

IN THE LICKING COUNTY MUNICIPAL COURT

Oakwood Management Company
dba Millstream Village

Plaintiff,

vs.

Kimberly Bryant

Defendant.

104 FEB 12 PM 5 04

NO. TO
LAF. OWN

Case No. 04CVG00057

Judge W. David Branstool

JUDGMENT ENTRY

Plaintiff Oakwood Management Company filed an eviction action against Defendant Kimberly Bryant which came before the Court on February 6, 2003. The issue before the Court is whether plaintiff complied with R.C. 1923.04(A) by leaving a notice to vacate premises wedged in the door of defendant's apartment. For the reasons that follow, the Court concludes that plaintiff's service of the notice was not adequate and the case is dismissed for lack of jurisdiction.

I. Facts

On January 11, 2004, Amy KcKee, an agent for Plaintiff Oakwood Management Company left a notice to leave premises at the defendant's apartment. Ms. McKee testified that she left the notice at the defendant's residence by wedging it in the crack of the defendant's door. She explained that there was no mail slot in the defendant's door and she was unable to slide the notice under the door due to weather stripping. The defendant testified that she never received the notice Ms. McKee claimed to have left at her residence and that she did not see the notice until she was served with a copy of the complaint.

Judge
Michael F. Higgins

Judge
W. David Branstool

40 W. Main St.,
Newark, O. 43055

740-349-6640
740-349-6652

II. Analysis

A. Procedural Due Process

Revised Code 1923.04 requires a landlord to give a tenant a three (3) day notice to leave the premises. After the expiration of the three (3) day period, the landlord may then commence an action on forcible entry and detainer. Revised Code 1923.04(A) specifies the contents and method of service of the three (3) day notice. The statute states as follows:

(A) Except as provided in division (B) of this section, a party desiring to commence an action under this chapter shall notify the adverse party to leave the premises, for the possession of which the action is about to be brought, three (3) or more days before beginning the action, by certified mail, return receipt requested, or by handing a written copy of the notice to defendant in person, or by leaving at his usual place of abode, or at the premises from which the defendant is sought to be evicted.

In order for a court to have jurisdiction over an action in forcible entry and detainer, the landlord must establish the proper service of a notice to vacate, as required by R.C. 1923.04(A). When a landlord fails to perfect service in a forcible entry and detainer action under this section, the trial court has no jurisdiction to consider the case, and the case must be dismissed. Associated Estates Corp. v. Bartell (1985), 24 Ohio App.3d 6.

In this case, the defendant argues that the plaintiff failed to adequately serve the notice to vacate the premises because wedging the notice between the door and the door jamb does not qualify as valid service under R.C. 1923.04(A). She also argues that such service does not satisfy minimum standards of due process. She relies primarily on the recent decision of the First District Court of Appeals in Cincinnati Metropolitan Housing Authority v. Morgan (2003), 155 Ohio App.3d 189. In that case,

the Court of Appeals held that service of the three-day notice to vacate by placing it on the tenant's door was not sufficient service under R.C. 1923.04(A). In reaching this conclusion, the court based its decision on the due process analysis developed by the United States Supreme Court in Greene v. Lindsey (1982), 456 U.S. 444.

In Greene v. Lindsey, the Supreme Court considered the constitutionality of a Kentucky statute that permitted service of process in forcible entry and detainer actions to be made by posting a summons on the door of the tenants apartment. The tenants claimed to have never seen the summonses allegedly posted on their doors and that they did not learn of the eviction actions until they had been served with writs of possession. Thus, they had been denied any opportunity to appear in the action and defend against it prior to being evicted. Under these circumstances, the Supreme Court held that the tenants had been denied due process unless the landlord could valid service otherwise.

The Court finds the defendant's reliance on Greene v. Lindsey is misplaced. The issue in Greene was whether service of the summons by posting it gave the tenant meaningful notice and opportunity to be heard. Greene dealt with whether service of the summons by posting provided the tenant with procedural due process. That is not the issue here, In this case, service of the summons and complaint is not at issue. Rather it is service of the three-day notice to vacate established by R.C. 1923.04(A). Service of the notice to vacate is different than service of the summons and complaint and is controlled by a different statute. Under R.C. 1923.04(A), the tenant must be served with the notice to vacate at least three days before a forcible entry and detainer action may be filed. After the notice to vacate is properly served, the landlord is then free to file an eviction action but he is still required to serve the summons and complaint

in accordance with the Ohio Rules of Civil Procedure.

In fact, R.C. 1923.06 specifically provides, that the summons in an eviction action “shall be issued . . . and served and returned as in the Rules of Civil Procedure. Such service shall be at least five days before the day set for trial.” Thus, under R.C. 1923.06, the tenant is guaranteed notice of the eviction action and an opportunity to be heard before a court can proceed with trial. The facts here are distinguishable from the facts in Greene v. Lindsey because of the procedural safeguards found in R.C. 1923.06. By relying on the due process analysis of Greene v. Lindsey, the defendant fails to distinguish between service of the notice to vacate and service of the summons and complaint. Under Ohio law the procedural safeguards, found lacking in Greene, are present. Therefore, the Court declines to accept the defendants invitations to follow the holding in Cincinnati Metropolitan Housing Authority v. Morgan, supra or to hold that the due process clauses of the United States and Ohio Constitutions actual notice of the three day notice to vacate.

B. Service of Notice to Vacate

Even though the Court rejects the defendant’s due process argument, the Court finds that the notice to vacate was not properly served in this case under R.C. 1923.04(A). The plaintiff’s agent testified that she served the notice by leaving it in the crack of the door. She explained that she was unable to leave the notice in a mail slot because the door had no mail slot. Further, she was unable to slide the notice under the door because of weather stripping. Significantly, the plaintiff presented no evidence that the notice was secured to the tenant’s door by the use of a thumbtack, adhesive tape, glue or any other means to secure the notice to the tenant’s door or ensure that it would drop out of the crack or blow away.

Because the plaintiff was not able to establish proper service of the three day notice to vacate, this Court lacks subject matter jurisdiction over this matter. Therefore, plaintiffs complaint is dismissed at its costs.

IT IS SO ORDERED.



Judge W. David Branstool

cc: Plaintiff
Attorney for Plaintiff
 Defendant
 Defense Attorney