

upon receipt thereof by the defendants.

If post-trial motions are not filed within the time set forth in Pa.R.C.P. No. 227.1(c) (2) this decree nisi shall become a final decree upon praecipe of either party.

THARP AND WIFE V. THARP, C.P. Franklin County Branch,  
No. A.D. 1990-131

*Writ of Certiorari - District Justice - Landlord-Tenant  
Gross Irregularity of Procedure*

1. Certiorari is limited to an examination of the record of the proceedings before the District Justice.
2. Where the plaintiff amended his complaint to add a ground for eviction at the hearing and it was done in the presence of the defendant, there is no irregularity of procedure.
3. The failure of the District Justice to apprise the unrepresented defendant of a right to request a continuance upon amendment of the complaint is not a gross irregularity in procedure.

*Timothy W. Misner, Esq., Attorney for Plaintiffs  
Jonathan D. Fenton, Esq., Attorney for Defendant*

**OPINION AND ORDER OF COURT**

KAYE, J., May 21, 1990:

**OPINION**

This matter is before the Court on a writ of certiorari filed by the defendant from a district justice's decision which awarded possession of real property and costs to the plaintiffs.

**PROCEDURAL AND FACTUAL BACKGROUND**

The plaintiffs, Loretta Tharp and Ray Tharp, who are husband and wife, own a parcel of real property located at 7255 Slabtown Road, Waynesboro, Franklin County, Pennsylvania. The defendant, Patricia Tharp, is the sister-in-law of plaintiff, Ray Tharp. Patricia

Tharp has leased the property located at 7255 Slabtown Road for approximately the last eight (8) years, and has parked her mobile home on the lot.

On October 3, 1989, the plaintiffs served a notice to quit and vacate the property by February 1, 1990 on the defendant. In the notice, the plaintiffs indicated that they intended to build a garage and a place of business on the lot.

The defendant failed to vacate the property by the February 1, 1990 date, and the plaintiffs filed a Landlord and Tenant Complaint with District Justice Pentz on February 2, 1990. On February 15, 1990, a hearing on the complaint was held by District Justice Pentz, and plaintiff, Loretta Tharp and defendant, Patricia Tharp both appeared. Loretta Tharp was represented by counsel at the hearing, however, Patricia Tharp appeared without counsel.

According to District Justice Pentz's certified record of the proceeding, the attorney representing Loretta Tharp moved to amend paragraph 5. of the complaint so that the first box was checked indicating that the term of the lease had fully ended. District Justice Pentz permitted the amendment pursuant to Pa.R.C.P.D.J.316.

On March 15, 1990, the defendant, through Legal Services, Inc., filed a Praecipe for Writ of Certiorari and Supersedeas, claiming that the proceedings held before District Justice Pentz contained "such gross irregularity of procedure as to make the judgment void."

The defendant alleges that the district justice judgment is void for gross irregularity of procedure because of the plaintiffs' failure to apprise the defendant of a lawful ground for the eviction prior to the hearing. Further, the defendant alleges that district justice and/or counsel for the plaintiffs, failed to explain to the defendant the nature of the motion to amend and the defendant's right to a continuance.

**DISCUSSION**

The Pennsylvania Rules of Civil Procedure District Justices provides for certiorari to the court of common pleas from the judgment of a district justice in order to attack "lack of jurisdiction

over the parties or subject matter, improper venue or such gross irregularity of procedure as to make the judgment void." Pa.R.C.P.D.J.1009(A). When raising questions under this rule, certiorari is limited to an examination of the record of proceedings before the district justice. Pa.R.C.P.D.J.1001 (3); Note to Rule 1001(3); and *Flaherty v. Atkins*, 189 Pa.Super. 550, 152 A.2d 280 (1959). Certiorari is narrow under the district justice rules. There is no justification for allowing a broad form of certiorari under the district justice rules because of the broad form of appeal de novo which is provided for in the rules. Note to Pa.R.C.P.D.J. 1001.

The defendant claims that she was not given notice of the ground for the eviction until the complaint was amended pursuant to Pa.R.C.P.D.J. 316. Rule 316 provides:

Amendment to the complaint may be made only at the hearing in the presence of the adverse party or his representative. Amendments other than those made as to form shall constitute grounds for continuance.

