14 Fla. L. Weekly Supp. 701a

Landlord-tenant -- Eviction -- Notice -- E-mail constitutes mailing sufficient to satisfy statutory requirement of mailing written notice whenever contract or course of dealing between parties establishes e-mail as permissible means of notice or whenever it is shown that recipient received actual and timely notice via e-mail which is substantially same notice as would have been provided in writing mailed through conventional means -- Notice to vacate sent through e-mail and acknowledged by tenant through return e-mail satisfied notice requirement of section 83.57

PHILLIP R. HARARI, Appellant, vs. JULES P. WHITFORD, Appellee. Circuit Court,15th Judicial Circuit (Appellate) in and for Palm Beach County. Case No. 502006AP000054XXXXMB. L.T. No. 502006CC002812XXXXMB. May 25, 2007. Appeal from the County Court in and for Palm Beach County, Judge James L. Martz. Counsel: Steven M. Selz, Selz & Muvdi Selz, P.A., Palm Beach, for Appellant. Geoffrey C. Burdick, West Palm Beach, for Appellee.

(STERN, J.) This appeal involves a case of first impression in this State. The issue is whether a statute requiring the mailing of written notice is satisfied when notice is given by a letter or memo in e-mail format, electronically sent and not otherwise delivered. For the reasons set forth below, we hold that an e-mail transmission generally is adequate to satisfy a statutory requirement to give written notice by mail.

Appellant HARARI leased a single family home from Appellee WHITFORD, under an oral month-to-month lease. On February 13, 2006, the Appellee sent an e-mail communication to Appellant, notifying him that he was terminating the lease and directing Appellant to vacate the premises on or before March 1, 2006. When Appellant did not vacate by the deadline, Appellee filed a complaint for eviction.

At the trial held before the Hon. James L. Martz, Appellant contended that he had not been served by mail with written notice to vacate, as required by §83.57, Fla. Stat. The court disagreed, and held:

> on the evidence presented the Court finds that the e-mail transmitted by [Appellee] to [Appellant] on February 13, 2006, and acknowledged by [Appellant] through a return e-mail satisfies the requirement set forth in §83.57 Fla. Stat. of 15 days notice to vacate by "mailing or delivery of a true copy" of the notice as set forth in §83.56(4), Fla. Stat.

(Final Order, R 50.) Section 83.57 requires "written notice;" it does not specify how the notice is to be transmitted or delivered. Section 83.56(4) states that "[t]he delivery of the written notices required by subsections (1), (2), and (3) shall be by mailing or delivery of a true copy thereof or, if the tenant is absent from the premises, by leaving a copy thereof at the residence."

The term "writing" is defined by the Legislature, for use in construing Florida statutes, in pertinent part as follows:

> 1.01 Definitions. -- In construing these statutes and each and every word, phrase, or part hereof, where the context will permit:
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> * * *
>
> (4) The word "writing" includes handwriting, printing, typewriting, and all other methods and means of forming letters and characters . . . . The word "writing" also includes information which is created or stored in any electronic medium and is retrievable in perceivable form.

Accordingly, an e-mail message constitutes a "writing," under any Florida statute. The only question, therefore, is whether the sending of an e-mail message constitutes the sending of "mail," as that term is used in §83.56(4), Fla. Stat. For the reasons set forth herein, we hold that it does.[1]

"[I]n deciding whether strict compliance with the mode of service provided in [a statute] is mandated, [courts] look to the purpose of the legislation." *Patry v. Capps,* 633 So. 2d 9, 12-13 (Fla. 1994). This precept is especially crucial where the statute does not define a term:

> Where, as here, the legislature has not defined the words used in a phrase, the language should usually be given its plain and ordinary meaning. *Southeastern Fisheries Ass'n, Inc. v. Department of Natural Resources,* 453 So. 2d 1351 (Fla. 1984). Nevertheless, consideration must be accorded not only to the literal and usual meaning of the words, but also to their meaning and effect on the objectives and purposes of the statute's enactment. *See Florida State Racing Comm'n v. McLaughlin,* 102 So. 2d 574 (Fla. 1958). Indeed, "[i]t is a fundamental rule of statutory construction that legislative intent is the polestar by which the court must be guided [in construing enactments of the legislature]." *State v. Webb,* 398 So. 2d 820, 824 (Fla. 1981).

