IN THE CIRCUIT COURT OF COOK COUNTY ILLINOIS
MUNICIPAL DEPARTMENT FIRST DISTRICT

Mac Property Management, LLC, as Agent,	)	
Plaintiff,	)	
vs.	)	No. 10 M1 716001
Lynn Brewer and All Unknown Occupants,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Mac Property Management LLC ("Mac Property"), the plaintiff herein, initiated this action against Lynn Brewer ("Lynn") and All Unknown Occupants, seeking the entry of an order for possession and a judgment for unpaid rent. This cause comes on to be heard on Lynn's motion to dismiss pursuant to 735 ILCS 5/2-619.[1]

---

[1] § 735 ILCS 5/2-619. Involuntary dismissal based upon certain defects or defenses

Sec. 2-619. Involuntary dismissal based upon certain defects or defenses. (a) Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds. If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit:

(1) That the court does not have jurisdiction of the subject matter of the action, provided the defect cannot be removed by a transfer of the case to a court having jurisdiction.

(2) That the plaintiff does not have legal capacity to sue or that the defendant does not have legal capacity to be sued.

(3) That there is another action pending between the same parties for the same cause.

(4) That the cause of action is barred by a prior judgment.

(5) That the action was not commenced within the time limited by law.

(6) That the claim set forth in the plaintiff's pleading has been released, satisfied of record, or discharged in bankruptcy.

(7) That the claim asserted is unenforceable under the provisions of the Statute of Frauds.

(8) That the claim asserted against defendant is unenforceable because of his or her minority or other disability.

(9) That the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim.

In her motion, Lynn claims that Mac Property failed to serve a statutory demand consistent with the applicable provisions of the Forcible Entry and Detainer Act ("FED")[2] and as a result this court lacks subject matter jurisdiction and this case, which seeks possession of a dwelling unit, of which she is in possession, and money damages for unpaid rent, should be dismissed.[3] Lynn makes this assertion because she claims that Mac Property caused a *Landlord's Five Day Notice* to be left under the door of her apartment. She believes that this method of service is defective and a violation of 735 ILCS 5/9-211 (West 2008) ("§ 9-211"). Lynn cites *Figueroa v. Deacon, et al.*, No. 1-09-1844 (1st Dist. 2010) as controlling and in support of her proposition.

735 ILCS 5/9-211 (West 2008) provides as follows:

> Service of demand or notice.
> Sec. 9-211. Service of demand or notice. Any demand may be made or notice served by delivering a written or printed, or partly written and printed, copy thereof to the tenant, or by leaving the same with some person of the age of 13 years or upwards, residing on or in possession of the premises; or by sending a copy of the notice to the tenant by certified or registered mail, with a returned receipt from the addressee; and in case no one is in the actual possession of the premises, then by posting the same on the premises.

In her motion Lynn does not refer to a specific paragraph of the cited section. The content of the motion would appear to suggest that it is based on paragraph (1).

[2] 735 ILCS 5/9-101, *et seq.* (West 2008).

[3] Even if Lynn's motion was granted on the claim for possession the joined claim for unpaid rent could go forward. See *Graue Mill Country Condominium Association No. 1 v. Gary-Wheaton Bank*, 213 Ill.App.3d 698, 699 (2nd Dist. 1991).

In *Figueroa v. Deacon*, No. 1-09-1844 (1st Dist. 2010), the plaintiff testified that the statutory notice was *served* by putting a copy in the door and another under the door. The appellate court reversed the trial court order which granted possession to the plaintiff. The only reading that this court can place on the *Figueroa* decision is that that court concluded that § 9-211 is *exhaustive* of the methods by which service of a statutory notice maybe accomplished and only permits service of a notice by one of the methods set forth therein and, Figueroa, by his own admission, did not do so. Though it would have been interesting to know whether or not the defendant in *Figueroa* acknowledged receipt of the statutory notice, it would appear not to have mattered to that court, whether or not receipt was acknowledged.

