

MUNICIPAL COURT OF

IN THE CUYAHOGA FALLS MUNICIPAL COURT 2001 JUL 24 P 1: 07

SUMMIT COUNTY, OHIO

CUYAHOGA FALLS, OHIO

OWNER'S MANAGEMENT COMPANY)	CASE NO. 01 CVG 1693
)	
PLAINTIFF)	
)	
vs)	
)	
CHERYL BRENT)	
)	
DEFENDANT)	<u>MAGISTRATE'S ORDER</u>

The within matter came on for hearing on July 23, 2001, on the defendant's motion to quash the service of summons upon her.

The record of the cause reveals that the subject complaint in forcible entry and detainer was filed on June 22, 2001; the plaintiff, Owner's Management Company, seeking restitution of residential premises at 265 N. Thomas Road, K-103, in the City of Tallmadge from the defendant, Cheryl Brent, for the latter's alleged failure to comply with a notice of termination of tenancy. The complaint and summons were posted upon her residence on June 25, 2001, with ordinary mail service of such process being accomplished on June 22, 2001. The within motion to quash such service was filed on July 16, 2001. Although, at the within hearing, the defendant did waive service of process, it is believed that the question at issue will repeat itself and is of considerable importance. Accordingly, the matter will be addressed.

R.C. §1923.06, as amended by effective date of September 29, 1999, provides for service of process in actions in forcible entry and detainer by either personal (residential) service, accompanied by ordinary mail; certified mail, accompanied by ordinary mail; or posting on the premises, accompanied by ordinary mail. The within motion to quash alleges the unconstitutionality of that portion of such statute authorizing service by posting and ordinary mail; it being asserted that such process conflicts with the constitutional authority of the Ohio Supreme Court to promulgate rules of practice and procedure and is, therefore, violative of Article IV Section 5(B) of the Ohio Constitution; is violative of the separation of powers mandated by Article II Section 32 of such constitution; and violates the "one subject rule" of legislation required by Article II Section 15(B). It must initially be noted that service of process is subject to a motion to quash for any defect which would render such process invalid or void. 76 O. Jur. 3d Process §88 at 278.

The seminal case involving the alleged unconstitutionality of R.C. §1923.06, insofar as the same involves service by posting and ordinary mail, is Talley v. Warner, 99 Ohio Misc. 2d 42 (Cleveland Mun. Ct. 1999); such case holding that the posting and ordinary mail service sanctioned by such provision is unconstitutional as being in violation of Article II Section 5(B) of the Ohio Constitution, such section providing that statutes conflicting with rules of practice and procedure established by the Ohio Supreme Court are of no force and effect. Such decision was followed in the cases of McKown v. Johnson, No. 99 CVG 7561 (Akron Mun. Ct., November 1, 1999), and Boyle v. Hernandez, No. CVG-99-11252 (Toledo Mun. Ct. August 27, 1999). With such decisions, this magistrate must respectfully disagree.

Methods of service of process are established by Civ. R. 4.1, with the same containing no authorization for service by posting, and providing for ordinary mail service after certified mail has been returned as either unclaimed or refused. Civ. R. 4.6. Matters of process and service of the same are procedural in nature. Fraiberg v. Cuyahoga Cty. Court of Common Pleas, Domestic Relations Div., 76 Ohio St. 3d 374, 376 (1996). Clearly, R.C. §1923.06, insofar as the same authorizes service by posting and ordinary mail, and provides for service by certified and ordinary mail simultaneously, is in conflict with the above rule. Accordingly, if applicable, Civ. R. 4.1 would prevail and those portions of R.C. §1923.06 in conflict with the same would be invalid. To the extent that the Civil Rules would, by their nature, be clearly inapplicable, they shall not apply in actions in forcible entry and detainer. Civ. R. 1(C)(3). The underlying purpose of actions of forcible entry and detainer is to provide a summary, expeditious and speedy method for the recovery of possession of real estate. Cuyahoga Metropolitan Housing Authority v. Jackson, 67 Ohio St. 2d 129, 131, 21 Ohio Op. 3d 81 (1981). The civil rules are applicable in such proceedings unless found to frustrate such purpose. State ex rel GMS Management Co., Inc. v. Callahan, 45 Ohio St. 3d 51, 55 (1989). Even the Talley court found that Civ. R. 4.1 and 4.6, providing for service by ordinary mail only after certified mail is returned, frustrates the summary nature of the forcible entry and detainer proceeding. Talley v. Warner, 99 Ohio Misc. 2d at 46. In finding that Civ. R. 4.1 is applicable to actions of this nature, however, the Talley court created a method of service not sanctioned by such rule (service by certified and ordinary mail simultaneously), grafted it upon Civ. R. 4.1 and declared the existence of a conflict with the subject statute. In addition to the fact that no such

method of service has been established by the Civil Rules, it has been specifically found that the service of process by certified and ordinary mail, simultaneously, is invalid. Akron Metropolitan Housing Authority v. Thompson, C.A. No. 14428 (Ct. App. Summit County July 25, 1990). It is found that Civ. R. 4.1 and 4.6, insofar as they do not provide for service by posting and ordinary mail or service by certified and ordinary mail simultaneously, would frustrate the summary, speedy and expeditious recovery of possession of real property which is the purpose behind the forcible entry and detainer action. R.C. §1923.06 is, therefore, not unconstitutional on such ground.

Civ. R. 4.1 not being applicable to matters of this nature, the general assembly's provision for a method for service of process in this special statutory proceeding would not appear to violate the separation of powers provision set forth in Article II Section 32 of the Ohio Constitution.

The version of R.C. §1923.06 at issue, and pursuant to which the challenged service of process was accomplished, was effective on September 29, 1999. Accordingly, the constitutional attack (for allegedly violating Article II Section 15(B)) on that version adopted in March of 1999 must fail.

A fundamental issue for resolution is whether the posting and ordinary mail service at issue meets constitutional muster. Service of process meeting such constitutional standard is that service which is reasonably calculated, under all of the circumstances, to reach interested parties and apprise them of the pendency of the action and their opportunity to appear. Akron-Canton Regional Airport Authority v. Swinehart, 62 Ohio St. 2d 403, 406, 16 Ohio Op. 3d 436 (1980). Posting, alone, in circumstances wherein such process may be removed from the door of a residence,

has been held constitutionally deficient. Greene v Lindsey, 456 U.S. 444, 452, 102 S. Ct. 1874 (1982). Notice by mail, in addition to posting, can provide the constitutionally required assurance that the state has not allowed its power to be invoked against a person who has had no opportunity to present a defense. Greene v. Lindsey, 456 U.S. at 455. Although the method of such mail service (certified or ordinary) was not specifically addressed by the Greene court, it is found that ordinary mail service, in conjunction with posting, is sufficient to meet minimum due process notice requirements. Notice by ordinary mail may, in appropriate circumstances, be constitutionally adequate. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318 (1950). Although neither ordinary mail, by itself, nor posting, by itself, would satisfy such constitutional requirement, it is found that the two, together, as provided for in R.C. §1923.06, is reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and their opportunity to appear, and it is found that such statute is a constitutional enactment.

Accordingly, in light of the above, it is recommended that the defendant's motion to quash be denied.



STEVEN J. SCHWARTZ, Magistrate

cc: Ted S. Friedman, Attorney for Plaintiff
Gregory R. Sain, Attorney for Defendant
File