

CLEVELAND MUNICIPAL COURT
HOUSING DIVISION
CUYAHOGA COUNTY, OHIO
Judge Raymond L. Pianka

Ernest Blevins

DATE: September 22, 2003

Plaintiff

-vs-

CASE NO.: 2003 CVG 4465

Robbie Gosa

Defendant

MAGISTRATE'S REPORT AND
RECOMMENDATION

This case came to be heard September 8, 2003 before Magistrate David D. Roberts, Judge Raymond L. Pianka having referred the case to the magistrate to take evidence on all issues of law and fact. The parties had begun trial before Magistrate Ruben Pope on March 14, 2003 but the case was continued for status hearings and additional testimony.

Plaintiff appeared with counsel. Defendant appeared with counsel. Counsel for the parties stipulated to the following findings of fact from the March 14, 2003 hearing.

1. Plaintiff is the owner of the property at 3434 W. 98th St., Cleveland, Ohio.
2. Defendant lives at the subject residential property.
3. Plaintiff served upon Defendant a thirty-day notice to terminate periodic tenancy.
4. Plaintiff subsequently served upon Defendant a three-day notice under O.R.C. §1923.
5. Plaintiff and Defendant lived on the property together until approximately one and one-half years ago when Plaintiff moved from the property.
6. Defendant and Plaintiff have two children both of whom currently live at the property.

Based on the testimony and evidence offered at the September 8, 2003 hearing, the Court makes the following additional findings of fact.

Findings Of Fact From September 8, 2003

7. Plaintiff and Defendant lived together since 1984, first at a different property and then at 3434 W. 98th St., Cleveland, Ohio.
8. Plaintiff and Defendant did not ever obtain a marriage license and were not ever married in a ceremony.
9. Defendant understood and intended to enter into an agreement with Plaintiff in approximately 1984 or 1985 that she and Plaintiff were married.
10. Plaintiff bought Defendant a ring that he and Defendant considered to be an engagement ring and a ring that he and Defendant considered to be a wedding ring.
11. The teachers and staff at the schools that the parties' children attended considered Plaintiff and Defendant to be married.
12. Plaintiff's employer considered Plaintiff and Defendant to be married and included Defendant in Plaintiff's medical coverage as his wife.
13. Plaintiff represented on government forms that he and Defendant were married, including income tax returns in 1995 and 1996 and bankruptcy filings in 1996.
14. Defendant filed for divorce in Cuyahoga County Common Pleas Court, Division of Domestic Relations, Case No. DR01-283112, eventually dismissing the lawsuit without prejudice.

Conclusions Of Law

The Court finds that it lacks subject matter jurisdiction over Plaintiff's forcible entry and detainer action against Defendant.

In this forcible entry and detainer action, Plaintiff seeks a writ of restitution authorizing him to forcibly move Defendant and her children from the subject property. Defendant asserts as her defense that she is Plaintiff's common law wife and that, without a valid order from the domestic relations division of a common pleas court, he may not evict her from marital property. *Slansky v. Slansky*, 33 Ohio App.2d 127, 293 N.E.2d 302 (8th Dist. Cuyahoga, 1973). Plaintiff denies that he formed a common law marriage to Defendant.

Ohio Revised Code §1923.02(A)(5) authorizes an owner of property to bring an eviction action against "an occupier of land or tenements, without color of title." When

an occupier of land has “color of title,” the owner must file under another appropriate statute, as e.g. O.R.C. §5303.03 *et seq.*

Not every claim of interest in property constitutes “color of title” under O.R.C. §1923.02(A)(5). *Haas v. Gerski* (1963), 175 Ohio St. 327, 194 N.E.2d 765. Under the “present title doctrine,” a defendant’s claim to “color of title” will bar an eviction only when that claim constitutes a challenge to plaintiff’s “present title.” *Id.* at 330-331. *Fenner v. Parkinson*, 69 Ohio App.3d 210, 590 N.E.2d 339. That a defendant has filed a lawsuit challenging title is not, by itself, sufficient to establish a challenge to “present title.” Otherwise, tenants could “defeat the purpose of the forcible entry and detainer statutes (i.e., immediate possession)” by “merely bringing title into question in a collateral suit in common pleas court.” *State, ex rel. Carpenter, v. Court* (1980), 61 Ohio St.2d 208, 210, 400 N.E.2d 391.

The courts of Ohio have not articulated a standard of review for courts to use in determining whether a challenge to title constitutes a challenge to “present title.”

