

Rec'd 6/1/21

COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2021-SC-0153

40 ACRES AND THE MULE, LLC, et al.

PETITIONERS

v.

HONORABLE LINDSAY HUGHES THURSTON

RESPONDENT

and

BLANCO DELGADO, et al.

REAL PARTY IN INTEREST

* * * * *

**RESPONDENT'S MOTION TO DISMISS PETITION TO
EXERCISE ORIGINAL JURISDICTION UNDER KY. CONST. § 110(2)(a)**

Respondent, Lindsay Hughes Thurston, Fayette District Court Judge ("Judge Thurston"),¹ by counsel, submits this Motion to Dismiss the Petition for Writ of Prohibition and Other Relief Against Enforcement of Supreme Court Amended Order 2021-07 ("Petition") which seeks to invoke this Court's original jurisdiction to supervise the Court of Justice under KY. CONST. § 110(2)(a).

I. INTRODUCTION

The six Petitioners – 40 Acres and The Mule, LLC, Morton Properties, LLC, Briggs Properties, LLC, Lawrence W. Morton, H2 Construction, LLC and Lawrence M. and Hope T. Morton ("Petitioners") – are landlords in separate forcible detainer actions filed in Fayette District Court whose motions to be permitted to proceed with eviction actions against their tenants for failure to pay rent were denied by Judge Thurston based on Supreme Court Amended

¹ Although Judge Thurston is the only Respondent named in the Petition, Petitioners purport to seek relief against "all other District Court judges in the Commonwealth of Kentucky applying the Supreme Court Amended Order 2021-[]07." Petition, p. 2. As set forth more fully, *infra*, CR 76.36(1) mandates that a petition initiating an original proceeding in an appellate court "name each respondent against whom relief is sought." Petitioners' failure to do so here is fatal to their claim, requiring their Petition to be dismissed.

Order 2021-07 which requires residential evictions to comply with the CDC Halt Order's temporary prohibition of evictions based solely on nonpayment of rent for tenants meeting certain income and other qualifying criteria. (CDC No. 2021-02243, 86 FR 8020, Jan. 31, 2021). The Petition against Judge Thurston is procedurally improper and should be dismissed.

CR 76.36 requires that an original proceeding in an appellate court be initiated by a Petition naming "each respondent against whom relief is sought," and stating the "style and file number of the underlying action before the respondent(s)." CR 76.36(1)(a) and (b). Although Petitioners name Judge Thurston as the only Respondent and identify only the style and case numbers of the actions pending before her as the underlying actions, their Petition seeks relief, not just from Judge Thurston or arising out of the identified cases before her, but against "this Court" and "all other District Court judges in the Commonwealth applying the Supreme Court Amended Order 021-[]07." *Petition*, p. 2. In addition, their Petition states that the "relief sought is relief from Supreme Court Amended Order 2021-07, specifically including relief from the Disease Control and Prevention (CDC) order entitled, 'Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19 (CDC No. 2021-02243, 86 FR 8020 (Jan. 31, 2021))['],² and any subsequent CDC orders extending or modifying the temporary halt in residential evictions, all of which are incorporated into the Amended Order." *Id.* at 2-3, 7. Thus, the Petition seeks no specific relief directed to Judge Thurston and provides no legal basis for naming her as a party, much less as the only Respondent to this action.

Moreover, even if the Court were inclined to invoke its jurisdiction over this case, it lacks an adequate record upon which to make the adjudication requested. The Petition asserts that the CDC Halt Order is invalid, but presents the case without the complete lower court records to

² Hereafter, "CDC Halt Order."

support its legal challenge. Instead, the Petition merely alleges the general circumstances of the Petitioners' cases (*Petition*, pp. 5-6), but lacks a sufficient lower court factual record and argument necessary to conduct a proper legal analysis. For these reasons, this Court should dismiss the Petition and deny the relief requested.

II. ARGUMENT/MEMORANDUM OF AUTHORITIES

The Petition Should Be Dismissed As Procedurally Improper.