Florida Birth-Related Neurological Injury Compensation Assn. v. Fla. Div'n of Adm've Hrgs, 686 So. 2d 1349, 1354-55 (Fla. 1997). The quote from *State v. Webb* is even more powerful in context:

> It is a fundamental rule of statutory construction that legislative intent is the polestar by which the court must be guided, and this intent must be given effect even though it may contradict the strict letter of the statute. Furthermore, construction of a statute which would lead to an absurd or unreasonable result or would render a statute purposeless should be avoided.

State v. Webb, 398 So. 2d 820, 824 (Fla. 1981).[2] We expressly reject Appellant's contention that the use of e-mail, in facts such as those here, contradicts the strict letter of the statute. Instead, we note that the term "e-mail" is now considered to be a form of "mail," and is included within the definition of "mail" in *Black's Law Dictionary, Eighth Ed.* (*Thomson West,* 2004): "mail, *n.* ... 3. One or more written or oral messages sent electronically (e.g., through e-mail or voicemail)." *Id.* at 972, citing Cases: Telecommunications [key no.] 461.15. C.J.S. *Telegraphs, Telephones, Radio, and Television* §221.]

Accordingly, on the basis of the foregoing legal authority, we hereby hold that e-mail constitutes a mailing sufficient to satisfy a statutory requirement of a mailing of written notice, whenever a contract or course of dealing between parties establishes e-mail as a permissible means of notice, or whenever it is shown that the recipient received actual and timely notice through e-mail which is substantially the same notice as would have been provided in a writing mailed through conventional means.[3] The trial court's holding to that effect, and its ruling in favor of the Plaintiff-Appellee WHITFORD, is therefore AFFIRMED. (FRENCH, J., concurs.)

(MAASS, J., dissents with opinion.) I respectfully dissent. Appellant, Phillip R. Harari, was a residential tenant of Appellee, Jules P. Whitford, under a month-to-month tenancy. Whitford sought to terminate the tenancy under Florida Statute §83.57(3), which provides that a month-to-month tenancy may be terminated "by giving written notice in the manner provided in s. 83.56(4) . . ." at least 15 days prior to the end of any monthly period. Under Florida Statute §83.56(4), the written notice "shall be by mailing or delivery of a true copy thereof or, if the tenant is absent from the premises, by leaving a copy thereof at the residence."

Whitford's Complaint alleged notice was given February 13, 2006 under Florida Statute §83.57. The attached exhibit showed Whitford emailed Harari on February 13, 2006, saying "(p)lease leave before or March 1st as we agreed ..." Harari's responsive email provided that "I will be vacating the house at the earliest date possible but not prior to what we discussed. You know very well we did not agree on March 1, which is entirely impossible." In Harari's responsive pleading,[4] he alleged that Whitford's email did not satisfy §§83.57 and 83.56(4), because it was neither mailed nor delivered as contemplated by the statute.

The majority finds that an email transmission satisfies the "written notice" requirement of Florida Statute §83.57(3). The holding overlooks, though, that the written notice still must be delivered "by mailing or delivery . . . or, if the tenant is absent from the premises, by leaving a copy thereof at the residence." Fla. Stat.

§§83.57(1), 83.56(4). Under Florida Statute §83.56(4), a landlord has three choices only: he may deliver it by hand; he may mail it; or he may leave a copy at the premises if the tenant is not there. *See Investment and Income Realty, Inc. v. Bentley,* 480 So. 2d 219 (Fla. 5th DCA 1985); Hauser, *Florida Residential Landlord Tenant Manual,* §4.01[1]g[i] (2007 ed.).[5] The majority opinion ignores, too, that if "mailing" under Florida Statute §83.56(4) includes "emailing," the notice was not timely, since five days must be added to the compliance time. *See Investment and Income Realty, Inc. v. Bentley,* 480 So. 2d 219 (Fla. 5th DCA 1985) (Rule 1.090(e), Fla. R. Civ. P., applies to Chapter 83 notices).

The majority cites to the *noun* definition of "mail" in Black's Law Dictionary to support its view that "emailing" is subsumed in "mailing." Florida Statute §83.56(4), though, uses "mail" and "deliver" as *verbs.* The *verb* definitions of mail are 1. "(t)o deposit . . . with the U.S. Postal Service; to ensure that a letter . . . is properly addressed, stamped, and placed into a receptacle for mail pickup . . . 2. to deliver . . . to a private courier service that undertakes delivery to a third person, often within a specified time." Black's Law Dictionary 972 (8th ed. 2004). "Delivery" is the "formal act of transferring something . . .; the yielding possession or control of something to another." *Id.* at 461. Both contemplate a physical document's physical delivery.