In *Haas v. Gerski* (1963), 175 Ohio St. 327, 194 N.E.2d 765, the Court held that defendant’s prior lawsuit seeking to set aside a quitclaim deed because of plaintiff’s failure to carry out oral promises was not a sufficient challenge to plaintiff’s “present title” to bar an eviction. Plaintiff held “present title.” Likewise, in *State, ex rel. Carpenter, v. Court* (1980), 61 Ohio St.2d 208, 400 N.E.2d 391, defendant’s claim that plaintiff obtained his deed through false and fraudulent means was not sufficient to bar an eviction.

By contrast, in *Fenner v. Parkinson*, defendant’s claim that he held title through a better deed than plaintiff’s was sufficient to put plaintiff’s “present title” in doubt, giving defendant “color of title,” and depriving the court of jurisdiction to hear an eviction action. 69 Ohio App.3d 210, 590 N.E.2d 339. The plaintiff would need to prevail first on the issue of the parties’ competing claims to title, and then bring an eviction proceeding.

There are two factors which distinguish the results in *Haas*, *State ex rel. Carpenter*, and *Fenner*: (1) the type of challenge to title; and (2) the likelihood of success on the merits of that challenge. In *Fenner*, the court found that a battle between two deeds gave both parties a claim to “present title.” “[U]ntil such [dispute] is judicially resolved, neither party can claim a superior right to present possession.” 69 Ohio App.3d 214, 590 N.E.2d 341. In *Haas* and *State ex rel. Carpenter*, the courts found that defendants’ collateral attacks on plaintiffs’ recorded title did not constitute challenges to “present title.”

But implicit in *Fenner* is the court’s conclusion that the merits did not favor either party whereas the *Haas* and *State ex rel. Carpenter* courts implicitly held that the defendants in their cases were unlikely to prevail. Without some inquiry into the merits of a defendant’s claim, the “present title doctrine” would invite collateral challenges

designed to “defeat the purpose of the forcible entry and detainer statutes (i.e., immediate possession)” *State, ex rel. Carpenter, v. Court* (1980), 61 Ohio St.2d 208, 210, 400 N.E.2d 391. The only question for defendants would be how to articulate a claim that would count as a challenge to “present title.” Thus, if *Fenner* established that any challenge based on a written instrument would constitute a challenge to “present title,” those defendants with claim founded on a written instrument could stave off eviction for at least as long as it took for a sister court to reach the merits of their collateral lawsuits.

An inquiry into the merits of a defendant’s claim better serves to protect the purpose of Ohio’s forcible entry and detainer law. The Eight District Court Of Appeals has upheld a decision of this Court that found that defendant’s possession of a competing written instrument was not sufficient to challenge to plaintiff’s “present title” where the instrument was not recorded and may have been defective, even though defendants were litigating in common pleas court to declare the instrument valid. *Clark v. Reynolds*, 2000 WL 1714927 (Ohio App. 8 Dist.).

By this decision, this Court adopts a two-part test for determining if a defendant has shown a challenge to “present title.” The Court first asks if the type of claim defendant asserts can constitute a challenge to “present title.” The Court then asks if defendant has shown sufficient likelihood of success on the merits for the claim to constitute such a challenge.

Under this two-part test, the question before this Court is whether Defendant’s claim that she is married to Plaintiff by common law marriage can constitute a challenge to Plaintiff’s “present title” and, if so, whether she has established a sufficient likelihood of success on the merits to establish such a challenge.

This Court finds that a claim of common law marriage can constitute a challenge to “present title,” the right of a married person to live in marital property qualifying as “color of title” under O.R.C. §1923.02(A)(5) and depriving this Court of jurisdiction under *Slansky v. Slansky*, 33 Ohio App.2d 127, 293 N.E.2d 302 (8th Dist. Cuyahoga, 1973). *Slansky v. Slansky* held that only a common pleas court has jurisdiction to determine if one spouse can exclude the other from marital property, even if one spouse holds sole title.

A claim of common law marriage is more like a claim based on a competing deed, as in *Fenner*, than a collateral attack on a recorded title, as in *Haas* and *State ex rel. Carpenter*. Defendant is not mounting a collateral attack on Plaintiff’s claim to title. Defendant is instead claiming that she holds an interest equal to Plaintiff’s by virtue of being married to him.

The Court also finds that Defendant showed a reasonable likelihood of success on the merits were she to pursue her claim of a common law marriage in an appropriate forum. This Court is not ruling directly on Defendant’s claim that she is married to Plaintiff. Nothing in the jurisdictional statutes of this Court authorizes such a ruling.

O.R.C. §§1901.18 and 1901.181. Rather, this Court is evaluating whether the merits of Defendant's claim are sufficient to constitute a challenge to Plaintiff's "present title."

