SUPREME COURT OF KENTUCKY

CASE No. 2021-SC-0153

ORIGINAL ACTION IN SUPREME COURT
ARISING FROM FAYETTE DISTRICT COURT
FORCIBLE DETAINER/EVICTIONS PROCEEDINGS
NOS. 21-C-1479, 21-C-1471, 21-C-1474, 21-C-1480, 21-C-1482, 21-C-1483, 21-C-1490

40 ACRES AND THE MULE, LLC, et al. PETITIONERS/LANDLORDS

v.

PETITIONER'S RESPONSE TO MOTION TO DISMISS

HONORABLE LINDSAY HUGHES THURSTON RESPONDENT

AND

BLANCO DELGADO, et al. REAL PARTY IN INTEREST/TENANTS

*** *** *** *** ***

Come the Petitioners, 40 Acres and the Mule, LLC, Morton Properties, LLC, Briggs Properties, LLC, Lawrence W. Morton, H2 Construction, LLC, Lawrence M. and Hope T. Morton (the landlords and collectively referred to as "the Petitioners"), by counsel, and for their Response and Objection to the only response received, the Motion to Dismiss[1] filed by Respondent Lindsay Hughes Thurston, Fayette District Court Judge ("Judge Thurston"), state as follows:

First, the Respondent's Motion to Dismiss appears to simultaneously contend that Judge Thurston is not properly named as a party to this action but also that every other District Court Judge sitting in Kentucky should have additionally been named. Those arguments are irreconcilable and incorrect. It is true that Judge Thurston is bound by Amended Order 2021-07,

[1] The response appears to be merely a time killer filing. Respondent argues the petition is "procedurally improper" but does not address the merits in any way.

which (as further explained below) is why the Landlords brought their Petition as an original action in this Court rather than in the Fayette Circuit Court. The Circuit Court, like the District Court, must adhere to the Amended Order. There is no means through which the Petitioners may challenge the Amended Order except through an original action in this Court. The Petitioners' request that the Amended Order be set aside on a statewide basis does not require each and every District Court Judge to be named as a Respondent any more than a challenge to the constitutionality of a statute (or an executive order) requires every single individual or entity conceivably affected by such a ruling to be named as a party. Obviously, this Court's orders and rules apply to the Court of Justice in its entirety; if Amended Order 2021-07 is set aside on the grounds set out in the Petition, then it may not be enforced by any District Court, regardless of whether individual Judges are named as Respondents. Indeed, the authority cited by the Respondent expressly holds that a trial judge who is named in a petition for a writ is "[m]erely a nominal party . . . whose presence is not required for the court to grant complete relief." (Motion, p. 4 (quoting *Sweasy v. King's Daughters Mem'l Hosp.*, 771 S.W.2d 812, 817 (Ky. 1989)). Even if other District Court Judges should have been named, then, their absence does not preclude the Court from addressing the Petition on the merits.[2]

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[2] The Respondent correctly notes the CDC's Halt Order, as extended by the CDC on March 28, 2021, states that it will expire on June 30, 2021, such that this matter may become moot before it is heard by the Court, and that it would be "entirely speculative" to conclude that the CDC's moratorium (now invalidated by numerous Courts) will be extended. (Motion, p. 4 at n. 4). It is equally speculative to conclude that it will not be extended. In any event, and recognizing the important issues presented by governmental responses to the COVID-19 pandemic, Courts throughout the country have wisely applied the "capable of repetition, yet evading review" exception to the mootness doctrine to similar challenges. See, e.g., *Roman Catholic Diocese v. Cuomo*, 592 U.S. --, 141 S.Ct. 63, 208 L.Ed.2d 206 (2020) (per curiam) (application to enjoin order restricting attendance at religious services not moot despite restrictions being lifted during pendency of action because restrictions could be reinstated as pandemic evolves); *Department of Fish and Game v. Federal Subsistence Board*, 501 F.Supp.3d 671 (D. Alaska 2020) (State's challenge to federal officials' delegation of authority to local land managers to open emergency

Second, the Respondent argues that this Court lacks an adequate record on which to adjudicate the Petition, and further suggests that all landlords and tenants in the Commonwealth should be made parties to this action so that the Court may take into account "the specifics of each case". (Motion, p. 5-6). Petitions for writs are necessarily resolved on a limited record. See, e.g., *Interactive Media Entertainment and Gaming Ass'n, Inc. v. Wingate*, 320 S.W.3d 692, 695 (Ky. 2010) (observing that writ decisions "necessitate[ ] an abbreviated record"). Should the Court desire a greater part of the record in the underlying actions than the Petition provided, then it may certainly enter an order to that effect and the record before this Court will be supplemented. The Respondent's argument, however, ultimately proves the Petitioners' point: because the CDC Halt Order, incorporated into Amended Order 2021-07, applies without regard to "the specifics of each case", it invades the province of the General Assembly to create, define, and regulate the rights of residential landlords and tenants. If a tenant qualifies as a "covered person," as defined in the Order, then the Order provides that a landlord "shall not evict" that person from any residential property for non-payment of rent. By incorporating the Halt Order into its Amended Order, this Court has promulgated a substantive law applicable to ***all*** Kentucky residential landlords that suspends the statutory right to a forcible detainer. This contravenes the Kentucky Constitution's principle of separation of powers, including Section 15, which provides that "[n]o power to suspend laws shall be exercised **unless by the General Assembly or its authority.**" Cf. *Beshear v. Acree*, 615 S.W.3d 780, 813 (Ky. 2020) (emphasis added) (to the