In this case, the motion to amend was made during the hearing and in the presence of the defendant as required by Rule 316, so no irregularity of procedure occurred as a result of amending the complaint.

The defendant claims that because the amendment to the complaint was not one of form, but of substance, either the district justice or the plaintiffs' attorney should have apprised her of the right to a continuance. There is no indication in the district justice's record of the proceeding that she was told of this right.

In *Vann v. Commonwealth of Pennsylvania Unemployment Compensation Board of Review*, 508 Pa. 139, 494 a.2d 1081 (1985), the Supreme Court of Pennsylvania stated that anytime a lay person chooses to represent himself in a legal proceeding, he assumes the risk that his lack of legal expertise will be his undoing to some reasonable extent. We cannot see where either the district justice or the plaintiffs' attorney had any obligation to inform the defendant of her right to a continuance.

We do not see any gross irregularity in the proceeding due to a failure on the part of the district justice and the plaintiffs' attorney to apprise the defendant of her right to a continuance, nor in his

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granting of the motion to amend. Defendant makes no claim of any resultant prejudice as to her ability to present a defense to the ejectment action asserted by plaintiffs. It was not suggested that even if defendant had been given an express offer to a continuance of the hearing that she would have requested it and, if she had, that this would have affected the outcome of this proceeding.

Defendant had an election to make when she was dissatisfied with the District Justice's judgment. Pa.R.C.P.D.J. No. 1015. Had she filed an appeal, plaintiffs would have been required to proceed *de novo* under the provisions of the Rules of Civil Procedure, Pa.R.C.P.D.J. No. 1007.A., and such procedure would have required the filing of a civil complaint and the service thereof on defendant, followed by a full opportunity to defend.

The granting of the writ of certiorari would simply require the reference back of the matter to the District Justice where the allegedly gross irregularity would be rectified through this Court's direction, and that court would then proceed to rule on the matter. In this instance, defendant has failed to convince us that the interests of justice, as expressed in the due process clause of the Constitution, compel or even suggest such a requirement. If we had the slightest belief that the procedures employed by the District Justice had an adverse impact on this litigant's rights, we would not hesitate to grant the writ. We have no such belief, and so we will deny the relief sought.

#### ORDER OF COURT

NOW, May 21, 1990, the Court finds against defendant, and dismisses the writ of certiorari heretofore issued.

Costs to be paid by defendant.

FIRST NATIONAL BANK OF GREENCASTLE V. TALHELM,  
ET AL., C.P. Franklin County Branch, No. A.D. 1989 - 330

*Mortgage Foreclosure - Counterclaim - Right to Jury Trial*

1. In an action in mortgage foreclosure, the plaintiff has no right to demand a jury trial; however, the defendants counterclaim in trespass would allow a demand for jury trial.
2. A party waives his right to a jury trial if demand is not made within 20 days after service of the last pleading (Pa. RCP 1007.1).
3. In enforcing Pa. RCP. Rule 1007.1 the Court will not consider prejudice to the other party and the rule will be strictly enforced.

*David C. Cleaver, Esq.*, Counsel for plaintiff  
*Gregory R. Reed, Esq.*, Counsel for Defendants

KAYE, J., June 21, 1990:

#### OPINION

This matter is before the Court on a petition for leave of court to make written demand for jury trial which was filed by the defendants, Gerald D. Talhelm, Gregory M. Talhelm, and Harold E. Talhelm.

#### FACTS AND PROCEDURAL BACKGROUND

On September 27, 1989, the plaintiff, First National Bank of Greencastle, filed a civil complaint in action of mortgage foreclosure against the defendants. The defendants filed their original answer on October 31, 1989, and an amended answer on January 30, 1989, in response to the plaintiff's preliminary objections. The defendants asserted new matter and counterclaims against the plaintiff in both of the answers. The plaintiff filed a reply to the new matter on February 15, 1990 which completed the pleadings in this case. The defendants caused a rule to show cause why they should not be granted leave to make a written demand for a jury trial in their counterclaims to be issued on the plaintiff. The plaintiff filed its answer to the rule on May 7, 1990, and the matter was set for oral argument to be held June 7, 1990. Argument was held on that date and the matter is in a posture for decision.

#### DISCUSSION

We are asked to decide whether the defendants should be granted leave to make a written demand for a jury trial. The plaintiff in this case is not entitled to a jury trial on the mortgage foreclosure action