Lynn also cites *American Management Consultant, LLC v. Carter*, 392 Ill.App.3d 39 (3rd Dist. 2009) in support of her proposition. Similarly in *Figueroa*, the notice, was posted on the door even though the defendant remained in possession, and therefore, not served consistent with the methods mentioned in § 9-211 and the court so concluded.[4]

[4] It appears that the affidavit supporting proof of service of the statutory notice in the *American Management* case may have included a false statement in that it indicated that ... "[N]o one was in actual possession" as it was undisputed that the tenant there, Geaniece D. Carter, remained in possession at the time the notice was served.

The *American Management* court acknowledges that its result is at odds with the conclusion reached by the court in the *Prairie Management v. Bell*[5] decision and attempts to reconcile this conflict by suggesting that it was considering a different provision of the statute than that considered by the *Prairie Management* court and for that reason it was distinguishable.[6] The *American Management* court also seems to conclude that service of a statutory notice is jurisdictional a position also adopted by the *Figueroa court*. *American Management* 392 Ill.App.3d at 41.

Lastly, the *American Management* court suggested that the defendant, Geaniece D. Carter, was denied *due process* by virtue of the fact that the statutory demand was not served consistent with the statute. 735 ILCS 5/9-211 (West 2006). *American Management v. Carter,* 392 Ill.App.3d at 57. However, no authority was provided in support of this premise.[7] Likewise, the *Figueroa* court relying on the

---

[5] 289 Il.App.3d 746 (1st Dist. 1997)

[6] The provision of the FED considered by the *Prairie Management* court is 735 ILCS 5/9-211 (West 1994). And, while the *American Management* court cites this as one of its basis for concluding differently, it considered the same statutory provision as the *Prairie Management* court. See *Prairie Management* at 289 Ill.App.3d at 752 and *American Management* at 392 Ill.App.3d at 56-57.

[7] Due process is afforded when notice of the proceedings is provided consistent with the applicable rules and the parties are granted an opportunity to participate and be heard. *Mullane v. Central Hanover Trust Company*, 339 U.S. 306 (1950) and *Grannis v. Ordean*, 234 U.S. 385 (1914). Clearly, Ms. Carter was provided such an opportunity and she availed herself of this chance in the action brought against her by American Management. So, it is difficult to conclude that this portion of the *American Management* decision can be cited as authority for the suggested proposition.

American Management decision reaches the same conclusion on this issue.

Thirteen years earlier, and from the same appellate court that gave us the *Figueroa* decision, we have the ruling in *Prairie Management Corporation vs. Bell*, 289 Il.App.3d 746 (1st Dist. 1997). The *Prairie Management* court was faced with facts similar to the *Figueroa* court and the *American Management* court regarding the method by which the statutory notice was served but it reached a different result.

In *Prairie Management* the plaintiff served the statutory notice by placing it under the door to the unit and also by first-class mail. *Prairie Management* 289 Ill.App.3d at 752. At trial, the defendant acknowledged receipt of the notice. On appeal the defendant raised five issues, two of which are relevant here. First, whether the plaintiff's failure to serve the statutory notice consistent with § 9-211 deprived the trial court of subject-matter jurisdiction. And, the second, whether the failure to serve the notice consistent with § 9-211 was a failure of an element of proof at trial.

Regarding the jurisdictional question the P*rairie Management* court concluded that how the statutory notice is served ..."[I]s not a jurisdictional issue." *Prairie Management*

289 Ill.App.3d at 752. The opinion goes on to state that how or whether a notice is served is an element of proof and may constitute a defense but it is not jurisdictional. See *Morris v. Martin-Trigona*, 89 Ill.App.3d 85 (4th Dist. 1980) and *Burnham Management Company v. Davis*, 302 Ill.App.3d 263 (2nd Dist. 1998). Further, the method of service set forth in § 9-211 is suggestive of how a statutory notice may be served but does not constitute all the methods by which a party seeking an order for possession may employ. *Ziff v. Sandra Frocks, Inc.*, 331 Ill.App. 353 (1st Dist. 1947).[8] See also *Vole, Inc. v. Georgacoupoulos*, 181 Ill.App.3d 1012 (2nd Dist. 1989).[9]

Like the opinion in *Figueroa*, the *Prairie Management* court was a unanimous decision and, though two of its members have now since left the court, one remains.

