UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE
Electronically filed

TONI FLOYD and CHERI NICHOLSON on behalf of themselves and all those similarly situated *Plaintiffs* v. ANNETTE KAREM,[1] in her official capacity as Chief Judge of the Jefferson County District Court *Defendant*	Civil Action No. 3:21-cv-00058-DJH

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

The Court should deny the Plaintiff's Motion for Preliminary Injunction.

BACKGROUND

In innumerable ways, the COVID-19 pandemic has altered the lives of many Kentuckians. Business as usual is on hold. Businesses have changed their operations to adapt to the current public health emergency and to protect the public. The Jefferson County District Court has too.

"In light of the declared federal and state emergencies," the Supreme Court of Kentucky has ordered sweeping changes to the operations of Kentucky's courts. *See*

[1] Judge Karem has succeeded Judge Haynie as the chief judge of the Jefferson District Court. As Judge Haynie's successor, Judge Karem is "automatically substituted as a party" under Federal Rule of Civil Procedure 25(d).

generally AO 2021-01 at 1; AO 2021-02 at 1.[2] The Court has ordered that Kentucky's courts must "hear civil and criminal matters using available telephonic and video technology to conduct all proceedings remotely." AO 2021-01 at 3 § B.1.[3] The Court also has instituted procedures to implement the requirements of the federal CARES Act as it relates to evictions. AO 2021-02 at 2-4 § B.1. For example, eviction cases must be held in abeyance for 14 days after the initial court appearance in eviction court to allow tenants an opportunity to access rental assistance from the Commonwealth's Healthy at Home Eviction Relief Fund. *Id.* § B.1.d. But this 14-day waiting period does not apply to cases in which the landlord dismisses the complaint, the parties reach an agreement to settle, or "a tenant who was properly served under KRS 383.210 or KRS 383.540 fails to appear" at the initial court appearance. *Id.* § B.1.d.ii.

In response to the Supreme Court's administrative orders, the Jefferson District Court has been conducting eviction proceedings since last summer by Zoom and telephone. Because the Court's initial Zoom account was not sufficient to keep up with the volume of the court's business, the Jefferson District Court upgraded its Zoom account. When it upgraded its account, the court was unable to retain the same

---

[2] Supreme Court Administrative Order (AO) 2021-01 (Ky. Jan. 6, 2021) is available at https://kycourts.gov/Courts/Supreme-Court/Supreme%20Court%20Orders/202101.pdf (last visited Feb. 2, 2021). Supreme Court Administrative Order (AO) 2021-02 (Ky. Jan. 6, 2021) is available at https://kycourts.gov/Courts/Supreme-Court/Supreme%20Court%20Orders/202102.pdf (last visited Feb. 2, 2021).

[3] Both of the judges of the Jefferson District Court who have presided over eviction proceedings since January 4, 2021, have permitted any party who wishes to attend an eviction proceeding in person to do so. The Jefferson District Court judges have done so under the Supreme Court's grant of authority to permit attorneys, parties, and witnesses to enter court facilities "to attend emergency, in-person hearings, as determined by the court." AO 2021-01 at 1 § A.1.a.

access codes and dial-in numbers. The Office of the Circuit Court Clerk has tried to notify parties to eviction actions of the change in access codes and dial-in numbers using the Jefferson District Court's website. DN 1 at 7 ¶ 33. In fact, the Jefferson District Court Clerk's Office has provided clear direction for defendants in eviction proceedings to consult the Court's website for information. *See* DN 1 at 7 ¶ 36; DN 1-8. The Court updated its website as the information on accessing hearings changed. *See* DN 1 at 7 ¶ 33; DN 1-7.

In addition, to address the potential confusion caused by the change in the court's Zoom information, the two judges presiding over the Jefferson District Court's eviction dockets established a new docket held weekly on Fridays at 11:00 a.m. A party who misses an eviction hearing can have his or her case re-docketed for the Friday eviction docket by contacting the Clerk's office or by having her attorney file a motion.

It is in this context that the Plaintiffs' cases were handled. The eviction case against Plaintiff Cheri Nicholson began in the Jefferson District Court on January 6, 2021. Ex. 1, p.008.[4] The Notice of Eviction Hearing (summons) issued by the court to Ms. Nicholson gave her notice of the initial court appearance on January 27, 2021. *Id*. With that notice, Ms. Nicholson also was served with information on participating in the hearing remotely by Zoom or telephone. DN 1-3.

[4] A complete copy of the Jefferson District Court's case file in *Crystal Prada v. Cheri Nicholson*, Case no. 21-C-00061, is attached as **Exhibit 1**.

