[Cite as *Carkhuff v. Corpening*, 2018-Ohio-3972.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

JAMES R. CARKHUFF, c/o DIANE CARKHUFF, AGENT,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2017-A-0090**
- vs -	:	
TANISHA CORPENING,	:	
Defendant-Appellant.	:	

Civil Appeal from the Ashtabula Municipal Court, Case No. 2017 CVG 00830.

Judgment: Affirmed.

Gary L. Pasqualone, Curry and Pasqualone, 302 South Broadway, Geneva, OH 44041 (For Plaintiff-Appellee).

David G. Phillips, 4403 St. Clair Avenue, Cleveland, OH 44103 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Tanisha Corpening, appeals the Judgment of the Ashtabula Municipal Court, overruling her Motion to Dismiss and Objection and ordering the restitution of the premises to plaintiff-appellee, James R. Carkhuff. The issues before this court are whether an action of forcible entry and detainer is properly commenced without a thirty-day notice of termination of rental agreement where the complaint alleges a violation of Revised Code Chapter 2925 [Drug Offenses]; whether a

complaint for restitution of premises as of September 14 properly invoked the jurisdiction of the court where the notice to leave ordered that the premises be vacated by September 15; whether a landlord's knowledge of the tenant's purported drug activity may be challenged on appeal in the absence of a proper objection or transcript of proceedings before the magistrate; and whether a party is deprived of due process where she fails to appear at a hearing but claims to have been present and not called into court. For the following reasons, we affirm the decision of the court below.

{¶2} On September 20, 2017, James R. Carkhuff filed a forcible entry and detainer Complaint in Ashtabula Municipal Court. The Complaint alleged, in relevant part:

> 1. Defendant, Tanisha Corpening, on or about March 23, 2016 as tenant of the Plaintiff, James R. Carkhuff, under a written lease, * * * entered upon the following described premises * * * known as 1712 Norman Avenue, Ashtabula, Ohio 44004.
>
> 2. Defendant has violated the terms of such agreement as follows: Violation of ORC Chapter 2925.
>
> 3. On the 11th day of September 2017, Plaintiff duly served upon Defendant, in the form required by Ohio Revised Code Section 1923.04, a notice in writing to leave said premises * * *.
>
> 4. Defendant therefore has even [sic] since the 14th day of September 2017 and does still, unlawfully and forcibly detain from Plaintiff possession of said premises.

{¶3} Attached to the Complaint was a copy of the Notice served upon Corpening, which stated in relevant part:

> To Tanisha Corpening
>
> You will please notice that I want you, on or before September 15, 2017 to leave the premises you now occupy * * *. Grounds: Tenant has been engaged in a violation of ORC Chapter 2925, and a

> search warrant was issued, and tenant has been charged with violations of ORC 2925.

{¶4} The municipal court set the matter for hearing on October 11, 2017.

{¶5} On October 5, 2017, Corpening filed a Motion to Dismiss the action "due to the fact the plaintiff is filing this complaint in retaliation that the plaintiff was reported to the health department and the city housing department prior to filing the complaint." With respect to the purported reasons for seeking restitution, Corpening claimed: "The Plaintiff was aware of the tenant accusation of ORC chapter 2925 on August 17th[,] 2017 and did not bring to action promptly give notice by section C of ORC 5321.17 in which the plaintiff did not do so promptly." [Sic.]

{¶6} Corpening did not appear at the October 11, 2017 hearing before a magistrate of the Ashtabula Municipal Court. The magistrate rendered his Decision for the plaintiff on the same day.

{¶7} Thirty minutes after the Magistrate's Decision was time-stamped, Corpening filed the following Objection:

> The defendant Tanisha Corpening was checked in at the clerks desk and was not able to appear FOR THE Hearing was held Without Tanisha present in the court room and Tanisha was present in the court waiting area at 2:17 pm check in time, the hearing was scheduled for 2:15 and there was still people that was supposed to be seen at 2:00 pm that was not seen yet when Tanisha checked in. [Sic.]

{¶8} On October 12, 2017, Corpening filed a Motion to Amend or Correct Judgment, reasserting the claims raised in her Motion to Dismiss and Objection.

{¶9} On November 8, 2017, the municipal court held a hearing on Corpening's Motion to Dismiss and Objection. At the conclusion of the hearing, the court overruled

the Motion to Dismiss and the Objection and upheld the Magistrate's Decision granting restitution.