There are two issues presented by the facts of the instant case and the apparent conflict between the *Figueroa /American Management* outcomes with that in Prairie Management. First, as suggested by the decisions in *Figueroa and American Management*, does the failure to serve a statutory notice consistent with one of the three (3) methods proscribed by

[8] In *Ziff v. Sandra Frocks, Inc.*, 331 Ill.App. 353 (1st Dist. 1947) the court concluded that the methods of service of the statutory notice under 211 are not exhaustive.

[9] The *Prairie Management* court seemed to suggest that the defendant waived any objection to the method of service issue since it was being raised for the first time on appeal. *Cochran, et al., v. George Sollitt Construction Company, et al.*, 358 Ill.App.3d 865, 872-73 (1st Dist. 2005) citing *Haudrich v. Howmedica, Inc., et al.*, 169 Ill.2d 525 (1996).

§ 9-211 deprive a court of subject matter jurisdiction. And, second, are the requirements of § 9-211 mandatory or permissive and directory.

ANALYSIS

A. Is Service of the Statutory Notice Jurisdictional?

The notion that the failure to serve a statutory notice deprives a court of subject matter jurisdiction is curious. Courts derive jurisdiction based on the fact of their authority and the ability to issue a valid order. Jurisdiction is typically spoken of in terms of personal and/or subject matter (*in personam* or *in rem*). Ignoring for purposes of this discussion the problems associated with actions based on the so called long arm principles or transactions within our state sufficient to invoke the rules of *International Shoe Company v. State of Washington, et al.*, 326 U.S. 310 (1945), jurisdiction flows from the authority of a court to issue an order which a party must obey or which affects their rights or property.

Since the 1970 Illinois Constitutional Convention, Illinois courts have become courts of general jurisdiction. Meaning, that they possess the ability to adjudicate all judiciable matters.[10] As mentioned, the notion that the lack of a statutory notice is jurisdictional would appear

[10] Illinois Constitution, Article VI, § 9 (2010).

to contravene the Illinois constitution and, further, no such limitations appear in the FED.[11] It is a given that a forcible action is in derogation of common law and therefore strict compliance is required. *Yale Tavern, Inc., v. Cosmopolitan Bank, et al.*, 259 Ill.App.3d 965, 971 (1st Dist. 1994). But, not this requirement to invoke subject matter jurisdiction.

It appears that the first case to suggest that the failure to serve a statutory notice deprives a court of jurisdiction is *Eddy v. Kerr*, 96 Ill.App.3d 680 (2nd Dist. 1981). Both *Figueroa* and *American Management* cite *Nance v. Bell*, 210 Ill.App.3d 97 (2nd Dis. 1991) in support of this proposition. The cases that the *Nance* court relied on to support this premise are *Vogel v. Dawdy*, 123 Ill.App.3d 356 (4th Dist. 1984) and *Eddy v. Kerr*, 96 Ill.App.3d 680 (2nd Dist. 1981). But what do *Vogel* and *Dawdy* really say about this

[11] It is an oft cited proposition that where the statutory demand is defective then the court lacks jurisdiction. Even the court in *Figueroa v. James* suggested that this was a valid premise and cited *Nance v. Bell*, 210 Ill.App.3d 97 (2nd Dist. 1999) in support. However, the *Nance* decision uses the decision in Avdich v. Kleinert to support to this jurisdictional premise and it does not so hold. See *Nance, 210 Ill.App.3d at* 99. In *Avdich v. Kleinert*, 69 Ill.2d 1 (1977), a decision from our supreme court that turned on the fact that the action was filed prematurely; there is no suggestion that because of this fact, the court lacked jurisdiction. But the notion of jurisdiction expressed in these decisions and others that these cases cite relates to whether or not the proceedings fit within the limited scope of the FED - that being whether the question to be determined is *Who is entitled to possession*? In an attempt to discover the *root* case where the concept that a statutory notice is jurisdictional the court discovered *Burns v. Nash*, 23 Ill.App. 552 (1st Dist. 1887). Again, however, a careful reading of the *Burns* case reveals that the issue was whether the dispute concerned a question of possession. Likewise, *French v. Willer*, 126 Ill. 611 (1888). The *French* case involved a confession of judgment in a forcible action. The court determined that it was unauthorized to grant such relief and, as a result, the court lacked subject matter jurisdiction. So, it would appear that the evolution of the notion that the issue of how a notice is served, or even whether the notice is legally defective, is *jurisdictional* is not well founded.

question and since a forcible action is statutorily based – what, if any, language in the statute supports this conclusion.

