

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

IN THE DELAWARE MUNICIPAL COURT  
DELAWARE, OHIO

Hayes Colony, Ltd.  
Plaintiff

Case No. 08 CV 2030

vs.

Tonya Woods, et al  
Defendants

Judge Gormley  
Magistrate Pelanda  
**Judgment Entry / Magistrate's Decision  
Findings of Fact and Conclusions of Law**

FILED  
DELAWARE  
MUNICIPAL COURT  
DELAWARE, OHIO  
2008 SEP - 3 PM 4:10  
CINDY DINDO  
CLERK

This came on for hearing August 28, 2008 on Plaintiff's petition for a writ of eviction. A representative of Plaintiff appeared with counsel of record. Attorney Stacy Thomas appeared with Defendants.

Defendants failed to pay a portion of rent and utilities due in July 2008 and paid no rent due in August 2008. Under the parties' written lease, rent is due on the first day of each month; and where rent is not paid timely, a \$50 late charge is assessed on the 6<sup>th</sup> day. The lease requires tenants to "sign up for and pay all charges and bills incurred for gas, electricity, telephone, water sewer, and/or storm water." It is unclear whether any utility service providers issued bills for bulk service to the landlord who thereafter assessed charges to the tenants.

As to nonpayment of rent, the complaint filed August 15, 2008 alleged only that "on August 1, 2008 Defendants had not paid the rental payment due for the month of August 2008." No allegation is made in the complaint of nonpayment of rent or utilities due in July. The evidence and the copy of the notice attached to the complaint showed that Plaintiff served the three day notice to leave premises on August 1, 2008. Following the close of evidence by Plaintiff, Defendants moved to dismiss the complaint alleging that the court lacked subject matter jurisdiction for the reason that Plaintiff served the notice on the last day that the rent was due for August and, thus, before the payment was actually delinquent.

The three-day notice is required by R.C. § 1923.04(A) which provides

Except as provided in division (B) or (C) of this section, a party desiring to commence an action under this chapter shall notify the adverse party to leave the premises, for the possession of which the action is about to be brought, three or more days before beginning the action, by certified mail, return receipt requested, or by handing a written copy of the notice to the defendant in person, or by leaving it at the defendant's usual place of abode or at the premises from which the defendant is sought to be evicted.

This seemingly innocuous condition precedent to "beginning the action" is so fundamental that the trial court actually lacks subject matter jurisdiction in the absence of a properly served notice:

In *Barr Hotel Co. v. Lloyd MacKeown Buick Co.*, 104 Ohio App., 69, at page 75, the court said:

1 "Proper service of the notice to leave premises is not only a condition precedent to  
2 beginning an action in forcible entry and detainer but, when controverted, as herein, is an  
3 essential element of plaintiff's case in chief. . . ."

4 The failure of proof on this vital part of the case in chief prevented the trial court from  
5 having jurisdiction to proceed with the action. The trial court, hence, committed error  
6 prejudicial to the rights of the appellant, Washington. *Sternberg v. Washington* (1960), 113  
7 Ohio App. 216 at 221.

8 In this case, Plaintiff served the three-day notice on the last day for Defendant to timely pay August rent.  
9 As such, Defendant were not in default as to the August rent at the time of service of the notice.

10 Plaintiff argues that Defendants were, in fact in default for nonpayment of a portion of the rent and  
11 utilities due in July as shown by the testimony. Pursuant to Civil Rule 15, Plaintiff proposed to amend the  
12 complaint to conform to the evidence, or otherwise to reflect a default to pay rent and utilities as of July 1,  
13 not August 1 as alleged in the complaint. However, the Civil Rules are inapplicable in forcible entry and  
14 detainer proceedings. Civil Rule 1(C)(3). Even where the rules apply, Civil Rule 15 provides that leave to  
15 amend pleadings be freely granted "when justice so requires." Due to the expedited nature of the  
16 proceedings, it would be fundamentally unfair to the tenant who must prepare a defense on only a few days  
17 notice to allow the landlord to substantially alter fundamental factual allegations in the complaint.

18 Further, to proceed at any level, the court must have subject matter jurisdiction. Without jurisdiction  
19 the court lacks authority to permit Plaintiff to amend the complaint. Plaintiff cannot confer jurisdiction on  
20 the court retroactively.

21 Yet, Defendant does not challenge the service of the notice, but the timing of the service. Defendant  
22 says that a notice issued before the tenant is in default is no notice at all. Nothing in the express language  
23 of R.C. § 1923.04 requires the landlord to wait for the tenant to default on the lease agreement before issuing  
24 the three-day notice to leave. However, allowing service of a notice to leave before there is any lawful basis  
25 to demand that the tenant leave would render the statute moot. A landlord could simply include a notice to  
26 leave in every lease agreement or deliver it on the first day of every lease term. The cases have held that the  
three-day notice cannot be served until after a tenancy is otherwise terminated. *Voyager Village Ltd. v.*  
*Williams* (1982), 3 Ohio App.3d 288; *Siegler v. Batdorff* (1976), 63 Ohio App.2d 76 at 82-83.

In this case, the lease expressly provides a five day "grace period" before a \$50 late fee is imposed  
on the tenant. Under similar facts the Lake County Court of Appeals found the lease ambiguous in *Reinhard*  
*v. Loreck*, No. 95 -L-028 (11<sup>th</sup> Dist. C.A., Lake Co., Sept. 8, 1995):

This agreement provides that rent is due on the first of the month, but also provides a grace  
period of five days before late charges accrue. While the lease is unclear as to whether this  
clause provides a grace period for the payment of rent or for the accrual of late charges, it  
is well settled that "where there is doubt or ambiguity in the language of a contract it will

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

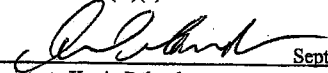
be construed strictly against the party who prepared it." *McKay Machine Co. V. Rodman* (1967), 11 Ohio St.2d 77, 80. See also *Sites v. Moore* (1992), 79 Ohio App.3d 694, 700.

The lease in the case at bar provides that payment of rent after the first of the month is "late." However, language in the paragraph titled "Default by Lessee" refers only to failure by the tenant to "make any rental payment herein provided within the time required." The language used leaves open to debate whether the "time required" includes or excludes the five-day grace period. The language must be construed in favor of the tenant. As such, the tenant may be "late" but cannot be deemed in "default" until after expiration of the grace period.

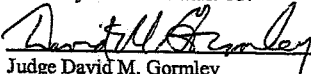
The notice served on Defendants failed to satisfy the statute depriving the court of subject matter jurisdiction. The court lacks jurisdiction and the case must be dismissed. However, the landlord proposes to immediately issue a new three-day notice and commence new proceedings likely before this decision is served. This matter is but a minor skirmish lost in a war in which the landlord appears destined to prevail. Nevertheless, the tenant may have preserved valuable additional time within which to pursue other options.

WHEREFORE, judgement is granted to Defendants dismissing Plaintiff's petition.

The clerk shall serve the parties, or counsel, a copy hereof by regular mail per Civil Rule(s) 53 / 58 and indicate below and in the journal said service by initial or signature. A party may not assign as error on appeal the court's adoption of any finding of fact or conclusion of law unless the party timely and specifically objects to that finding or conclusion as required by Civil Rule 53(D)(3).

  
September 3, 2008  
Magistrate Kevin Pelanda

This is adopted as the final order of the court subject to Civil Rule 53.

  
Judge David M. Gormley

copy served: \_\_\_\_\_ Plaintiff attorney  
                  \_\_\_\_\_ Defendant attorney

08CV2030 Final Eviction Reprint.jmt.wpd\0903081036