Plaintiff Toni Floyd's eviction case began in the Jefferson District Court on January 8, 2021. Ex. 2, p.016[5]; DN 1 at 9 ¶ 43. The Notice of Eviction Hearing (summons) issued by the court to Ms. Floyd gave her notice of the initial court appearance on January 27, 2021. *Id*. With that notice, Ms. Floyd also was served with information on participating in the hearing remotely by Zoom or telephone. DN 1-2.

The information served on both Ms. Nicholson and Ms. Floyd at the commencement of their eviction cases informed them that, if they did not have a reliable phone or computer, "or ha[d] trouble," they could contact the Office of the Circuit Court Clerk by email or telephone for assistance. DN 1 at 5 ¶ 21.

At some point on January 27, but after her case had been heard by the court, Ms. Nicholson received actual notice from the Clerk's office of the correct means of attending via Zoom. DN 1 at 12 ¶ 69. Because Ms. Nicholson was not present when the court called her case, the court entered a Forcible Detainer Judgment. Ex. 1, p.007. By the time Ms. Nicholson appeared for her hearing, the judgment had already been entered. DN 1 at 12 ¶ 70. The court informed Ms. Nicholson that it had already entered judgment against her, but connected her with the Legal Aid Society to obtain counsel for the purpose of having the judgment set aside. *Id*.

Later on the same day, Ms. Nicholson's counsel entered an appearance, Ex. 1, p.001, and moved to set aside the judgment, Ex. 1, p.005. On January 29, 2021, the Jefferson District Court stayed all proceedings under the Forcible Detainer Judgment

[5] A complete copy of the Jefferson District Court's case file in *Brian Lawson v. Toni Floyd*, Case no. 21-C-00188, is attached as **Exhibit 2**.

and scheduled a hearing for February 5, 2021, on the motion to set it aside. Ex. 1, p.004.

Also on January 27, but after her case had been heard by the court, Ms. Floyd received actual notice from the Clerk's office of the correct means of attending via Zoom. DN 1 at 10 ¶¶ 52-53. Because Ms. Floyd was not present when the court called her case, the court entered a Forcible Detainer Judgment against her. Ex. 2, p.009. By the time Ms. Floyd appeared for her hearing, the judgment had been entered. DN 1 at 11 ¶ 56. The court informed Ms. Floyd that it had entered a judgment against her, but connected her with the Legal Aid Society to obtain counsel to have the judgment set aside. *Id.*

Ms. Floyd's counsel entered an appearance the next day, Ex. 2, p.001, and moved to set aside the judgment, Ex. 2, p. 003. The court granted the motion to set aside the judgment and continued the case for a review hearing on February 25, 2021. Ex. 2, p.002.

In a Kentucky eviction (*i.e.*, forcible detainer) action, a judgment of eviction allows the tenant seven days to vacate the property or file an appeal. *See* Ky. Rev. Stat. §§ 383.240 (prescribing form of judgment), 383.255(1) (seven-day deadline to appeal judgment), 383.245 (landlord may request a warrant of possession if no appeal filed within seven days after judgment); *see also* Ex. 1, p.007; Ex. 2, p.009. If no appeal is filed and the tenant does not vacate the property, the landlord can request from the court a warrant of possession, which orders the sheriff to put the landlord back

in possession of the property.[6] Ky. Rev. Stat. § 383.245. Neither Ms. Nicholson's nor Ms. Floyd's landlords have requested a warrant of possession. And the Court would not grant a warrant of possession against either of the Plaintiffs. That is because in Ms. Nicholson's case, the Court has not yet considered her motion to set aside the judgment, which is still pending. And the Court could not grant a warrant of possession in Ms. Floyd's case because the judgment against her has been set aside and is no longer valid.[7] As their cases stand now, both Ms. Nicholson and Ms. Floyd may remain in their homes.

ARGUMENT

The Plaintiffs seek an injunction against a Kentucky court. Congress has prohibited such relief by enacting the Anti-Injunction Act. 28 U.S.C. § 2283. But even if the Plaintiffs can show that an exception to the Anti-Injunction Act applies, they still are not entitled to the extraordinary relief they seek.

A "preliminary injunction is an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in the limited circumstances which clearly demand it." *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000) (cleaned up). Before issuing a preliminary injunction, the Court must consider four factors. *Overstreet v. Lexington-Fayette Urb. Cty. Gov't*, 305 F.3d 566, 573 (6th Cir.

