

MAGISTRATE'S PRETRIAL ORDERS

2006 JUN 27 AM 11:16

LORAIN METROPOLITAN HOUSING AUTHORITY  
Plaintiff

CLERK OF  
ELYRIA MUNICIPAL COURT

VS

CASE NO. 06CV601137

TIMOTHY LEWIS  
Defendant

9234  
92034

Pursuant to Rule 53 this matter was referred to the Magistrate for disposition of pretrial issues. Plaintiff and Defendant appeared through counsel.

Plaintiff moves to strike the jury demand that was filed a day before trial as rescheduled, but otherwise timely under the Civil Rules. Motion to strike jury demand is denied.

In Pernell v. Southall Realty (1974), 416 U.S. 363, 94 S.Ct. 1723, 40 L.Ed.2d 198, the Supreme Court carefully reviewed the centuries-old history of proceedings in forcible entry and detainer and declared that the rights of tenants under common law, carried into the Seventh Amendment to the United States Constitution, "guarantees the right to trial by jury" in evictions. Section 5, Article 1, of the Ohio Constitution similarly preserves this right. Hocking Metro. Housing Auth. v. Martin (Hocking App. 3/5/98), No. 97CA9, 1998 WL 100416.

The right to a trial by jury in forcible entry and detainer proceedings is recognized by statute at R.C. §1923.10. Under R.C. §1923.09, only if "neither party demands a jury..., a judge of the court may try the cause." The legislature requires clerks of court issue a unique summons informing tenant-defendants with the date of trial: "You may request a trial by jury." R.C. §1923.06(B). The only statutory limitation in Chapter 1923 as to the right to file a jury demand applies to "county court" where "a party demanding a jury shall first deposit money with the court sufficient to pay the jury fee." R.C. §1923.101.

Before 1987, R.C. §1901.24 set forth the standard for filing jury demands in municipal court, stating that a "demand for a jury trial in civil cases must be made in accordance with rule of court, and if there is no rule, then not less than three days before the date set for trial." Our court of appeals in Administrator of Veterans Affairs v. Jackson (Summit 1987), 41 Ohio App.3d 274, 277, held this section applicable to proceedings in forcible entry and detainer. This section was amended, effective March 19, 1987, to delete the reference to a specific time as well as to local rules of court. It now requires that a demand be made in the manner prescribed by the Ohio Rules of Civil Procedure. Civil Rule 38(B) permits the filing of a jury demand "not later than fourteen days after the service of the last pleading directed to such issue." This pleading is usually the complaint, unless an answer is filed. Defendant complied with these requirements.

Plaintiff argues that this Court should follow an unreported, 1975 decision from the Sixth District Court of Appeals, Savage v. Wright (Lucas App. 11/21/75), No. L-75-123, 1975 WL

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182473. Plaintiff misreads the opinion as "in the interest of justice" fashioning its own deadline for asking for a jury trial in evictions, to be three days before trial, in order to strike an appropriate balance to preserve both the inviolate right to a jury and the summary nature of the forcible entry and detainer proceedings." However, a review of the facts of that case and the law at that time reveals that this decision merely interprets the then-existing R.C. §1901.24 in the context of an overly restrictive local rule. Though R.C. §1901.24 then permitted the filing a demand for jury trial in any civil case up to three days prior to trial, the legislature allowed local rules to provide less or more time. In Savage, a jury demand was filed on May 20<sup>th</sup> for an eviction trial set for May 28<sup>th</sup>. However, the trial court denied the demand because a local rule set the return date for the summons as the deadline to request a jury trial, see R.C. §1923.09, and the return day as "four court days after date of filing of the complaint." May 20<sup>th</sup> was one day after the return day. Summarily rejecting the assignment of error challenging the "jury demand scheme" as unconstitutional, the appellate court "in the interest of justice" disregarded the local rule and restored to the defendant the default period under the then-existing R.C. §1901.24, that is, "within three days prior [to] the appearance date or the date set for trial." Section 1901.24 has since been amended to substitute the standards of the Civil Rules for this three-day period or local rule to determine when a jury demand must be filed. Savage is no longer relevant.

However, the Savage court usefully distinguishes the 1883 Ohio Supreme Court case that would have controlled but for the 1975 version of R.C. §1901.24. In Bonham v. Mills (1883), 39 Ohio St. 534, 1883 WL 208, the court reversed a lower court that had held that a demand filed on the hearing date was "too late," being after the day for return of the summons. It explained that "lower courts" that interpreted the statute, now R.C. §1923.09, to require a jury demand be filed by the return date of the summons had erred, misconstruing language from a treatise out-of-context and ignoring "former statutes." The supreme court held that the filing of a jury demand up to and even on the day of trial was not untimely in a forcible entry and detainer action.

