

CLEVELAND MUNICIPAL COURT
HOUSING DIVISION
CUYAHOGA COUNTY, OHIO

DETROIT HOUSING LTD. PSHIP.

DATE: SEPTEMBER 21, 2004

Plaintiff(s)

-VS-

CASE NO.: 03-CVG-08908

JOHN SPURLOCK

Defendant(s)

JUDGMENT ENTRY

This case was called for trial on plaintiff's first cause of action on or about July 28, 2003. All parties were present in court and represented by counsel. On that date, after conference with the parties and counsel, the magistrate recommended dismissal of the plaintiff's first cause of action for lack of jurisdiction, as the plaintiff's R.C. 1923.04 notice did not comply with Local Rule 6.01(A).

The plaintiff filed timely objections to the magistrate's decision. In an attempt to resolve the parties' underlying dispute, this Court set this case for settlement conference. After full exploration by the parties, with the assistance of the Court's alternative dispute resolution specialist, the parties were unable to resolve this matter by agreement. Accordingly, the Court now addresses plaintiff's objections.

The facts in this case relevant to the magistrate's decision largely are undisputed: The defendant is a tenant of the plaintiff at 6518 Detroit Avenue, Unit #331. The unit occupied by defendant is a residential rental unit. On or about April 1, 2003, in an attempt to commence an eviction action against the defendant, the plaintiff served defendant with a notice captioned "3 DAY NOTICE," a copy of which is attached to plaintiff's complaint as Exhibit C. On April 15, 2003, after expiration of the April 1, 2003 notice, the plaintiff filed its complaint.

A notice served under R.C. 1923.04 to recover residential premises must contain specific language printed or written in a conspicuous manner¹. R.C. 1923.04 does not define "conspicuous."

¹ The required language is: "You are being asked to leave the premises. If you do not leave, an eviction action may be initiated against you. If you are in doubt regarding your legal rights and obligations as a tenant, it is recommended that you seek legal assistance." R.C. 1923.04

In response to the lack of definition in R.C. 1923.04, and in an attempt to clarify the notice requirement for landlords and tenants both, the Housing Court some ten years ago enacted a local rule, Housing Division Rule 6.01, which provides a definition of "conspicuous":

This statutory language will not be construed by this Court as conspicuous unless the printing or writing of that language is (i) at least twice as large as all other printing or writing on the Notice **and** (ii) printed or written in contrasting, bold faced type or writing.

That rule has stood unchallenged until the present time.

This Court must determine whether the local rule described above is enforceable, and, so, whether a dismissal based upon failure to comply with that rule may stand.

Courts may enact local rules that deal with the administration of justice. *Cassidy v. Glossip* (1967) 12 Ohio St.2d 17. However, local rules cannot circumscribe statutory provisions. *Hunt v. Ohio* (1904) 17 Ohio C.D. 16.

Two issues, then, must be addressed: whether the local rule addresses a substantive issue or a procedural issue dealing with the administration of justice; and, if the issue is substantive, whether the local rule circumscribes the statutory provision.

Regarding the first issue, the Court is persuaded that plaintiff's position has merit, that is, that the local rule addresses a substantive issue. The local rule does not address an administrative requirement, such as the processing of poverty affidavits, submission to the court of copies of motions to stay move outs, or the court's procedure in conducting case management conferences. Instead, it addresses a jurisdictional prerequisite to the filing of an eviction case – that is, service of a three day notice that complies with R.C. 1923.04.

Regarding the second issue, that is, whether the rule is more restrictive than the statute, the court again is persuaded that plaintiff's position has merit, for the following reasons.

In statutory interpretation, under the Revised Code, words and phrases must be read in context and construed according to the rules of grammar and "common usage." R.C. 1.42. Merriam Webster's Collegiate Dictionary (1997) defines conspicuous as "obvious to the eye or mind; attracting attention; striking."

The Court enacted the rule in an attempt to provide a "bright line" test for conspicuousness, to serve as a clear guide to landlords and tenants. The rule, however, does not acknowledge that inherent in the term "common usage" is the idea the meaning of a word or term may vary as a result of the context in which it is used, and so words or terms must be interpreted in light of that context, essentially on a case-by-case basis.

This Court can envision cases in which mandatory language in the three day notice would not comply with the local rule, but would, in fact, be conspicuous; for example, a notice in which the mandatory language is in all capital letters the size of other capital letters in the notice, in print of a contrasting color (e.g. red on a black and white document), set off by a border. In that circumstance, the size of the language would render the notice out of compliance with the local rule, but arguably in compliance with the statute.²

Accordingly, the local rule, to the extent that it imposes a restriction more stringent than that of the state statute, is unenforceable. *In re Estate of Duffy* (2002) 148 Ohio App.3d 574, Hunt 17 Ohio C.D. 16. The Court is left to construe the rule as exemplary in nature, and not mandatory.

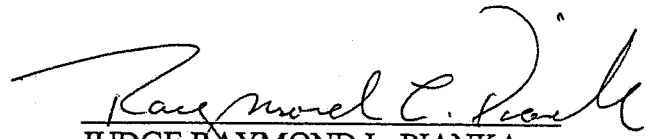
This conclusion regarding the local rule, however, does not resolve the issue at hand. While the Court is persuaded that the local rule upon which the magistrate relied is unenforceable, the Court is not persuaded that the magistrate reached an incorrect result.

Plaintiff relies upon the April 1, 2003 notice to establish compliance with R.C. 1923.04. In reviewing this notice, the Court concludes that the mandatory R.C. 1923.04 language of the notice is not conspicuous. While the language itself appears in capital letters which may be italicized, the typeface of the language is smaller than that of other language in the notice. It is in the same color as all of the other language of the notice. The mandatory language is not set off by a border, and is not placed within the notice apart from other language, or otherwise positioned so as to attract special attention. The language is not obvious to the eye, striking, or calculated to attract attention. Therefore, the Court concludes that defendant in fact was entitled to dismissal of the complaint, due to plaintiff's failure to comply with R.C. 1923.04.

² One also can imagine cases in which compliance with the local rule would not ensure that the mandatory language in the R.C. 1923.04 notice is conspicuous. For example, a landlord may be required to serve a notice in a different format to a tenant who is visually impaired, to ensure that tenant is on notice of his rights. *See Greene Metro. Hous. Auth. V. Manning*, No 98-CA-55, 1999 WL 76456 at 3 (Ct. App. Greene Cty. Feb. 19, 1999).

Plaintiff's objections to the magistrate's decision are sustained in part. The decision of the Court is modified to state that plaintiff's first cause of action is dismissed due to plaintiff's failure to comply with R.C. 1923.04.

Plaintiff having dismissed its second cause of action previously, the Clerk may set this case file over to Judgment.


JUDGE RAYMOND L. PIANKA
HOUSING DIVISION

A copy of this judgment entry was sent by regular U.S. mail to plaintiff's counsel, Jeffrey M. Sonkin and Ann Marie Johnson, 55 Public Square, Suite 1660, Cleveland, Ohio 44113, a and to defendant's counsel, Jennifer Stoller, 1223 West Sixth Street, Cleveland, Ohio 44113, on 9 / 21 / 04.