---

[6] Because execution of a warrant of possession may require the sheriff to remove, or "set out," the tenant's belongings from the property, a warrant of possession often is called a "set-out order."

[7] It is simply incorrect to state that the Jefferson District Court "took no action to vacate [Ms. Nicholson's and Ms. Floyd's] judgments and reschedule the hearings for another date." *Cf.* DN 1 at 13 ¶ 75. The Plaintiffs admit in their Complaint that the Jefferson District Court connected them to attorneys at the Legal Aid Society who could help them navigate the process. Further, a review of the Plaintiffs' eviction case files attached as Exhibits 1 and 2 shows that Ms. Floyd's judgment *has* been set aside and her hearing has been scheduled for February 25. Ex. 2, p.002. And Ms. Nicholson's motion to set aside her judgment is set to be heard this Friday, February 5. Ex. 1, p.004.

2002). The Plaintiffs must show that they are likely to succeed on the merits, they will suffer irreparable harm without the injunction, that issuance of the injunction will not cause substantial harm to others, and that the public interest will be served if the injunction is issued. *Id.* None of these factors are dispositive, but each factor must be weighed against the others. *Id.*

Here, all four factors weigh against issuing a preliminary injunction. Thus, the Court should deny the Plaintiffs' motion.

I. The Anti-Injunction Act prohibits the Court from granting the injunction.

The Anti-Injunction Act ("Act") provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. The Act recognizes our federalist system, and the independence of the States' judiciaries. *See Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 287 (1970). Moreover, it "is generally to be assumed that state courts . . . will observe constitutional limitations as expounded by [the Supreme Court], and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings." *Dombrowski v. Pfister*, 380 U.S. 479, 484-85 (1965). As a result, the Act "creates an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions." *Martingale LLC v. City of Louisville*, 361 F.3d 297, 302 (6th Cir. 2004) (quotation omitted).

Here, none of the exceptions apply. No federal court has entered an order in need of effectuation. And no federal court has obtained jurisdiction over the underlying case such that action must be taken to aid a federal court in asserting jurisdiction. For that reason, the Plaintiffs may only obtain an injunction if they can identify a federal statute expressly authorizing the court to stay state court forcible detainer proceedings. *Id*. There is no such statute. *See*, *e.g.*, *Knoles v. Wells Fargo Bank, N.A.*, 513 Fed. App'x 414, 416 (5th Cir. 2013) (acknowledging that the Act prevented the federal district court from staying a Texas forcible detainer action).

Other federal district courts have reached similar conclusions in the context of foreclosure actions. *See, e.g., Millonzi v. Bank of Hillside*, 605 F. Supp. 140, 143-44 (N.D. Ill. Mar. 20, 1985); *Williams v. Deutsche Bank Nat'l. Tr. Co.*, Case No. 4:20-cv-00664, 2020 WL 6276083 *7-8 (N.D. Tex. Oct. 6, 2020). Moreover, in *Martingale LLC v. City of Louisville*, the Sixth Circuit held that the Act prohibited federal courts from enjoining state condemnation proceedings. 361 F.3d at 304. Forcible detainer actions are similar state court proceedings involving the possession of rental property. The Plaintiffs ask this Court to enjoin the Jefferson District Court's entire forcible detainer docket. But by definition, once the forcible detainer complaint has been filed and the summons has been issued, the state court proceeding has begun. *See* Ky. R. Civ. P. 3.01. An injunction that stays those proceedings until a new notice is issued directly contradicts the Act.[8]

[8] Presumably, the Plaintiffs would like the Court to fashion any such notice.

Thus, the Act bars the Plaintiffs' requested relief. For that reason alone, the Court should deny the Plaintiffs' motion for a preliminary injunction.

II. The Plaintiffs are not likely to succeed on the merits.

Even if the Anti-Injunction Act did not bar the Plaintiffs' requested relief (it does), the Plaintiffs still cannot demonstrate that they are entitled to an injunction. That is because to "state a claim for denial of due process, a plaintiff must first establish he has been deprived of a property or liberty interest." *Zilba v. City of Port Clinton*, 924 F. Supp. 2d 867, 877 (N.D. Ohio 2013) (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972)). The Plaintiffs cannot meet that threshold burden.

The Plaintiffs claim that their constitutional rights to due process have been violated because they were provided a phone number and Zoom login information to access their eviction hearing but were not subsequently notified when the access information changed. However neither Plaintiff has yet been evicted. In fact, the Court set aside the judgment in Ms. Floyd's case. *See* Ex. 2, p.002. And the Court has stayed the proceedings against Ms. Nicholson until her case is reviewed at the hearing on February 5, 2021. *See* Ex. 1, p.004.[9] Thus, neither Ms. Floyd nor Ms. Nicholson have been deprived of a "property" or "liberty" interest. *Roth*, 408 U.S. at 569.

