catanzariti
Frank P. Catanzariti
Attorney for Defendant-Appellant
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(513) 325-5991

MEMORANDUM

Appellant was the defendant in the eviction action which is the subject of this appeal, and Appellee sought to evict Appellant for grounds other than nonpayment of rent. Appellant duly sought a supersedeas bond in the first instance from the trial court and argued that the bond should be equivalent to the rent and should be paid on a monthly basis as the rent comes due. The trial court decided Two Thousand Dollars (\$2,000.00) should be deposited as bond, notwithstanding Appellant's argument that for a person such as herself with low income, such a requirement would deprive her of any ability to effectively appeal the eviction.

In Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.

2d 208 (1972), a forcible entry and detainer case, Defendant was evicted for nonpayment of rent. Defendant filed a notice of appeal and moved for a waiver of an appeal bond due to her indigency. Such bond was a prerequisite to filing an appeal under Illinois law. The motion was denied, and Plaintiff argued that the appeal should be dismissed due to failure to file an appeals bond. The Illinois Supreme Court disagreed and stated that if the Illinois Constitution provided for an appeal, then "the statutes adopted and the rules promulgated in implementation of that right may not serve to discriminate against appellants by reason of the inability to furnish an appeal bond." Id. at 211. The Court further stated that the Illinois law that required the furnishing of bond as a prerequisite to filing an appeal was violative of the fourteenth amendment of the United States Constitution. Id. The Court further stated that a use and occupancy bond in a forcible entry and detainer case is appropriate. Id. at 225.

In a forcible entry and detainer case from Scioto County Ohio, the Fourth Appellate District of Appeals allowed Appellant's motion for reduction of a \$2,000.00 bond. Forest City Management, Inc. dba, Buckeye Towers v. Lauderback, Case No. 91-CA-1972 (Scioto County Court of Appeals, March 15, 1991). In this case, Appellant was living on a fixed income and she was clearly indigent. Due to Appellant's indigency,

the bond was reduced from \$2,000.00 to a use and occupancy bond. A copy of that decision is attached as Exhibit "A".

In the case at bar, it is clear that Appellant cannot post a \$2,000.00 cash bond. Appellant's indigency was documented to the trial court both at the hearing and in an affidavit attached to her motion for the supersedeas bond. If Appellant cannot post the bond, she will not be granted a stay of execution and she will be forced to leave her home. Such a bond is violative of her right to due process of law and to equal protection of the laws.

The purpose of a supersedeas bond is to ensure that the prevailing party at the trial level will not be injured by a stay of the judgment pending appeal. The purpose of the bond is not to punish the Appellant for making the decision to pursue an appeal. Tuteur -vs- P. & F. Enterprises, Inc., 21 Ohio App. 2d 122, 130 (1970).

In the case at bar, Appellant was current in rent through September 1991. Up until October 1991, Appellant's rent was zero. Appellee argued in its memorandum in opposition that a use and occupancy bond was inappropriate, as it gave no incentive for Appellant to modify the behavior of her destructive son. As of October 1, 1991, Appellant's rent increased to \$167.00 per month. That amount as bond, coupled with the condition that Appellant comply with the lease terms or face termination of the stay, is sufficient

for an indigent person who cannot afford to post a \$2,000.00 bond in order to pursue an appeal.

Appellee also argued in its memorandum in opposition that Appellant had substantially damaged the property and would continue to do so if permitted to remain in the premises. Appellant admits that her son caused damages. However, Appellant has consistently disputed the amount of damages and raised an affirmative defense to the eviction that she disputed the amount of those damages. It should be noted that the damage was not caused to Appellant's apartment and that the damage involved the criminal activity of Appellant's son.

As to Appellee's argument that Appellant will continue to damage the property, it should be noted that Appellant has paid for other damages which she has caused. Further, a statement that future damages will occur is speculative, and speculative damages are not appropriate in determining a bond. Tuteur, Id. at 129 (quoting Shaucet v. Davis, 78 Ohio Law Abs. 395 (1957)).

Besides the amount of monthly rent, the only other damage that Appellee will suffer if Appellant remains in the premises is loss of interest on the amount of a potential judgment for damages. Such a judgment does not yet exist. Further, the Tuteur Court stated that interest is considered as lost profits, which should not be included in the damages

recoverable from enforcement of the supersedeas bond. Id. at 130. It is unreasonable and a violation of the equal protection clause to require an indigent person to deposit \$2,000.00 in order to avoid being evicted. That is, the trial court's order is discriminatory against the poor, heavily burdens the tenant's right of appeal, and only allows the affluent to obtain a stay of execution pending appeal. Appellant submits to the Court that the purpose of the supersedeas bond would be fully satisfied by her paying her monthly rent as it becomes due.

Respectfully submitted,
Rural Legal Aid Society

by: Frank P. Catanzariti
Frank P. Catanzariti
Attorney for Defendant-Appellant

PROOF OF SERVICE

I hereby certify that a true copy of the foregoing motion and memorandum was served upon Samuel J. Petroff, Attorney for Plaintiff-Appellee, 31 East High Street, Suite #500, Springfield, Ohio 45502 by hand delivering a copy to his office, this 23rd day of October 1991.

Frank P. Catanzariti
Frank P. Catanzariti
Attorney for Defendant-Appellant