

ORIGINAL

IN THE SUPREME COURT OF OHIO

Clinton D. Dudley, Sr.,

Petitioner

vs.

Toledo Municipal Court, et al.,

Respondents.

* Case No.: 09-1465

* DISTINCTIVE HOMES OF
* NORTHWEST OHIO, INC.'S
* MOTION TO DISMISS

* **WAGONER & STEINBERG, LTD**

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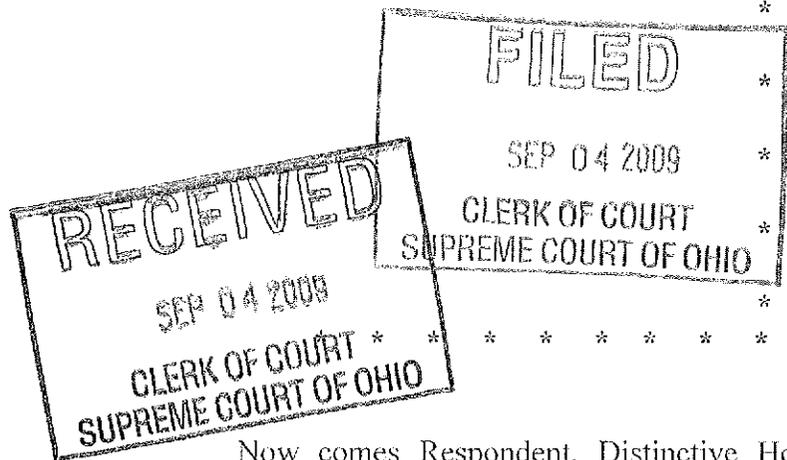
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Homes of Northwest Ohio, Inc.



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Now comes Respondent, Distinctive Homes of Northwest Ohio, Inc. ("Distinctive Homes"), by and through counsel, and moves to dismiss the Petition for its failure to state a claim upon which relief can be granted.

Civ.R. 12(B)(6) allows a complaint or petition be dismissed for failure to state a claim upon which relief can be granted.

A motion to dismiss under Civ. R. 12(B)(6) can be granted only where the party opposing the motion is unable to prove any set of facts which would entitle him to the relief requested. When reviewing a complaint under this standard, the factual allegations contained in the complaint are taken as true. The complaint's material allegations and any reasonable inferences

drawn therefrom must be construed in the nonmoving party's favor. *Kenty v. Transamerica Premium Ins. Co.* (1995), 72 Ohio St. 3d 415, 418.

In order to obtain a writ of prohibition, a petitioner must establish that (1) the respondent is about to exercise jurisdiction or quasi-judicial power, (2) the exercise of such power is unauthorized by law, and (3) the refusal of the writ would result injury for which there exists no adequate remedy in the ordinary course of law. *State ex rel McKee v. Cooper* (1974), 40 Ohio St. 2d 65. Furthermore, unless a lower court unambiguously lacks jurisdiction to proceed, a court having general jurisdiction of the subject matter has the authority to determine its own jurisdiction and an adequate remedy at law via appeal exists to challenge any adverse action. *Goldstein v. Christiansen* (1994), 70 Ohio St. 3d 232.

Distinctive Homes filed the underling eviction action with the Housing Division of the Toledo Municipal Court pursuant to R.C. § 5313.08 and Chapter 1923 of the Revised Code (paragraph 12 of the Complaint attached to the Pctition). R.C. § 5313.08 allows the vendor on a land installment contract, such as Distinctive Homes, to bring an action for restitution of the property under Chapter 1923 of the Revised Code, when the land installment contract has been in effect for less than five years. In turn, the Housing Division of Toledo Municipal Court has exclusive jurisdiction over a Chapter 1923 forcible entry and detainer action under R.C. § 1901.181(A)(1). “[A] municipal court's housing division has exclusive jurisdiction over forcible entry and detainer actions, * * * and the housing division has full power to render a complete determination of the rights of the parties.” *State ex rel. Brady v. Pianka* (2005), 106 Ohio St. 3d 147, 149.

Clearly, Toledo Municipal Court has patent jurisdiction over Distinctive Homes' Complaint. The Petition must be denied for this reason alone.

Moreover, the scheduled August 12, 2009 hearing at the Toledo Municipal Court was for the first cause of action, i.e., possession only, and not a hearing for damages. Due to the summary and speedy nature of a forcible entry and detainer action under Chapter 1923, the hearing for possession can be scheduled by local rules so long as it is not less than seven days from the date of service. R.C. § 1923.06(G)(1).

In the Petition, the Petitioner admitted that his wife was served by the sheriff on July 31, 2009 at their residence (Petition, ¶ 2). Thus, residential service was perfected on July 31, 2009 and the trial court's scheduling of the possession hearing on August 12, 2009 was in full compliance with R.C. § 1923.06(G)(1).

Even if assuming that the Petitioner has a valid claim for lack of time to prepare for trial, he had an adequate remedy at law by first going to the Toledo Municipal Court to request a continuance or pursue the appeal through the court of appeals upon an adverse decision by the lower court. The presence of this adequate remedy at both the trial court and the court of appeals is an additional ground to dismiss the Petition.

Finally, Section 4(B) of S. Ct. Prac. R. X requires a prohibition complaint be supported by an affidavit. The purported "supportive affidavit" attached to the Petition is not a legal affidavit for the lack of being notarized. The Petition should be dismissed for the lack of compliance with the court rules.

Based upon all of the above reasons, Distinctive Homes respectfully requests that the Petition for Writ of Prohibition be dismissed.

Respectfully submitted,

WAGONER & STEINBERG, LTD.
Attorneys At Law



Fan Zhang, Attorney for Respondent
Distinctive Homes of Northwest Ohio, Inc.

Certificate of Service

This is to certify that a copy of the foregoing is sent via U.S. regular mail, postage prepaid, on this 3rd day of September, 2009, to: Clinton D. Dudley, Sr., 1980 Northtowne Drive, Toledo, Ohio 43611, and Merritt W. Green, III, Senior Attorney, City of Toledo Department of Law, One Government Center, Suite 1710, Toledo, Ohio 43601



Fan Zhang, Attorney for Respondent
Distinctive Homes of Northwest Ohio, Inc.