As the court recognized in *Lanham v. Lanham*, 336 S.W.3d 123, 126-127 (Ky. App. 2011), the procedure of naming the trial judge in writ practice arises by rule. *Citing*, CR 76.36(2); CR 76.36(8). CR 76.36(1) provides that “[o]riginal proceedings in an appellate court may be prosecuted only against a judge or agency whose decisions may be reviewed as a matter of right by that appellate court.”³ Moreover, CR 76.36(1)(e) and CR 76.36(2) require each respondent judge to be served with the petition and permits the respondent to file a response within 20 days. Similarly, CR 76.36(1)(e) requires that the real parties in interest, defined in CR 76.36(8) as “any party in the circuit court action from which the original action arises who may be adversely affected by the relief sought pursuant to the Rule,” also has the right to file responses to the petition.

As the *Lanham* Court discussed, the reason for requiring the judge to be named as a respondent in writ practice is because “the petitioner is asking the appellate court to require the trial court to do or refrain from doing something. Since the trial judge is the representative of the trial court, he or she is named a party to the action.” *Id.* However, in an original action seeking a writ of mandamus or prohibition:

³ Petitioners acknowledge that this Court is not the appellate court from which a district court’s decision may be appealed as a matter of right, but urge the Court to invoke jurisdiction under the broad powers vested under Section 110 of the Kentucky Constitution as the only means to effectively challenge the Court’s Amended Order 2021-07. *Petition*, p. 7.

The trial judge is a party in name only. He has no interest in the outcome of the litigation, and no connection to it other than the obligation to abide by the Court of Appeals' decision. Indeed, although the trial judge is the named party, the final order of the appellate court is binding on whoever holds the office of trial judge at the time of the decision.

Sweasy v. King's Daughters Mem'l Hosp., 771 S.W.2d 812, 817 (Ky. 1989). Accordingly, the trial judge is "merely a nominal party" to a writ proceeding whose presence is not required for the Court to grant complete relief. *Id.* See also, *Stallard v. McDonald*, 826 S.W.2d 840, 842 (Ky. App. 1992). In contrast, real parties in interest "are indispensable parties" to a writ petition and "failure to name an indispensable party is a fatal error requiring dismissal." *3M Co. v. Childers*, 2018 Ky. Unpub. LEXIS 1, *4 (Ky. Feb. 15, 2018), citing *Courier-Journal, Inc. v. Lawson*, 307 S.W.3d 617, 623 (Ky. 2010); see also CR 19.01 (a person is an indispensable party if "in his absence complete relief cannot be accorded among those already parties[]").

Here, although Petitioners name Judge Thurston as the sole Respondent to their Petition, they expressly state that the Respondents are "this Court" and "all other District Court judges in the Commonwealth applying the Supreme Court Amended Order 2021-[]07" and that the "relief sought is relief from Supreme Court Amended Order 2021-07," including the CDC Halt Order "and any subsequent CDC orders extending or modifying the temporary halt in residential evictions." *Id.* at 2-3, 7. Thus, what Petitioners seek is not an order requiring Judge Thurston to do or refrain from doing something in their cases before her, but an order invalidating Supreme Court Amended Order 2021-07, including the CDC Halt Order and, preemptively, any subsequent orders halting residential evictions for non-payment of rent in every forcible detainer action brought before any District Court judge in the Commonwealth.⁴

⁴ The CDC Halt Order underlying Amended Supreme Court Order 2021-07, as extended by the CDC on March 28, 2021, expires on June 30, 2021. Given the recently revised CDC guidance regarding social distancing and mask usage, it would be entirely speculative to conclude that the CDC eviction moratorium will be extended.

