

IN THE MUNICIPAL COURT OF AKRON
SUMMIT COUNTY, OHIO

SEP 30 1999
MUNICIPAL COURT

William McKown)
) CASE NO. 99 CVG 7561
)
)
) Plaintiff)
)
) V.) Magistrate: Thomas F. Lynett
)
)
) Sue Johnson et al)
)
)
) Defendant)
) MAGISTRATE'S DECISION WITH
) FINDINGS OF FACT AND CONCLUSION
) OF LAW

This matter was scheduled for hearing before Magistrate Thomas F. Lynett on the 30th day of September 1999. Plaintiff was present in court. Defendant Harper was present in court. Defendant Johnson was present in court and represented by Ms. Joann Sahl of Western Reserve Legal Services.

Prior to hearing testimony, counsel for defendant Johnson filed a Motion to Quash service on the defendants. Defendants' Motion included a Memorandum and Brief claiming, in essence, that the recently amended ORC 1923.06 regarding service of process in forcible entry cases is unconstitutional. Defendants contend that service, effected in this case by posting and regular mail, is insufficient and must be quashed.

Defendant argues that the Rules of Civil Procedure, specifically Civil Rule 4.1(A) and Civil Rule 4.6, establish the procedures for service of process by mail for an eviction complaint. Civil Rule 4.1(A) permits service of process by certified or express mail. Civil Rule 4.6 permits service of process by ordinary mail, but only after service of process by certified or express mail has been refused or unclaimed.

Defendants further argue that any attempt by the legislature to amend the rules of service in eviction cases is in direct conflict with the Ohio Constitution which vests the Ohio Supreme Court with the exclusive power to govern practice and procedures in all courts of the state.

The court finds that the defendants' argument has merit. Article IV, Section 5(B) of the Ohio Constitution provides, inter alia that:

The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right.

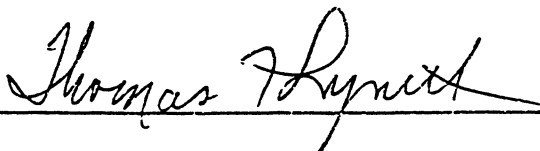
The Cleveland Municipal Court in *Tally v. Warner* (1999) 99 Ohio Misc 2d 42 and the Lucas County Municipal Court in *Boyle v. Hernandez* (Sept 3, 1999) unreported, both recently considered the constitutional argument presented by the defendants and both courts found that the service of process as allowed in ORC Section 1923.06 (posting and regular mail) is in direct conflict with the Civil Rules and runs afoul of Article IV Section 5(B) of the Ohio Constitution.

Accordingly, this court finds that ORC 1923.06 is invalid and is of no force. The Ohio Legislature, by enacting ORC 1923.06 created a new method of service in eviction cases (posting with regular US mail service) that is not permitted by the Civil Rules. The court finds that the legislators were in violation of Article IV, Section 5(B) of the Ohio Constitution and the separation of powers doctrine contained in Article II Section 22 of the Ohio Constitution.

Having determined that the ORC 1923.06 is unconstitutional and being in conflict with the Civil Rules, this court need not reach the issue of whether ORC 1923.06 violated the single subject rule contained in Article II Section 15(D) of the Ohio Constitution.

Accordingly, for the foregoing reasons, this court finds that there was insufficient service of process upon the defendants and that the defendants' Motion to Quash service is well taken and granted. Since the defendants' motion is not a Motion to Dismiss, Civil Rule 3(A) allows the

plaintiff one year from the date of filing in this action to obtain valid service of process. This matter shall be continued until proper service upon the defendants has been made.



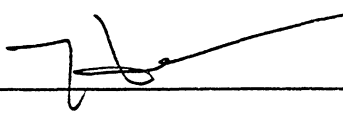
Magistrate Thomas F. Lynett

JUDGMENT ENTRY

The decision of the Magistrate is approved.

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Date



JUDGE

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