

[Cite as *Sharrock v. Bond*, 2004-Ohio-4857.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DAVID SHARROCK

Plaintiff-Appellee

-vs-

CALVIN BOND

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. John W. Wise, J.

Hon. Julie A. Edwards, J.

Case No. 2003CA0102

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Mansfield Municipal Court,
Case No. 2003CVG2860

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

September 9, 2004

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

JEFFREY N. KRAMER
24 West Third Street
Mansfield, Ohio 44900

IVAN L. REDINGER, JR.
116 Cleveland Avenue Nw
Canton, Ohio 44702

Hoffman, P.J.

{¶1} Defendant-appellant Calvin Bond appeals the March 9, 2004 Judgment Entry of the Mansfield Municipal Court, which denied his objections to a magistrate’s proposed decision filed August 29, 2003, and adopted and incorporated the proposed decision as its order. The March 9, 2004 Judgment Entry reaffirmed the trial court’s grant of a Writ of Restitution to plaintiff-appellee David Sharrock.

{¶2} Appellant assigns as error:

{¶3} “I. THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION AND THEREFORE ERRED IN GRANTING APPELLEE’S REQUEST FOR A WRIT OF RESTITUTION.”

{¶4} This case comes to us on the accelerated calendar. App. R. 11.1, which governs accelerated calendar cases, provides, in pertinent part:

{¶5} “(E) Determination and judgment on appeal.

{¶6} “The appeal will be determined as provided by App. R. 11.1. It shall be sufficient compliance with App. R. 12(A) for the statement of the reason for the court’s decision as to each error to be in brief and conclusionary form.

{¶7} “The decision may be by judgment entry in which case it will not be published in any form.”

{¶8} This appeal shall be considered in accordance with the aforementioned rule.

I

{¶9} Appellant contends if a landlord fails to serve a notice to vacate, or serves a notice to vacate, but its content or the service fails to comply with R.C. 1923.04, the

trial court lacks subject matter jurisdiction over the eviction action. Appellant cites to this Court's decision in *Godbelt v. McClain* (Nov. 20, 1995), Licking App. No. 94-CA-0066, unreported, as authority.

{¶10} We find *Godbelt* to have been wrongly decided. It is clear the municipal court has original subject matter jurisdiction over forcible entry and detainer actions. We conclude the notice required by R.C. 1923.04(A) is one of the necessary elements to be proved by the landlord at trial in order to succeed on a complaint for a writ of restitution. While an essential element of the landlord's claim, its absence does not divest the municipal court of subject matter jurisdiction to determine the landlord's complaint.

{¶11} Appellant's assignment of error is overruled.

{¶12} The judgment of the Mansfield Municipal Court is affirmed.

By: Hoffman, P.J.

Edwards, J. concurs separately.

Wise, J. dissents.

JUDGES

Wise, J. Dissenting

{¶13} I respectfully dissent from the majority opinion.

{¶14} Following the precedent set by this court in *Godbelt v. McClain* (Nov. 5, 1995), Licking App.No. 94-CA-0066, I find the three-day-notice requirement is a jurisdictional requirement. Other appellate districts have reached the same conclusion. See *Cincinnati Metro. Hous. Auth. v. Morgan*, 155 Ohio App.3d 189, 193, 2003-Ohio-5671; *Velanosky v. White* (Jan. 26, 1995), Cuyahoga App. No. 67479, at 2; *Knoll Grp. Mgmt. Co. v. Wolfe* (June 28, 1994), Adams App No. 93 CA 553, 93 CA 554, at 4; *Crigger v. Shaw* (Feb. 25, 1994), Erie App. No. E-93-62, at 2; *Chillicothe Metro. Hous. Auth. v. Anderson* (June 28, 1988), Ross App. No. 1406, at 5; *Smith v. Lydia* (Nov. 19, 1987), Cuyahoga App. No. 52982, at 1; *Gibbes v. Freeman* (Sept. 3, 1987), Cuyahoga App. No. 52745, at 2; *Label & Co. v. Hyde* (Aug. 20, 1986), Columbiana App. No. 85-C-63, at 2; and *FMJ Properties v. Hinton* (Apr. 10, 1986), Cuyahoga App. No. 50314, at 2.

JUDGE JOHN W. WISE

EDWARDS, J., CONCURRING OPINION

{¶15} I concur in the disposition of this case by Judge Hoffman, but differ in my analysis.

{¶16} I find that the appellant lost his ability to challenge the sufficiency of the notice to vacate under R.C. 1923.04. The Magistrate, in his August 29, 2003, proposed decision, found that the “Defendant has been duly served with the required notice to leave pursuant to O.R.C. 1923.04.” The trial court, in its March 9, 2004, Judgment Entry, stated: “The Court notes that the Objections filed by the parties were not filed with a supporting transcript of specific evidence submitted to the Magistrate relevant to the Objection. Therefore, the Court adopts the findings by the Magistrate as the complete finding of fact in this matter.”

{¶17} Civil Rule 53(E)(3)(c) sets forth that “[a]ny objection to a finding of fact shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that fact or an affidavit of that evidence if a transcript is unavailable.” The appellant, who fails to provide a transcript of the original hearing before the magistrate for the trial court’s review, cannot attack on appeal findings made by the magistrate and adopted by the trial court. See *Channell v. Matyaszek* (June 16, 2003) Stark App. No. 2002CA00440, 2003 WL 21398875 (Ohio App. 5 Dist.).