{¶10} On November 20, 2017, Corpening filed a Notice of Appeal. On appeal, she raises the following assignments of error:

{¶11} "[1.] The Trial Court erred in its adoption of the Magistrate's Decision in Appellee's Favor and/or in Denying Appellant's Motion to Dismiss because the Trial Court lacked jurisdiction to grant restitution due to insufficient notice to appellant to vacate the premises under R.C. 5321.11."

{¶12} "[2.] The Trial Court erred in its adoption of the Magistrate's Decision in Appellee's favor and/or in denying Appellant's Motion to Dismiss because the Trial Court lacked jurisdiction to grant restitution as a result of a defect in the Complaint that sought restitution."

{¶13} "[3.] The Trial Court Erred in its adoption of the Magistrate's Decision in appellee's favor because appellee failed to present evidence to meet the required burden for restitution under R.C. 1923.02(A)(6) and R.C. 5321.05(A)(9)."

{¶14} "[4.] The Trial Court's adoption of the Magistrate's Decision in Appellee's favor was in error because it violated appellant's right of due process to be present at the eviction hearing."

{¶15} In the first assignment of error, Corpening maintains that the municipal court lacked jurisdiction over Carkhuff's Complaint.

{¶16} Challenges to a lower court's subject-matter jurisdiction are reviewed de novo. *State ex rel. Ohio Civ. Serv. Emps. Assn. v. Ohio*, 146 Ohio St.3d 315, 2016-Ohio-478, 56 N.E.3d 913, ¶ 12. Our consideration of the issue, strictly speaking, is not

a review of the municipal court's decision inasmuch as the court's subject-matter jurisdiction was not challenged in the underlying proceeding. Be that as it may, "[b]ecause subject-matter jurisdiction goes to the power of the court to adjudicate the merits of a case, it can never be waived and may be challenged at any time." *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 11; *State v. Wogenstahl*, 150 Ohio St.3d 571, 2017-Ohio-6873, 84 N.E.3d 1008, ¶ 27.

{¶17} Typically, two notices are required to be given by the landlord to the tenant before an action in forcible entry and detainer may be initiated. *Voyager Village Ltd. v. Williams*, 3 Ohio App.3d 288, 291, 444 N.E.2d 1337 (2d Dist.1982); *Gibbes v. Freeman*, 8th Dist. Cuyahoga No. 52745, 1987 WL 16530, *2 (Sept. 3, 1987).

{¶18} The first is notice of termination of the rental agreement. "If the tenant fails to fulfill any obligation imposed upon him by section 5321.05 of the Revised Code that materially affects health and safety, other than the obligation described in division (A)(9) of that section ("[a] tenant * * * shall * * * [c]onduct himself * * * in connection with the premises so as not to violate the prohibitions contained in Chapter[] 2925. * * * of the Revised Code"), the landlord may deliver a written notice of this fact to the tenant specifying the act or omission that constitutes noncompliance with the pertinent obligations and specifying that the rental agreement will terminate upon a date specified in the notice, not less than thirty days after receipt of the notice." R.C. 5321.11.

{¶19} The second is notice to leave the premises. "[A] party desiring to commence an action [of forcible entry and detainer] under this chapter [1923] shall notify the adverse party to leave the premises, for the possession of which the action is

about to be brought, three or more days before beginning the action, by certified mail, return receipt requested * * *." R.C. 1923.04(A).

{¶20} According to Corpening, Carkhuff was required to deliver notice of termination of the rental agreement because his "Complaint asserts a violation or default of the lease," and, therefore, "a thirty-day notice, with a right to cure was required under R.C. 5321.11." Appellant's brief at 8. Corpening is mistaken.

{¶21} The thirty-day notice described in R.C. 5321.11 is only required "[i]f the tenant fails to fulfill any obligation imposed upon him by section 5321.05 of the Revised Code that materially affects health and safety." R.C. 5321.11. "Where the tenant breaches an obligation in the written lease, but does not violate R.C. 5321.05, the landlord need not give thirty days' notice to the tenant before commencing a forcible entry and detainer action." *Parker v. Fisher*, 17 Ohio App.3d 103, 477 N.E.2d 654 (9th Dist.1984), paragraph two of the syllabus; *Denney v. Carroll*, 3d Dist. Van Wert No. 15-14-10, 2015-Ohio-1693, ¶ 18.

