IN THE FRANKLIN COUNTY MUNICIPAL COURT
COLUMBUS, OHIO

RICHARD P. HARRIS,

Plaintiff,

v.

HATTIE M. HAMPTON, ET AL.,

Defendants.

Case No. 2005 CVG 43533

ENTRY

On December 23, 2005 the defendants filed a Motion to Quash Service or, in the alternative, for Leave to Respond to Plaintiff's Complaint. Plaintiff did not file a response.

The first issue raised by the defendants challenges the propriety of service pursuant to R.C. 1923.06 on the Second Cause of Action for past due rent. This method of posting of the summons on the resident's door and contemporaneously mailing it by ordinary mail was enacted by the legislature in its current form in 1999. R.C. 1923.06. This special method of service conflicts with Civ. R. 4.1 and 4.6, which require that the defendant refuse to accept the summons sent by certified mail before ordinary mail delivery is permissible. Ordinarily, the Ohio Supreme Court promulgates the procedural rules for Ohio courts. Legislative enactments that govern procedural matters which are inconsistent with the Civil Rules are unconstitutional.

In Franklin County, the court has accepted posting and ordinary mail service as valid for an eviction. Magistrate Mark Hummer has written the only Franklin County decision that discusses the apparent conflict between the statute and the civil rules. *Columbus Metro. Hous. Auth. v. Curry* (February 8, 2000), Franklin County M.C. No. 1999 CVG 35067, unreported and consolidated case *Columbus Metro. Hous. Auth. v. Allen* (August 11, 2000), Franklin County M.C. No. 1999 CVG 33239, unreported. As is evident in the portion of the decision included below, Magistrate Hummer

relies upon Civ.R. 1(C) to resolve the conflict through the stated exception for forcible entry and detainer actions. Magistrate Hummer reasons that:

> * * * After review of the statute, the rule and the related case law, the magistrate concludes that in the context of forcible entry and detainer law there is no conflict between the service provisions of R.C. 1923.06 and Civ.R. 4.1- 4.6.
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> Civ. R. 1(C)states in relevant part: ' Exceptions. These rules, ***to the extent that they would by their nature be clearly inapplicable, shall not apply*** to procedure * * * (3) in forcible entry and detainer * * * ' . The Supreme Court has quoted the following language, from the Staff Notes to the 1971 amendment to Civ. Rule 1(C), with approval: '(T)he civil rules will be applicable to special statutory proceedings adversary in nature unless there is a good and sufficient reason not to apply the rules.' *Ramsdell v. Ohio Civ. Rights Com'n* (1990), 56 Ohio St.3d 24, 27. Following *Ramsdell* , this court's inquiry should focus on whether there is good and sufficient reason not to apply the Civil Rules in the context of service of process in eviction cases. More specifically, the Ohio Supreme Court has directed that analysis should start not with the rule or rules at issue, nor even on the specific statutory provision at issue, but rather with a look at the entire statutory scheme of the special proceeding.[1] '[T]he civil rules should be held to be clearly inapplicable only when their use will alter the basic statutory purpose for which the specific procedure was originally provided in the special statutory action.' *Price v*

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[1]For an extended discussion of Civil Rule 1(C)'s application to forcible entry and detainer actions and miscellaneous judicial proceedings, see *1 Klein Darling, Ohio Civil Practice* (1997), Sections 1-19 to 1-96.

Westinghouse Elec. Corp. (1982), 70 Ohio St.2d 131, 133 (quoting State *ex rel. Millington v. Weir* (1978), 60 Ohio App.2d 348, 349).

The Ohio Supreme Court has considered other rules of Civil Procedure and found them to be inapplicable to forcible entry and detainer actions. In holding Rules 53 and 54 inapplicable to such actions, the court said, '* * * the drafters of the Rules of Civil Procedure were careful to avoid encrusting this special remedy with time consuming procedure tending to destroy its efficacy.' *Housing Authority v. Jackson* (1981), 67 Ohio St.2d 129, 131. Almost a decade later, in finding the automatic stay provisions of Civ.R. 53 inapplicable to a forcible entry and detainer action, the Supreme Court cited *Jackson* with approval in saying its refusal to apply the rule was '* * * based on the potential for delay of what is intended to be a summary proceeding.' *Colonial American Development Co. v. Griffith* (1990), 48 Ohio St.3d 72, 73. The court also noted the summary nature of forcible entry and detainer proceedings in finding Civ. R 52 inapplicable to evictions. *State ex rel. GMS Management Co., Inc. v. Callahan* (1989), 45 Ohio St.3d 51.

This court agrees with Magistrate Hummer's well-reasoned decision that Civ.R. 4.1 and 4.6 are inapplicable because of the need for an expedited proceeding recognized by the specific exception in Civ.R. 1(C). Thus, R.C. 1923.06 is constitutional.