Clearly, the *Eddy* decision can be cited for the stated proposition - that the method by which a statutory notice is served is jurisdictional. But, respectfully, the *Eddy* decision may be flawed, as it suggest that the statutory notice must be served rather than the words that appear in the statute may be served, which arguably renders the language directory or permissive rather than mandatory, a discussion that the court will take up *infra*. See *Eddy*, 96 Ill.App.3d at 683. And, while *Nance* also cites *Vogel*, that decision cannot be fairly read to support the jurisdictional proposition, suggested in *Nance* and reached in *Eddy*. *Vogel* speaks in terms of a statutory notice being a *condition precedent* (which this court would construe as an element of proof) but does not hold that the method of service is jurisdictional. See *Vogel*, 123 Ill.App.3d at 361. So, it renders the reliance placed by both the *Figueroa* and *American Management* courts misplaced trust.

Finally, there is no language in the FED to support the proposition that a statutory notice is jurisdictional.

B. Is the language of § 9-211 Mandatory or Directory

Also, importantly, the language of § 9-211 cannot fairly be read as being mandatory, but, rather permissive or directory, as since the statutory scheme uses the word *may* rather than *must* or a phrase such as *may only be* - that provision can only be construed as *permissive* and *non-exclusive* as so found by the court in *Ziff*.[12]

Obviously any party seeking an order for possession must satisfy the elements of proof in order to be granted

---

[12] We know from case law in the election law arena that when determining whether a statutory requirement is permissive or mandatory, courts have construed the mandatory requirements as those that would render a candidates nominating petition papers invalid if not satisfied and, but if not mandatory, then no sanction would result. *Ballentine v. Bardwell*, 132 Ill.App.3d 1033 (1st Dist. 1985). Also, our supreme court has considered the question of mandatory versus permissible in the context of its rules in the criminal procedure arena. See *People v. Delvillar*, 235 Ill.2d 507 (2009) and *People v. Thompson*, Docket No. 109853 (2010). As stated by Justice Freeman in his concurrence in Delvillar at 525-26, "The question of whether a statutory provision has a mandatory or directory character is one of statutory construction. *Pullen v. Mulligan*, 138 Ill.2d 21, 46 (1990). The ordinary meaning of the language should always be favored, and the form of the verb used in a statute, such as "shall" or "may," is "the single most important textual consideration determining whether a statute is mandatory or directory." 3 N. Singer § 57:3, at 13-14. However, even that is "still not the sole determinant, and what it naturally connotes can be overcome by other considerations." 3 N. Singer 57:3, at 14. In this way, "[a]ll pertinent intrinsic and extrinsic aids to construction are applicable when determining whether statutory provisions are mandatory or directory." 3 N. Singer § 57:3, at 11. For this reason, "shall" can be construed as directory (see, *e.g.*, United Illuminating Co. v. City of New Haven, 240 Conn. 422, 692 A.2d 742 (1997)), while "may" can be construed as mandatory (see, *e.g.*, T.W. Morton Builders, Inc. v. von Buedingen, 316 S.C. 388, 450 S.E.2d 87 (1994)). Whether language in a statute is mandatory or directory must be determined "on a case by case basis" with "the criterion whether such requirement is mandatory or directory is whether such requirement is essential to preserve the rights of the parties." 3 N. Singer § 57:3, at 21-22.
Here, although the General Assembly used "shall" in section 113-8, it did not set forth any specific consequences for the failure to follow the directive. Generally, "[w]hen a statute specifies what result will ensue if its terms are not complied with, the statute is deemed mandatory ***; [h]owever, if it merely requires certain things to be done and nowhere prescribes results that follow, such a statute is merely directory." 3 N. Singer § 57:3, at 23-24. This same rule finds support in our case law:
"The general rule in determining whether a statute is mandatory or advisory is as follows: 'Where the terms of a statute are preemptory and exclusive, where no discretion is reposed or where penalties are provided for its violation, the provisions of the act must be regarded as mandatory.' " Tuthill v. Rendelman, 387 Ill. 321, 350, 56 N.E.2d 375 (1944), quoting Clark v. Quick, 377 Ill. 424, 430, 36 N.E.2d 563 (1941).
A corollary of this rule is that the lack of consequences for noncompliance "leads to a directory construction." 3 N. Singer § 57:8, at 35. Indeed, this court has held that the lack of specific consequences for noncompliance following a statutory command results in a directory construction. See Carrigan v. Illinois Liquor Control Comm'n, 19 Ill. 2d 230, 233-34, 166 N.E.2d 574 (1960).