Common law marriage in Ohio exists where there is:

An agreement of marriage in praesenti when made by parties competent to contract, accompanied and followed by cohabitation as husband and wife, they being so treated and reputed in the community and circle in which they move.

Nestor v. Nestor, 15 Ohio St.3d 143 (1984). The agreement must be made prior to 1991, as O.R.C. §3105.12(B)(1) abolished common law marriage in Ohio after 1991. Plaintiff does not dispute that Defendant's testimony supports a finding that Plaintiff and Defendant competently agreed to marry and lived as husband and wife prior to 1991. Plaintiff argues instead that Defendant has failed to establish that the community in which Plaintiff and Defendant moved treated them and reputed them as married.

The Court disagrees. Defendant testified that staff at her children's schools considered the parties to be married and treated them as married, that Plaintiff's employer considered the parties married and treated them as married, particularly concerning insurance coverage for Defendant and the parties' two children, and that Plaintiff held himself out in certain tax returns and bankruptcy filings as married. Defendant does not have to show that the entire community treated and reputed the parties as married.

As to the element surrounding the reputation of the parties in the community as being man and wife, in order to establish a common law marriage it is not necessary that they disseminate information to all society generally, or to all of the community in which they reside. Rather, there must be a holding out to those with whom they normally come in contact. A common law marriage will not necessarily be defeated by the fact that all persons in the community within which the parties reside are not aware of the marital arrangement, nor by the fact that all persons with whom they normally come in contact are also unaware of the arrangement.

Nestor v. Nestor, 15 Ohio St.3d 146.

Plaintiff might have persuaded the Court that his pretense at being married to Defendant was a deliberate sham, his tax returns and insurance coverage fraudulent. But Plaintiff chose not to testify and therefore did nothing to rebut Defendant's testimony in support of each of the last two factors in *Nestor*.

Plaintiff asks the Court to find that Defendant has not proved her common law marriage by clear and convincing evidence. *Plaintiff's Post Trial Brief* at 3. *Nestor v. Nestor*, 15 Ohio St.3d 143 (1984). The clear and convincing standard for proving a common law marriage does not apply here, however, since Defendant is not attempting to prove her claim of marriage in this forum. Defendant is, rather, attempting to establish

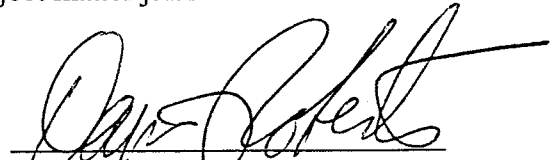
here that her claim of marriage is sufficient challenge to Plaintiff's "present title" to deprive this Court of jurisdiction. The Court considers the likelihood of Defendant's success on the merits as support for her claim to "color of title."

Because the Court finds that Plaintiff has failed to show that Defendant lacks "color of title" under O.R.C. §1923.02(A)(5), the Court finds that it lacks jurisdiction over Plaintiff's action to evict Defendant. Given the merits of Defendant's claim, only the domestic relations division of a court of common pleas can make a ruling evicting Defendant and her two children, who are also Plaintiff's children, from the subject property.

Accordingly, Plaintiff's claim should be dismissed for lack of subject matter jurisdiction.

Recommended Decision

Plaintiff's claim is dismissed for lack of subject matter jurisdiction.


MAG. DAVID DYLAN ROBERTS

ATTENTION: A PARTY MAY NOT ASSIGN AS ERROR ON APPEAL ANY MAGISTRATE'S FINDING OF FACT OR CONCLUSION OF LAW UNLESS THE PARTY TIMELY AND SPECIFICALLY OBJECTS TO THAT FINDING OR CONCLUSION AS REQUIRED BY CIV. R. 53(E)(3). ALL OBJECTIONS TO THE MAGISTRATE'S DECISION MUST BE FILED IN WRITING WITHIN FOURTEEN DAYS OF THE JOURNALIZATION OF THIS DECISION. OBJECTIONS MUST BE FILED EVEN IF THE TRIAL COURT HAS PROVISIONALLY ADOPTED THE MAGISTRATE'S DECISION BEFORE THE FOURTEEN DAYS FOR FILING OBJECTIONS HAS PASSED. OBJECTIONS MUST COMPLY WITH THE OHIO RULES OF CIVIL PROCEDURE, AND THE LOCAL RULES OF THIS COURT. FOR FURTHER INFORMATION, CONSULT THE ABOVE RULES OR SEEK LEGAL COUNSEL.

SERVICE

A copy of this *Magistrate's Report and Recommendation* was sent via regular U.S. Mail to the following on 4/26/13. U/R.

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