{¶22} Moreover, R.C. 5321.11 expressly provides that the thirty-day notice is not required where the tenant has failed to fulfill the obligation not to violate prohibitions contained in Chapters 2925 [Drug Offenses]. *Lorain Metro. Housing Auth. v. Fonseca*, 110 Ohio App.3d 292, 294, 673 N.E.2d 1019 (9th Dist.1996) ("[w]here a tenant fails to fulfill any of the * * * obligations that materially affect health and safety, except that imposed by R.C. 5321.05(A)(9), the landlord must provide the tenant with written notice that the rental agreement will terminate upon a date not less than thirty days after receipt of the notice"); *compare Portage Metro. Housing Auth. v. Brown*, 66 Ohio App.3d 737, 742, 586 N.E.2d 168 (11th Dist.1990) (where the landlord alleged a violation of the

lease prohibiting illegal conduct, it "did not need to provide [the tenant] with thirty-day notice prior to commencing its eviction action").

{¶23} Carkhuff's Complaint and notice to leave both claim that Corpening violated Revised Code Chapter 2925. Accordingly, the thirty-day notice of termination of agreement described in R.C. 5321.11 was not a jurisdictional prerequisite to the initiation of the present forcible entry and detainer action.

{¶24} The first assignment of error is without merit.

{¶25} In the second assignment of error, Corpening challenges the municipal court's jurisdiction on the grounds that the Complaint was defective in that it sought restitution from Corpening for not leaving the premises by September 14, 2017, while "Carkhuff's Notice to Ms. Corpening did not ask her to leave the premises until September 15, 201[7]." Appellant's brief at 10.

{¶26} We find no error in the municipal court's exercise of jurisdiction. Carkhuff was required to notify Corpening "to leave the premises * * * three or more days before beginning the action." R.C. 1923.04(A). The notice to leave was dated September 11 and provided her four days to leave. The Complaint, filed nine days after notice was given, sought restitution for her unlawful detainer of the premises after three days. While inconsistent with one another, both the Complaint and the notice satisfied R.C. 1923.04(A) so as to confer jurisdiction upon the municipal court.

{¶27} The second assignment of error is without merit.

{¶28} In the third assignment of error, Corpening claims that Carkhuff failed to meet his evidentiary burden of demonstrating "actual knowledge of or * * * reasonable cause to believe that the tenant * * * previously has or presently is engaged in a

violation of Chapter 2925. * * * of the Revised Code." R.C. 1923.02(A)(6)(a)(i); 5321.05(C)(2).

{¶29} Unlike the arguments raised regarding the municipal court's subject matter jurisdiction, arguments regarding factual determinations are waived if not properly raised in the lower court.

{¶30} "An objection to a magistrate's decision shall be specific and state with particularity all grounds for objection." Civ.R. 53(D)(3)(b)(ii). "An objection to a factual finding * * * shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding * * *." Civ.R. 53(D)(3)(b)(iii). "Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, * * * unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b)(iv)."

{¶31} In the underlying proceedings, Corpening did not raise an objection (specific or otherwise) with regard to Carkhuff's knowledge of her purported violations of R.C. Chapter 2925. Nor did Corpening provide the municipal court a transcript of the evidentiary hearing before the magistrate in support of the objections she did raise (regarding retaliation and due process). Accordingly, we find no error in the court upholding the Magistrate's Decision to grant restitution of the premises.

{¶32} The third assignment of error is without merit.

{¶33} In the fourth assignment of error, Corpening contends that she "did not have an opportunity to defend her Constitutionally protected property [possessory] interest" in the premises. Appellant's brief at 16.

{¶34} At the hearing on objections, Corpening complained that she was not allowed to participate in the hearing before the magistrate although she was present for the hearing ("I was here and was not called into the courtroom"). Given the record before us, we find no error in the proceedings. It is certain that Corpening was aware of the scheduled hearing before the magistrate. What is not certain is how she was deprived of the right to be heard by not being called into the courtroom.

{¶35} The fourth assignment of error is without merit.

{¶36} For the foregoing reasons, the Judgment of the Ashtabula Municipal Court, overruling Corpening's Motion to Dismiss and Objection and ordering the restitution of the premises, is affirmed. Costs to be taxed against the appellant.

CYNTHIA WESTCOTT RICE, J.,

COLLEEN MARY O'TOOLE, J.,

concur.