

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 32989

Louis Litoff, et al.

APPEAL FROM

APPELLEES

BEDFORD MUNICIPAL COURT

-vs-

No. 15922

D. H. Overmyer Co., Inc. of Ohio

JOURNAL ENTRY

APPELLANT

DATE MAR 21 1974

This cause came on to be heard upon the pleadings and the _____ transcript of the evidence and the record in the Bedford Municipal Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Bedford Municipal Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

On June 29, 1973 plaintiff-appellee Louis Litoff filed an action in forcible entry and detainer in Bedford Municipal Court against defendant-appellant D. H. Overmyer Co., Inc. Trial was set for July 18, but the defendant obtained a continuance until July 25. On July 24 the defendant filed a pleading captioned "Answer, Counterclaim, Jury Demand." The first seven pages contained the answer and counterclaim and were signed by the defendant's attorney. The eighth page contained the jury demand and proof of service, neither of which was signed.

The following day at trial the defendant orally renewed the jury demand.

The trial judge overruled the motion because the written demand was not signed and not filed three days before trial as required by R. C. §1901.24. The defendant appeals, contending that jury demands are now governed by Civil Rule 38(B) and that this rule does not require that the demand be signed nor that it be filed three days in advance of trial.

Civil Rule 38 provides in pertinent part:

(B) Demand. Any party may demand a trial by jury on any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than fourteen days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(D) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(D) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

Appellant argues that the word "indorsed" in Rule 38(B) merely means "attached" and does not require that the demand be signed. However, under the Rules all papers to be filed with the court must be signed.

The rules applicable to captions, signing, and other matters of form of pleading apply to all motions and other papers provided for by these rules. Civil Rule 7(B)(3).

The trial judge was therefore correct in holding that a jury demand must be signed, but erred in finding that this demand by the defendant was not signed. The caption of the pleading contained the words "Jury Demand." The demand was endorsed on the pleading as allowed by Rule 38, and the signing of the pleading also constituted a signing of the demand.

The appellee contends that the trial court should have disregarded the

jury demand because the proof of service was unsigned. Although Civil Rule 5(D) requires that the proof of service be signed, the failure of the appellee to object to the pleading on this basis at trial precludes him from raising the issue on appeal. See Conn v. Rhodes, 26 Ohio St. 644 (1875).

Notwithstanding that we find the jury demand was signed and any error relating to proof of service was waived, the trial court correctly ruled that the demand was not timely filed. R. C. §1901.24 provides that a demand for a jury trial must be made not less than three days before the date set for trial. The appellant contends that the time requirement of this statute has been repealed by Rule 38. Although the appellant did not file the demand three days before trial as required by the statute, he did attach the demand to a pleading as permitted by Rule 38. The demand therefore was timely under the Rule but not under the statute.

The Ohio Constitution, Art. IV, Section 5(B) authorizes the supreme court to prescribe rules governing civil procedure. That section also provides: "All laws in conflict with such rules shall be of no further force or effect...." Such a provision is necessary because the legislature in approving the rules could not anticipate all possible conflicts and thus could not expressly repeal all conflicting statutes.

However, the supreme court and the legislature also recognized that certain civil proceedings are designed to serve special functions. The application of the general mandates of the civil rules, and the resulting repeal of the corresponding statutes, can serve to defeat the purpose of such a proceeding. As a result, Civil Rule 1 states that the rules do not apply to special statutory proceedings "to the extent that they would by their nature be clearly inapplicable."

The issue in the present case is whether the jury demand provision of Rule 38 applies in the special statutory procedure of forcible entry and detainer. The