the relief sought (service of a legally sufficient notice, the fact of a lease violation, and; the lack of or an inability to cure). Since that burden is on the plaintiff it is a risky proposition to resort to posting a notice on a door or shoving it under a door as, without an acknowledgement of receipt by the target of the notice, it may be impossible to sustain the burden of proof on this issue. Surprisingly, though, it is this court's experience that most tenants will acknowledge receipt of a notice by any method, apparently so even in the case of Lynn Brewer. For the plaintiff who elects to pursue this approach, however, there is always the risk that the notice will removed from the door by the *mischievous* neighbor's kid down the hall, fall prey to the winds of the *Windy City* or find its under a rug or floor mat if it is placed under the door - only never to be received. In that instance the plaintiff cannot sustain its burden of proof of this issue and would not be entitled to the relief sought. This anecdotal evidence also would appear to belie the idea that a failure to serve the notice consistent with 9-211 would deny a tenant substantive due process.

Also, in the *Advich*[13] decision, support can be found for the suggestion that § 9-211 is not exclusive. While, ultimately, *Advich* turned on the question of a premature filing, the statutory notice there was served by certified mail but without a return receipt requested. Following *Figueroa* and *American Management*, this method would have been found to violate § 9-211 - an argument made by the defendant in *Advich*. Our supreme court rejected that notion since the defendant in *Advich* admitted receipt. See *Advich*, 69 Ill.2d at 6-7. Curiously, all of the cases following the *Advich* decision seem to ignore this reasoning. So, following *Advich*, this court concludes that the state of the law on the question would appear to be that § 9-211 is not exhaustive of the methods by which a statutory notice may be served - the issue is whether or not receipt of the notice is acknowledged and, if so, when was it received.

As a result, this court is inclined to follow *Prairie Management* rather than *Figueroa* or *American Management.*[14] To construe § 9-211 otherwise, under these facts, reduces the forcible entry and detainer statute to an overly technical

---

[13] 69 Ill.2d 1 (1977).

[14] A trial court is not obliged to follow the decision of an appellate court from another district where there is a contrary decision in its home district. Also, where there are conflicting decisions within an appellate district a trial court can follow any of the published decisions in its district. See *Aleckson v. Village of Round Lake Park*, 176 Ill.2d 82 (1997) and *O'Casek v. Children's Home and Aid Society of Illinois*, 229 Ill.2d 421 (2008).

scheme and would not be in keeping with the spirit of the act - that being to restore possession peacefully. 735 ILCS 5/9-101, *et seq.* (West 2008).

Receipt of the statutory notice gives the target of the notice the option to voluntarily comply with the demand made therein or to resist and have their rights adjudicated by a court - including the right to trial by jury where the premises are used as a residence.[15] As stated by the ***Prairie Management*** court the object of notice is notice whether it is obtained formally or informally. ***Prairie Management*** 289 Ill.App.3d at 752.

For the above reasons Lynn Brewer's *Motion to Dismiss* is denied.

Judge
Nunc Pro Tunc
November 17, 2010

[15] 735 ILCS 5/9-108 (West 2008).