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hunts in response to COVID-19 pandemic-related food security concerns would be considered even after completion of the village's emergency hunt pursuant to the "capable of repetition, yet evading review" exception to the mootness doctrine); *County of Los Angeles Department of Public Health v. Superior Court of Los Angeles*, 275 Cal. Rptr.3d 752 (Cal. App. 2021) (challenge to County's prohibition on outdoor dining fell within "capable of repetition, yet evading review" exception to mootness doctrine after it was lifted based on data showing a decline in daily COVID case and hospitalization rates).

extent that Governor Beshear's emergency powers during the COVID-19 pandemic qualify as legislative, then KRS Chapter 39A delegated those powers to the executive branch "with safeguards and criteria sufficient to pass constitutional muster").

Third, and finally, the case on which the Respondent principally relies, *Abernathy v. Nicholason*, 899 S.W.2d 85 (Ky. 1995), supports rather than refutes the Court's jurisdiction over this matter. In *Abernathy*, the petitioner filed an original action in this Court for relief from an administrative order entered by a Jefferson District Court Judge that prohibited any person with an outstanding bench or arrest warrant from appearing before his traffic division until and unless all previously entered contempt fines had been paid or, if there were none, an "appearance bond" of $50 had been posted in each case. The Judge, named as the Respondent, argued that the Supreme Court lacked jurisdiction, and that the Petitioner's sole remedy was either to file an appeal or to seek a writ in the Jefferson Circuit Court. This Court rejected the argument that it had no power to decide the case:

> Initially, it should be conceded that this Court possesses the raw power to entertain any case which fits generally within the rubric of its constitutional grant of authority. As Section 110(2)(a) of the Constitution contains a provision which grants the Supreme Court supervisory control of the Court of Justice, virtually any matter within that context would be subject to its jurisdiction.

Id. at 88. The Court distinguished, however, the question of whether it *could* exercise its jurisdiction from the question of whether it *should* do so, finding Section 110(2)(a) to be of a "decidedly discretionary tone." In other words, Section 110 does not mandate that this Court exercise its jurisdiction, but permits it to do so within its discretion.

The *Abernathy* Court then reviewed those cases in which it had confirmed its exclusive jurisdiction to control the Court of Justice. See *Ex Parte Farley*, 570 S.W.2d 617, 622 (Ky. 1978) (except for the limited right of review in the United States Supreme Court, the Kentucky

Supreme Court alone has jurisdiction to hear and determine a case which seeks a judgment declaring what the Supreme Court should or should not do pursuant to Section 110); *Francis v. Taylor*, 593 S.W.2d 514, 515 (Ky. 1980) (in addition to its appellate jurisdiction and the power to issue all writs necessary in the aid of that the Kentucky Supreme Court has independent jurisdiction to exercise control over the Court of Justice); *Ex Parte Auditor of Public Accounts*, 609 S.W.2d 682, 683 (Ky. 1980) (because the Kentucky Bar Association is an arm of the Supreme Court, that Court is the only forum in which a controversy concerning it may be heard and officially resolved). This Court held that those cases confirm the principle that it "has a basis of original jurisdiction" pursuant to Section 110(2)(a), even though that jurisdiction is to be "sparingly exercised and generally **only in cases where no other court has power to proceed**." *Id.* at 88 (emphasis added). Because the *Abernathy* petitioner challenged a District Court order, he could and should have sought a writ from the Jefferson Circuit Court. In light of the availability of that remedy, this Court concluded that it would be "unwise and inappropriate" for it to reach the merits of the original action.

Here, however, the challenge is **not** to a District Court order but to **this Court's** Amended Order 2021-07. Because the District Court and Circuit Court are bound to comply with the Amended Order, this is the **only** forum in which the Order may be challenged. This Court's exercise of its original jurisdiction granted pursuant to Section 110 of the Kentucky Constitution is thus eminently appropriate and necessarily in this case. There are no other meaningful remedies available to the Petitioners.

For the reasons set forth above, the Petitioners respectfully request that the Motion to Dismiss be denied and that an order be entered granting the relief sought by the Petitioners, including that the Court dissolve, terminate, rescind or otherwise void all existing/active

Administrative Orders of the Court that call for or require the application of the Halt Order or other restrictions on evictions in Kentucky.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was served via Courtnet2 and/or email and/or by U. S. mail, postage prepaid, on June 3, 2021, upon:

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