The court further finds that the terms "forcible entry and detainer", as used in Civ.R. 1(C) contemplate the included action for unpaid rent and damages to the property. In Franklin County these claims are nearly always included in the Complaint for eviction as "Count Two". The

Supreme Court of Ohio stated: "The purpose of the forcible entry and detainer statutes is to provide a summary, extraordinary, and speedy method for the recovery of possession of real estate in the cases especially enumerated by statute." *Cuyahoga Metro. Housing Auth. v. Jackson* (1981), 67 Ohio St.2d 129.

This language suggests to the court that R.C. 1923.06 contemplates a statutory scheme that includes all monetary claims related to the property. It must be remembered that the tenant is often in transition at that time, to hold that the two causes of action should be subject to two different types of service does nothing to increase the probability that the tenant is apprised "of the pendency of the action and afford * * * an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 US 306. In fact, the very opposite is true. Two cases, two court dates, two addresses for the tenant; only increases the chances that the tenants will be denied the opportunity to present their objections. Without this statutory scheme, landlords would be unable to receive compensation for unpaid rent and damages in expedited proceedings. Thus, the proceeds needed to restore and maintain the property for the next tenant would be delayed. Consequently, the court finds that service herein made pursuant to R.C. 1923.06(F) was proper.

The defendants seek to file a delayed Answer to the Complaint. The defendants appeared at the eviction hearing on October 31, 2005. Attendance at this hearing constitutes an "appearance" for the purposes of the default judgment rule.

The Franklin County Court of Appeals has stated that, "[a] motion for default judgment may not be heard ex parte where the defendant has appeared in the action. Rather, the motion can only be determined after a hearing of which seven days advance notice is given." *City of Columbus v.*

Kahrl, 1996 WL 117303 (Ohio App. 10 Dist.), quoting *Breeding v. Herberger* (1992), 81 Ohio App.3d 419, 422. The court gave defendants notice that their response to plaintiff's Motion for Default Judgment was due December 2, 2005. On December 26, 2005 plaintiff submitted a sworn statement of damages that appears to contradict some of the factual allegations in the Complaint. For example, plaintiff seeks to recover $1,145.00 in miscellaneous charges in his affidavit, even though the Complaint only requests past due rent. Plaintiff's Motion for Default Judgment was not ruled upon because defendants filed the motion which is the subject of this entry on December 23, 2005.

Defendants seek to extend the time to file their Answer relying on Rule of Civil Procedure 6(B) which states, in pertinent part:

> (B) Time: extension. When by these rules * * * an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect * * *

Thus, the defendant must demonstrate excusable neglect in order to file their untimely Answer. The supreme court defined this neglect in *Davis v. Immediate Medical Services, Inc.* (1997), 80 Ohio St.3d 10. In determining whether neglect is excusable or inexcusable, all the surrounding facts and circumstances must be taken into consideration. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 514 N.E.2d 1122, syllabus. Neglect under Civ.R. 6(B)(2) has been described as conduct that falls substantially below what is reasonable under the circumstances. *State ex rel. Weiss v. Indus. Comm.* (1992), 65 Ohio St.3d 470, 473, citing *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47

Ohio St.2d 146, 152. In the instant case, both defendants filed affidavits indicating that they deny owing plaintiff $3,000.00, that they were unaware of the need to file an Answer until they contacted counsel and that the court's notice advising them of the due date to respond to plaintiff's Motion for Default Judgment arrived eight days after the date to file a response. These affidavits set forth a sufficient basis to find excusable neglect on the part of the defendants. Thus, defendant are granted leave to file their Answer.

Finally, defendants claim that plaintiff must attach a copy of defendants' lease if his Complaint is based upon breach of the lease. Ohio Civ.R. 10(D) states:

> When any claim or defense is founded on an account or other written instrument, a copy of the account or written instrument must be attached to the pleading. If the account or written instrument is not attached, the reason for the omission must be stated in the pleading.

Defendants are correct that if plaintiff and defendants entered into a written lease, which is the subject of this litigation, a copy must be filed with the court and also mailed to the defendants' attorney. If this case is based on an oral month-to-month tenancy, plaintiff should file an Amended Complaint. Plaintiff is granted leave to amend his Complaint to reflect the month-to-month tenancy and/or to assert any other claims for damages that he is requesting.

Accordingly, the court finds that service of the Complaint was proper pursuant to R.C. 1923.06. Defendants are granted until April 3, 2006 to file their Answer. Plaintiff is granted until April 3, 2006 to file a copy of the lease and/or amend his Complaint.

This case is set for a pretrial on April 21, 2006 at 9:00 a.m. in courtroom 12B.

March 23, 2006

JUDGE ANNE TAYLOR

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