The majority holds that sending a notice by email satisfies a statutory requirement that a notice be mailed "whenever a contract or course of dealing between parties establishes e-mail as a permissible means of notice, or whenever it is shown that the recipient received actual and timely notice through e-mail which is substantially the same notice as would have been provided in a writing mailed through conventional means." (footnote omitted). The first part of this statement is contrary to Florida Statute §83.47(1)(a), which prohibits rental provisions which purport to waive a statutory requirement under the Florida Residential Landlord and Tenant Act ("Act"). The second part appears to acknowledge that the transmittal of the required notice by email may not comply with Florida Statute §83.56(4), but contemplates a tenant by his actions may have waived or be estopped from asserting compliance with the statutory delivery requirement. That may be, but it is not an issue reached by the trial court or raised, pled, or briefed by the parties. It is not an issue of statutory construction. More practically, the majority's rule would open a Pandora's box for the trial courts, requiring an inquiry into whether an email was opened and read. The Act is designed for clarity, though, both to apprise landlords and tenants of their rights and obligations and to facilitate legal actions if they are not honored.

At common law, a landlord seeking to terminate a tenancy had to place his notice "at the most notorious place on the demised premises . . ." from sunup to sundown. *Baker v. Clifford-Mathews Inv. Co.,* 99 Fla. 1229, 1234, 128 So. 827 (Fla. 1930), quoting 36 C.J. 608. Provisions of Act in derogation of the common law must be strictly construed. *Id*; *see*, also, Hauser, *Florida Residential Landlord Tenant Manual,* §5.01[1][c][i] (2007 ed.) ("(l)ike other areas of landlord-tenant law, the notice requirements are strictly construed"). Clearly, the Florida Legislature knows information may be electronically transmitted.[6] *See,* e.g., Fla. Stat. §§1.01(4)[7]; 109.6952(1); 817.5681; 119.011(11); 120.55(2)(c); 283.55; 334.03(38); 440.185(11)(c); 847.0137(1)(b); 1012.05. Indeed, its amendment of these statutes to include electronic information shows that if it thinks a statute should be broadened to include emails it can and will.

Whitford's compliance with the Florida Statute §83.57(4) notice requirement was a condition precedent to his claim for possession. *See Bell v. Kornblatt,* 705 So. 2d 113 (Fla. 4th DCA 1998). His attempt to send the required notice by electronic transmission, rather than by transmission through the U.S. mail, hand delivery, or posting, did not meet the statutory requirement. Consequently, I would reverse the portions of the trial court's decision which granted possession to Whitford based on the disputed notice and awarded him holdover tenancy damages.

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[1]Obviously, the requirement of Rule 1.090(e), Fla.R.Civ.P., that five days be added to deadlines when mail is used to serve a paper, would not apply to e-mail, as delivery is instantaneous.

[2]Thus, even if we were holding that e-mail technically is not "mail," we would under the facts of this case rule that it *does* satisfy the requirement of a mailing.

[3] We realize that, under some discrete facts in a particular case, a court may find it inappropriate to regard e-mail as valid notice, but this is true as well of conventional mail.

[4]Chapter 83 actions are subject to Chapter 51, Summary Procedures. Chapter 51 does not permit a motion practice. Consequently, it appears the trial court properly treated Harari's Motion to Dismiss as his Answer. *See Crocker v. Diland Corp.,* 593 So. 2d 1096 (Fla. 5th DCA 1992).

[5]In 1987, the Legislature substituted "premises" for "his last or usual place of abode" in Florida Statute §83.56(4). The cited case refers to the former language.

[6]The Florida Supreme Court does, too. *See,* e.g.*,* Rule 2.420(b)(1)(A), Fla. R. Jud. Admin. *See,* also, Rule 1.080(b), Fla. R. Civ. P., directing how papers to be served may be delivered, including by facsimile transmission but, notably, not electronic transmission.

[7]The majority cites to the statutory definition of "writing" as including information stored electronically if retrievable in perceivable form to argue that an email transmission satisfies the Chapter 83 notice requirement. If the Legislature intended to incorporate that definition into Chapter 83, it could have easily done so by using the term "writing" instead of "written notice." It did not.

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