The supreme court's reference to "former statutes" is clear. In the early years of Ohio, the statutes required that every "inquiry" into forcible entry and detainer be by jury, *i.e.*, by "six judicious, disinterested men of the county, who shall be freeholders in said county." See *e.g.* 22 Ohio Laws 233 (1824). Not until 1853 was a "justice" permitted to decide the right to possession as between the parties and a demand required to have a jury trial. 51 Ohio Laws 179 (Osgood & Blake 1853). That it was "settled law" between 1795 and 1853 that only a jury could decide an eviction was one primary consideration when in 1880 a common pleas judge expressed disbelief "that the right to a jury... should be limited... [or] deemed waived" prior to the date of trial, at least without an unambiguous directive from the legislature. Hill v. Hollister (Huron C.P. 1880), 8 Ohio Dec. Reprint 115, 5 W.L.B. 757, 1880 WL 5818, at \*3. The language of the Code, now at R.C. §1923.09, suggesting a deadline by the "return day of the summons" was held insufficient to terminate that right. The Ohio Supreme Court in Bonham v. Mills cites the opinion of the judge in Hollister with approval as "in accordance with [the supreme court's own] view" that a defendant may request a jury up until the time of trial. Bonham, 39 Ohio St. at 534.

The Savage court could not follow Bonham. The clear legislative directive at R.C. §1901.24 that then required a demand be filed three days prior to the date set for trial, unless local rule provided otherwise, boxed the Savage court in. Savage could only follow Bonham in spirit. With the 1987 amendment of R.C. §1901.24, the legislature directs the courts of Ohio to look only to the Civil Rules for the time and manner to demand jury trials. Even a local rule cannot alter the scheme, if inconsistent with the Civil Rules. See Vance v. Roedersheimer (1992),

64 Ohio St.3d 552. This does not mean that demands for jury trial are without restriction; a defendant that does not comply with the Civil Rules waives the right to a jury trial.

Ironically, the observation in the 1800's that actions in forcible entry in detainer were actually "civil" in nature in part led the courts to according tenants the same jury rights as parties as in civil actions generally, who at that time had until the date of trial to demand a jury. **FILED**  
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Hollister, 1880 WL 5818, at \*3; Miller v. Schmidt (Hamilton C.P. 1894), 5 Ohio Dec. 4, 3 Ohio N.P. 296, 1894 WL 687, following Bonham and Hollister. By amending R.C. §1901.24 to incorporate the Civil Rules, the legislature has brought jury demands in evictions full circle. **CLERK OF CUYAHA MUNICIPAL COURT**  
BY: \_\_\_\_\_

To the extent any actual conflict exists between Savage and the Bonham- related cases, the Magistrate concludes the decision by the supreme court in Bonham is controlling, until reversed by the Ohio Supreme Court itself. **234**  
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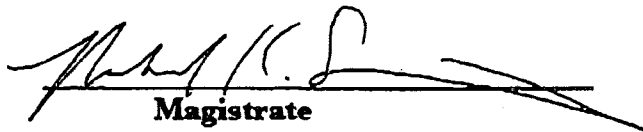
Finally, nothing supports Plaintiff's argument that delay of a trial date terminates the right to file an otherwise proper jury demand. In Hollister, approved by the supreme court in Bonham, the trial was continued twice for cause before the demand was made. The court held that the right to request a jury "is not limited to the time the cause may be first set for trial." Hill v. Hollister, 1880 WL 5818, at \*3. In an 1894 case, Miller v. Schmidt, 1894 WL 687, the court relied on Hollister and Bonham to permit the same.<sup>1</sup> The argument rejected in the 1800's is no more persuasive today.

It is highly unlikely that 1795, 1883 or 1895 landlords were any less frustrated or impatient than 2006 landlords at the prospect of a jury trial to try to get their land back. The principles and even the basic statutory framework for evictions have remained remarkably unchanged over two hundred plus years. No less than the United States Supreme Court has urged tolerance by landlords at the inconvenience and delay that come with jury demands in evictions:

[These are] inherent in any fair-minded system of justice. A landlord-tenant dispute, like any other lawsuit, cannot be resolved with due process of law unless both parties have had a fair opportunity to present their cases. Our courts were never intended to serve as rubber stamps for landlords seeking to evict their tenants, but rather to see that justice be done before a man is evicted from his home.

Pernell, 416 U.S. at 385.

Based on the foregoing, the Magistrate need not consider the evidence and arguments of Defendant's counsel that her own illness coupled with reassurances by Plaintiff's counsel that this matter would be settled by accepting rent excused an earlier filing of the jury demand.

  
Magistrate

Copies to Counsel

<sup>1</sup> Savage did not involve the issue of a rescheduled trial date and was applying a statute since amended. See *supra*.