Yet, contrary to the requirements of CR 76.36, Petitioners failed to name any other district court judge in the Commonwealth as a Respondent to the action. In accordance with the Kentucky Constitution, district courts are “courts of limited jurisdiction and shall exercise original jurisdiction as may be provided by the General Assembly.” KY. CONST. § 113(6). Petitioners freely admit that all Judge Thurston did here was to follow this Court’s Amended Order 2021-07 (*Petition*, pp. 7-8), something she was duty bound to do as a District Court Judge. *See, e.g.*, SCR 1.040(5) (“On all questions of law the circuit and district courts are bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court and, when there are no such precedents, those established in the opinions of the Court of Appeals.”). *See also, Commonwealth v. Carman*, 455 S.W.3d 916 (Ky. 2015) (in the only instance in which this Court granted § 110 relief, it did so through a supervisory writ directed to all judges of the Court of Justice, rather than any individual judge). Thus, as a Fayette District Court Judge, Judge Thurston has no legal authority to grant Petitioners relief from Supreme Court Amended Order 2021-07, or any other order issued by this Court. As such, the Petition seeks no specific relief directed to Judge Thurston and provides no legal basis for naming her as a party, much less the only Respondent to this action.

In addition, the Petition failed to name any other residential landlords or tenants as real parties in interest who may be adversely affected by the relief they are seeking although the relief sought would impact an entire statewide class of landlords and tenants without taking into

This Motion to Dismiss is being filed on May 27, 2021, with any response due by June 7, 2021. CR 76.34(2). Thus, this Court will have only about three weeks to decide this matter before the Amended Supreme Court Order being challenged simply expires. As such, this matter will likely become moot prior to any decision from this Court, further counseling against the Court’s exercise of its completely discretionary §110 supervisory powers here. *See, e.g., Beshear v. Acree*, 615 S.W.3d 780, 824 (Ky. 2020) (succeeding public health orders, issued in light of rapidly changing knowledge concerning COVID-19, largely rendered order being challenged moot).

account the specifics of each case. That includes whether the numerous prerequisites for invoking eviction relief under the CDC order⁵ have been met in any particular instance. The record supplied with the Petition is wholly absent on this issue. Thus, the Petitioners themselves are merely representative parties. As the Petition fatally fails to name all indispensable parties, it is procedurally improper and must be dismissed. *3M Co.*, 2018 Ky. Unpub. LEXIS at *4; *Lawson*, 307 S.W.3d at 623; CR 19.01. Moreover, because neither the Respondent nor the Petitioners are named in anything more than a nominal or representative capacity, it would be improper to invoke the Court's § 110 authority to obtain what amounts to broad-based class relief without a more fully developed factual record. *See, e.g., Abernathy v. Nicholson*, 899 S.W.2d 85, 88-89 (Ky. 1995) (original jurisdiction under § 110(2)(a) should be invoked "only in well-defined or compelling circumstances").

III. CONCLUSION

For the foregoing reasons, the Petition should be dismissed as procedurally improper. The Petition improperly names Judge Thurston as the sole Respondent, when it does not seek a writ to command her to provide any sort of relief to the individual Petitioners. Moreover, the

⁵ To constitute a "covered person" entitled to protection under the CDC Halt Order, a tenant must provide their landlord "a declaration under penalty of perjury indicating that:

- (1) The individual has used best efforts to obtain all available government assistance for rent or housing;
- (2) The individual either (i) earned no more than \$99,000 (or (\$198,000 if filing jointly) in Calendar Year 2020, or expects to earn not more than (\$99,000 in annual income for Calendar Year 2021 (or no more than \$198,000 if filing a joint tax return), (ii) was not required to report any income in 2020 to the U.S. Internal Revenue Service, or (iii) received an Economic Impact Payment (stimulus check);
- (3) The individual is unable to pay the full rent or make a full housing payment due to substantial loss of household income, loss of compensable hours of work or wages, a lay-off, or extraordinary out-of-pocket medical expenses;
- (4) The individual is using best efforts to make timely partial payments that are as close to the full payment as the individuals' circumstances may permit, taking into account other nondiscretionary expenses; and
- (5) Eviction would likely render the individual homeless – or force the individual to move into and live into close quarters in a new congregate or shared living setting – because the individual has no other available housing options."

Petition purports to seek broad-based relief impacting a state-wide class of landlords and tenants without naming them as real parties in interest or providing a record taking into account the specific facts of their case, making it inappropriate to invoke the Court's § 110 authority to obtain relief.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Respondent's Motion to Dismiss Petition to Exercise Original Jurisdiction Under KY. CONST. § 110(2)(a)** was served via First Class U.S. Mail, postage prepaid, this 27th day of May, 2021, upon:

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