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FILED

Elyria Municipal Court

601 Broad Street, Elyria, OH 44035

Judge Lisa A. Locke Graves ~ Judge Gary C. Bennett

Clerk Eric J. Rothgery

2013 MAR 11 A 8:51

CLERK OF COURT
ELYRIA MUNICIPAL COURT

Civil Journal Entry

Case No. 2013CVG00086

BY: ETHEL HUDGINS
Plaintiff(s)

Vs.

SHELLY CAMPBELL
Defendant(s)

Magistrate's decision reviewed, adopted, and incorporated by reference herein. Clerk to journalize the Magistrate's Decision along with this order. Case dismissed without prejudice at Plaintiff's costs.

JUDGE

CLERK TO SERVE ALL PARTIES NOT IN DEFAULT FOR FAILURE TO APPEAR WITH NOTICE OF JUDGMENT AND DATE OF ENTRY UPON THE JOURNAL.

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CLERK OF
ELYRIA MUNICIPAL COURT

STATE OF OHIO, LORAIN COUNTY, ss., - THE ELYRIA MUNICIPAL COURT

BY: _____

MAGISTRATE'S DECISION

ETHEL HUDGINS
Plaintiff

VS **CASE NO. 13CVG00086**

SHELLY CAMPBELL
Defendant

Pursuant to Rule 53 this matter was referred to the Magistrate for hearing and decision. Plaintiff appeared through counsel, Michael G. Polito. Though Defendant did not appear, case was set to be tried as though she had. Immediately prior to hearing, Defendant's brother telephoned the Court to advise that her medical condition prevented her attendance. After the Magistrate denied him a request for continuance, Plaintiff admitted that this brother also resided in the premises.

FINDINGS OF FACT AND LAW

Plaintiff's admission that at least one other adult resides in the premises, who she did not name in the complaint but seeks to have removed with the Defendant, cannot be easily disregarded. Although Plaintiff desires all of the occupants to be removed, a writ of restitution may be executed only against the specified defendant. Although a three-day notice may be vaguely addressed to all occupants, "[a] writ of restitution is directed solely to the defendant of a forcible entry and detainer action, not to 'all tenants and occupants.'" Hooper v. Seventh Urban, Inc. (Cuyahoga 1980), 70 Ohio App.2d 101, 108. This rule applies even when unauthorized subtenants are present. Accordingly, "an order of restitution may not be enforced against a subtenant who was not a party to the forcible entry and detainer action.... [T]he proper remedy against a subtenant who allegedly has no right to continued possession is an action in forcible entry and detainer." *Id.* at 110.

Plaintiff urges that any other occupant, by not entering into a formal rental agreement with her, never became her "tenant" and may be removed at her discretion as unauthorized. Plaintiff confuses a "lessee" with a "tenant." Our court of appeals has explained that they are not synonymous: "The term 'tenant' is... sometimes used in a broader sense so as to include 'one who holds or possesses lands or tenements by any kind of title, either in fee, for life, years, or at will.'" Baughman v. Semaan (Medina 1986), 29 Ohio App.3d 365, 366, *quoting* 33 Ohio Jurisprudence 2d (Rev.1976) 527, Landlord and Tenant, Section 2 (emphasis added). Though R.C. §1923.01(C)(1) defines the term "tenant" as one "entitled under a rental agreement to the use or occupancy of premises," R.C. §1923.02 more generously "speaks of tenants as those who

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are 'in possession.'" Baughman, 29 Ohio App.3d at 366. This is a difference without distinction here, because Plaintiff acknowledges her acquiescence to his presence and dealings with him.

This is a civil rights issue as well. Though not naming any other resident as a party, Plaintiff no less seeks adverse governmental action towards him *i.e.,* intrusion into his home and his physical ouster with his property. The language and principles of the Due Process Clause of the United States Constitution require that any person at risk of being deprived of property by the government receive adequate notice of the potential action and a meaningfully opportunity to be heard. Without a summons and complaint served upon *all* adult residents, Plaintiff is asking this Court to knowingly deny them their fundamental, Constitutional rights.

Executing a writ of restitution against a named defendant without executing against the persons or property of other residents in shared premises is in practical terms difficult if not impossible, asking this Court's bailiff to identify ownership of each item of personal property, to ensure that none of the personal property of the unnamed residents be removed.

Plaintiff could be granted leave to file an amended complaint to add the names of these other adults as party defendants. However, if the R.C. §1923.04 notice to leave the premises does not identify any other adults by name or general category, such as "all other occupants," this case would have to be dismissed.

Furthermore, the complaint states that the three-day notice was served on January 10, 2013. This action was thereafter filed on January 14, 2013. Revised Code §1923.04 requires service of notice to vacate "three or more days before beginning the action." Civil Rule 6(A) provides that in the computation of time of "any applicable statute, the date of the act... shall not be included." Thus, the date of service, January 10, 2013, is not counted. Civil Rule 6(A) further states that "[w]hen the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation" of time. Under this Rule, January 12th and 13th should also be excluded. Defendant had until midnight of January 15th to vacate, that is, the day *after* the date of filing. A prematurely filed action should be dismissed. *See* Wintrow v. Smith, 32 Ohio Misc.2d 12 (1987).

The Civil Rules apply to proceedings in forcible entry and detainer unless "clearly inapplicable." Civ. R. 1(C). The purpose of the three day notice is to provide a tenant with an opportunity to consider and act upon the options outlined in the notice, that is, move and/or prepare for litigation. Although an action in forcible entry and detainer is intended to be expedited, the three-day notice precedes litigation and is plainly meant to interrupt the gathering momentum for benefit of the tenant. Access to banks and transportation rentals is often limited on weekends and holidays. The legal advice specifically "recommended" in the notice is in short supply on those days. Service of this notice prior to litigation is not a mere formality, in which strict application of Civil Rule 6(A) would clearly be improper, but the very basis for this Court's exercise of jurisdiction in eviction cases. *See e.g.,* Sternberg v. Washington, 113 Ohio App. 216 (Summit 1960). The benefits to be derived by both landlords and courts from a tenant taking steps to avoid litigation, such as by vacating the premises, remedying the breach, or negotiating settlement, cannot be discounted. Thus, Rule 6(A) is not "clearly inapplicable" to R.C. §1923.04 notices.

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RECOMMENDATION

CASE SHOULD BE DISMISSED WITHOUT PREJUDICE AT PLAINTIFF'S COSTS.

Magistrate

A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).

COPIES TO ATTORNEY MICHAEL G. POLITO
DEFENDANT