For these same reasons, the Plaintiffs lack standing, a constitutional prerequisite to invoke this Court's jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To have standing, the Plaintiffs must first show that they have

[9] Under local practice, the handwritten abbreviation on the Court's order, "cc," is shorthand used by the Jefferson District Court to denote "case continued."

suffered a concrete and particularized injury, or that such injury is imminent. *Id*. Second, the Defendants must have caused the injury. *Id*. Finally, the Plaintiffs must show that the Court's relief will redress their injury. *Id*. at 561.

Neither Plaintiff has been ordered to vacate her property. For that reason, they have suffered no injury. Moreover, the Plaintiffs will be given an opportunity to be heard before a final judgment is rendered in their respective cases. Thus, the Plaintiffs have no risk of imminent injury.

The Plaintiffs' claim fails for another reason. The notice did not violate the due process clause. Due process only "requires the government to provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Jones v. Flowers*, 547 U.S. 220, 226 (2006) (quotation omitted). The Court "judges the adequacy of notice from the perspective of the sender, not the recipient." *Lampe v. Kash*, 735 F.3d 942, 944 (6th Cir. 2013).

Recently, a district court in this Circuit addressed a similar claim. There, the court found that a city's practice in sending actual notice to the owner of a property facing condemnation, in addition to placing notice of the condemnation proceeding on the city's publicly available website, provided sufficient notice to any would-be property owner that the property risked being demolished by the city. *Keene Grp., Inc. v. City of Cincinnati*, No. 1:19-cv-730; 2020 WL 3980304 (S.D. Ohio July 14, 2020). As a result, the court dismissed a § 1983 claim brought by the purchaser of the property who claimed he received no notice that the property would be demolished.

Id. at *5. "Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry may have led." *Id.* at *4 (quoting *Ming Kuo Yang v. City of Wyoming,* 793 F.3d 599, 605 (6th Cir. 2015)).

Here, the Plaintiffs received actual notice that their landlords had initiated a forcible detainer action against them. DN 1 at 8-9 ¶¶ 39, 43, 46 (notice to Ms. Floyd); *id.* at 11-12 ¶¶ 59, 62 (notice to Ms. Nicholson). The Plaintiffs were also given actual notice of the time and place of their respective hearings. Ex. 1, p.012; Ex. 2, p.016. Although the Plaintiffs may have been unable to appear telephonically, the Jefferson Circuit Clerk's telephone number and email address were provided to them at the time the summons was served for just that reason. *See* DN 1-2; DN 1-3. The Plaintiffs knew that they were scheduled to appear before the court on January 27, 2021. When they were unable to appear, the Plaintiffs correctly contacted the Clerk's office for instructions. Ultimately, they were able to appear before the judge via Zoom, though late, and obtained information from the Court on having the judgments against them set aside.

At bottom, the Plaintiffs cannot show that they have suffered an injury in the past or that they will suffer an imminent injury in the future. Therefore, the Plaintiffs fail to present the threshold requirement for a due process claim. That also means they lack standing. For both reasons, the Plaintiffs are unlikely to succeed on the merits of their claims. Thus, the Court should deny the Plaintiffs' motion for a preliminary injunction.

III. The Plaintiffs will not suffer irreparable harm if an injunction is not issued.

"A district court abuses its discretion when it grants a preliminary injunction without making specific findings of irreparable injury to the party seeking the injunction, and such an injunction must be vacated on appeal." *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 105 (6th Cir. 1982). The Plaintiffs must show that they will suffer irreparable harm if an injunction is not issued. *Overstreet*, 305 F.3d at 573. Neither of the Plaintiffs[10] has suffered an injury and there is no risk of imminent injury. The Plaintiffs have already been given the relief they seek—notice of a new hearing and an opportunity to present their cases.

Ms. Nicholson's hearing is set for 11:00 a.m. on February 5, 2021. Ms. Floyd's hearing is set for 11:00 a.m. on February 25, 2021. Therefore, both Plaintiffs have been notified of their new hearing dates, and both Plaintiffs may attend virtually or in person at the Jefferson District Court.[11] For this reason, the Plaintiffs are not at risk of suffering irreparable harm but have instead been provided the relief they seek.

