

SEP 03 1999

SEP -3 AM 9:15
CLERK
MARGARET B. THURBER

J.E. Fendered

AUG 27 1999

TOLEDO MUNICIPAL COURT

IN THE MUNICIPAL COURT OF TOLEDO, LUCAS COUNTY, OHIO

JAMES E. BOYLE

Plaintiff

Vs.

THOMAS A. HERNANDEZ

Defendant

*
*
*
*
*
*
*
*
*
*

Case No. CVG-99-11252

JUDGE WEIHER
MAGISTRATE MUSKA

JUDGMENT ENTRY AND OPINION

This action in forcible entry and detainer (eviction) was heard before Magistrate Susan Hartman Muska on the 17th day of August, 1999. Plaintiff was present, pro se, and Defendant was present with counsel, Thomas P. Goodwin, of the Toledo Legal Aid Society.

Defendant moved orally to quash service of the summons on the grounds that it was served in a manner inconsistent with the Constitution of the State of Ohio and the Fourteenth Amendment to the United States Constitution. Because the first issue regarding constitutionality under the Ohio Constitution results in the granting of the Motion to Quash

Service, this Court will not address the second issue raised regarding the possible conflict between R.C. §1923.06 and the Fourteenth Amendment to the United States Constitution.

Article IV §5 of the Ohio State Constitution gives the Ohio State Supreme Court the authority to “prescribe the rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right.” The Ohio Supreme Court has exercised this enumerated power by setting forth the Ohio Rules of Civil Procedure.

Pursuant to Civ. R. 1(C)(3), the Ohio Rules of Civil Procedure are applicable to actions in forcible entry and detainer unless they are found to frustrate the summary nature of the proceedings. State ex.rel GMS Management Co., Inc. v. Callahan (1989), 45 OS 3d 51, at 54. “The use of certified or express mail does not frustrate the summary nature of evictions, ” causing only “an incremental delay in the proceedings where it returns unclaimed or undeliverable.” Talley v. Warner, Case No. 99-CVG-7215, Cleveland Municipal Court Housing Division, Cuyahoga County, Ohio (May 12, 1999), at 3. The Court in Talley arrived at this conclusion after examining the U.S. Postal Service regulations, which permit certified mail to be held for delivery for as little as three days. This Court agrees with the finding that the summary nature of eviction proceedings is not frustrated by the use of certified or express mail.


The manner in which service of process in civil matters is to take place is governed by Civ. R. 4.1 through 4.6. Under Civ. R. 4.1(A), service “of any process shall be by certified mail or express mail unless otherwise permitted by these rules”. Civ. R. 4.6 governs service by ordinary mail, permitting service by ordinary mail only after certified mail or express mail has been returned “refused” or “unclaimed.”


The Ohio State Legislature recently passed Ohio Revised Code §1923.06, which purports to prescribe the manner in which service can be made in an eviction action. R.C.

§1923.06 permits service of the summons and complaint by ordinary mail and bailiff service simultaneously. The Court's record in the instant case reflects that service of the summons was accomplished by regular mail and by the bailiff posting the summons at the Defendant's residence. There was no attempt of service by certified or express mail.

Service of process using R.C. §1923.06, which permits service as discussed above, is in direct conflict with Civ. R. 4.1(A) and Civ. R. 4.6. The Ohio legislature does not have the power to prescribe "the rules governing practice and procedure in all courts of this state." This power was given to the Ohio State Supreme Court under Article IV § 5, which additionally states, "All laws in conflict with such rules shall be of ^{no} further force or effect after such rules have taken effect."

For the foregoing reason, this Court ^{holds} rules that there was insufficient service of process upon the Defendant, and Defendant's Motion to Quash Service is found well-taken and granted. This matter shall be continued until proper service upon the Defendant has been made.


MAGISTRATE SUSAN HARTMAN MUSKA 9/1/99


JUDGE ROGER WEIHER