

IN THE GALLIPOLIS MUNICIPAL COURT
GALLIPOLIS, OHIO

FILED

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GALLIPOLIS
MUNICIPAL COURT

Lynn Angell Queen,

Plaintiff,

Case No. 07 CVG 00808

vs.

Sheila Blakeman,

Defendant.

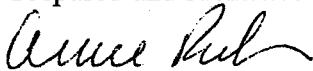
JUDGMENT/JOURNAL ENTRY

This matter came on for hearing on November 29, 2007 on the Plaintiff's Complaint and the Defendant's motion to dismiss. The Court finds that the required statutory language in the three day notice to vacate and in the summons is not conspicuous. The Court finds the Defendant's motion well taken and hereby grants the same. IT IS THEREFORE ORDERED that the Plaintiff's Complaint be, and hereby is, dismissed without prejudice.

Costs to be paid by Plaintiff.


Margaret Evans, JUDGE

Prepared and submitted by:



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**DEFENDANT'S MEMORANDUM IN SUPPORT
OF MOTION TO DISMISS**

The undersigned counsel entered an appearance on behalf of the Defendant on November 27, 2007 and orally moved the Court to dismiss the Plaintiff's Complaint pursuant to Ohio Civil Rule 12 (B)(1), (4), and (6) for lack of subject matter jurisdiction, insufficiency of process, and failure to state a claim upon which relief can be granted. The Defendant's motions argue that the language required to be included in the Notice to Vacate and Summons in forcible entry and detainer are not set forth conspicuously in this case, as required by Ohio Rev. Code §1923.04 and §1923.06(B).

The Defendant provided the Plaintiff and the Court with the decision of the Montgomery County Court of Appeals in *Dayton Metropolitan Housing Authority v. Russell* (1980), Case No. CA6396, 1980 WL 352498. That case stands on all fours with the case *sub judice*. In *Russell*, the notice to vacate contained the statutory language required by Ohio Rev. Code §1923.04. However, that language was printed in exactly the same size type as the rest of the notice. The Court found this did not comply with Section 1923.04 and dismissed the Plaintiff's complaint since full compliance with Section 1923.04 is a condition precedent to bringing an action of forcible entry and detainer. The court noted that the Defendant has a statutory right to receive a proper notice before he is sued, and cannot be said to have waived that notice by what he did after he was sued. *Id.* at 2. Similarly, this case should be dismissed since the language in the

notice to vacate is not conspicuous as required by statute because it is in the same size print as the rest of the language of the notice.

Other Ohio courts have considered the issue and consistently hold that this statutory language is not conspicuous if it is in the same print as the rest of the language of the notice. In *Sahara Apartments v. Brown-Austin* (Stark Co. App. Ct. 1993), CA-9028, unreported, attached, the court found that the statutory language in the notice to vacate printed in all capital letters, with only the portions that the landlord typed in to fill in the blanks in upper and lower case letters, was not sufficiently conspicuous. (In contrast, the decision is instructive in that the court found that the notice required by federal regulation, which was in upper and lower case letters, and included the language required by Ohio Rev. Code §1923.04 in all capital letters, was sufficient to invoke the court's jurisdiction.) The Licking County Municipal Court dismissed a landlord's complaint in *Cherry Lee Apartments v. Walcott, et al.*, (4-25-2003), Case No. 03CVG00510, unreported, attached, when the notice to vacate was "in no way bold-faced or otherwise distinguishable from other verbage (sic) in the notice." *Id.* at p. 2. In comparison, in *Owner's Management Company v. Willis* (Wood Co. App. Ct. 1988), No. WD-87-59, unreported, attached, the court found sufficient a notice to vacate written in all upper case type in which the statutory language was set off above and below by a line of asterisks.

A notice entirely in capital letters, not just the statutorily required portions, was found not to be "conspicuous" in a commercial context in *Rufener v. Lunau* (Tuscarawas Co. App. Ct. 2004), 2004 - Ohio -1688, unreported, attached. The case is noteworthy for its description of various ways that terms may be conspicuous, such as if the language is larger, or of other contrasting type or color. *Id.* at p. 3. Other methods are also described in *Couris v. Graham* (Stark Co. App. Ct. 1983), No. CA-6226, unreported, attached. These include highlighting or underlining text, indenting text further from the margins, or separating text from other language by a wide margin entirely framed in a black line.

The fact that, in this case, some part of the required statutory language is in bold type does not satisfy the requirements of Ohio Rev. Code §1923.04. Ohio Rev. Code §1923.04 explicitly states:

Every notice given under this section by a landlord to recover residential premises shall contain the following language printed or written in a conspicuous manner : '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.'

The legislature framed the exact language to included in the notice and required that such language *in toto* be set forth conspicuously. The statute requires that all - not merely some - of the specified language be conspicuous. The Court's duty is to give effect to the words used in the statute, not to delete words used or insert words not used. *State ex rel. Moorehead v. Indus. Comm.* (2006), 112 Ohio St.3d 27. The Plaintiff's notice, by having some of the required language in bold, implies that the sentence that is not in bold type is somehow less important. That was not the intent of the state legislature, as expressed in the words they chose. *State v. Cravens* (Hamilton Co. 1988), 42 Ohio App.3d 69.

The same considerations apply to the Defendant's motion to dismiss the Plaintiff's complaint for insufficiency of summons. The language required by Ohio Rev. Code §1923.06(B) is not conspicuously displayed on the summons that was issued to this Defendant. The text is in the same font, distinguishable only by being much smaller, not larger, than the other text on the summons. The text is not underlined, framed, or otherwise highlighted. For the same reasons discussed above pertinent to the notice to vacate, the summons should be quashed and the Complaint dismissed pursuant to Ohio Civil Rule 12(B)(4).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum was served on Plaintiff, pro se, by fax to 740-446-2046 and by mailing a copy via regular U.S. Mail to 736 Second Ave., Gallipolis, OH 45631 this _____ day of November, 2007.

Anne S. Rubin (0018364)
Attorney for Defendant