---

[10] The Plaintiffs request to represent a class, but they lack standing to bring this claim. They therefore cannot serve as representatives a class. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 n.6 (2016) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40, n. 20 (1976)) ("That a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong.'"). The Defendant objects to the Plaintiffs' request for class certification and will promptly respond in that regard. But at this stage of the proceedings, the Plaintiffs have sought an emergency hearing seeking a preliminary injunction without sufficiently identifying the class they purport to represent or demonstrating their standing to assert the claims they have made.

[11] The Jefferson District Court judges accommodate defendants in eviction proceedings who may be unable to attend virtually. *See* note 4.

IV. The public will be harmed if an injunction is issued.

The remaining two *Overstreet* factors require the Court to consider whether issuing an injunction will cause substantial harm to others and whether the public interest would be served by issuing the injunction. 305 F.3d at 573. In considering these two factors, the Court should consider that the "purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Moreover, an injunction must "state its terms specifically" and "describe in reasonable detail . . . the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1). The Plaintiffs have not asked this Court to restrain the Defendant. Rather, the Plaintiffs ask this Court to draft notices to their satisfaction and require the Jefferson District Court to use those notices before any other eviction proceedings may continue. But as discussed, there is no reason to issue an injunction for these Plaintiffs. Their eviction judgments have been set aside or the proceedings have been stayed, and they have been given new hearings. On the other hand, the Jefferson District Court has implemented a policy to ensure all defendant-tenants, including the Plaintiffs, are given an opportunity to be heard. An injunction would upend the status quo and risk chaos in the Jefferson District Court.

The Jefferson District Court processes several hundred forcible detainer actions each week. *See* DN 1 at 14-15 ¶ 82. During the current state of emergency, the Jefferson District Court has strived to continue its vital functions while ensuring the safety of litigants, attorneys, and court personnel. Like many in this new virtual

era, the Jefferson District Court experienced some technical difficulties in adjusting. But it has provided appropriate safeguards going forward.

Recognizing that litigants had received notice of the previous phone number, the Office of the Circuit Court Clerk has tried to notify parties to eviction actions of the change in access codes and dial-in numbers via the Jefferson District Court's website. DN 1 at 7 ¶ 33. In addition, to address the potential confusion caused by the change in the court's Zoom information, the two judges presiding over the Jefferson District Court's eviction dockets have created a new docket, to be held weekly on Fridays at 11:00 a.m. Any party who misses an eviction hearing can have her case re-docketed for the Friday eviction docket by contacting the Clerk's office.

In this way, the Jefferson District Court has implemented a policy that ensures no defendant-tenant misses his or her day in court because of technical issues. This policy is designed to resolve the very notice-issue that the Plaintiffs raise. But an injunction, which must "state its terms specifically," Fed. R. Civ. P. 65(d)(1)(B), would undo this policy and lead to even more confusion. That is because litigants who have already been notified of the new Zoom phone number would have to receive a new notice. Issuing such notices to hundreds of litigants, who may already know how to access their hearing, will interfere with the orderly administration of court business and would harm other litigants and attorneys. Thus, any notice issued under an injunction could cause even more confusion than the notice about which the Plaintiffs complain, and invite the very harm that the Plaintiffs claim they wish to avoid. *Cf. McNeilly v. Land*, 684 F.3d 611, 621 (6th Cir. 2012) (the district court properly found

that enjoining a campaign finance law would invite the very harm the law sought to prevent and would interfere with the orderly administration of an election).

The Jefferson District Court recognized and appreciated the due process rights of defendant-tenants in forcible detainer actions. To that end, the Jefferson District Court has enacted procedures to ensure each litigant receives her day in court. Those procedures are the status quo and the public is relying on their continued implementation. To preserve the status quo, and to prevent further confusion, the Court should deny the Plaintiffs' motion for a preliminary injunction.

CONCLUSION

For all these reasons, the Court should deny the Plaintiffs' motion for a preliminary injunction.

Respectfully submitted,

/s/ Carmine G. Iaccarino
Carmine G. Iaccarino (No. 93838)
Aaron J. Silletto, Esq. (No. 89305)
Marc Manley (No. 96786)
Office of the Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
Phone: (502) 696-5300
Carmine.Iaccarino@ky.gov
Aaron.Silletto@ky.gov
Marc.Manley@ky.gov

Counsel for Judge Annette Karem, in her official capacity as Chief Judge of the Jefferson County District Court

CERTIFICATE OF SERVICE

I certify that on February 3, 2021, the above document was filed with the CM/ECF filing system, which electronically served a copy to all counsel of record.

/s/ Carmine G. Iaccarino
Counsel for the Defendant