

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

DAVID P. FRISCH,	:	APPEAL NO. C-140444
and	:	TRIAL NO. A-1305037
CATHERINE FRISCH,	:	
Plaintiffs-Appellants,	:	<i>OPINION.</i>
vs.	:	
RESTAURANT MANAGEMENT, INC.,	:	
Defendant-Appellee.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause Remanded

Date of Judgment Entry on Appeal: March 11, 2015

Harry B. Plotnick, for Plaintiffs-Appellants,

Kohnen & Patton, LLP, and *Colleen M. Blandford*, for Defendant-Appellee.

Please note: this case has been removed from the accelerated calendar.

FISCHER, Judge.

{¶1} Plaintiffs-appellants David and Catherine Frisch appeal the decision of the trial court entering summary judgment in favor of defendant-appellee Restaurant Management, Inc. (“RMI”), in this landlord-tenant dispute regarding an Arby’s restaurant. Because we determine that genuine issues of material fact exist as to the Frisches’ claim for breach of lease and RMI’s counterclaim for constructive eviction, we reverse that portion of the trial court’s judgment and remand for further proceedings.

{¶2} The Frisches own a multi-level commercial property at 2500 West Clifton Avenue. On May 27, 2005, the Frisches entered into a ten-year lease agreement with RMI, which would permit RMI to operate an Arby’s restaurant on the first floor of the premises. The lease provided that the Frisches would keep the common areas of the building in good condition and repair, and would not interfere with RMI’s quiet enjoyment of the property.

{¶3} On May 10, 2013, RMI received a letter from Duke Energy Corporation (“Duke”), advising RMI that Duke employees had not been able to access the meters in the basement of the building for the past five months. When RMI’s director of purchasing, David Konerman, inquired as to why Duke employees could not access the meters, he was told, allegedly, that the conditions in the basement were not safe because of rats. RMI informed the Frisches of the rodent issue on May 20, 2013, and requested an exterminator on the premises within 24 hours.

{¶4} A pest-control company confirmed the presence of rats in the basement of the building, and on May 22, 2013, RMI informed David Frisch (“David”) in writing that it would be immediately closing the Arby’s restaurant

because of ongoing roof leaks and the presence of rats in the building. RMI attached a list of demands and requested the Frisches' compliance with those demands within 30 days, or else RMI would consider the Frisches in default of the lease. In general, RMI's demands included eliminating rats from the premises, using soap and disinfectant to clean the basement where rat feces remained, eliminating rodent access points and harborage areas, and repairing roof leaks. Under the lease, the Frisches had 30 days within which to cure any default.

{¶5} At the end of the 30-day "cure" period, RMI and David disagreed about the Frisches' level of compliance with RMI's demands, and, as a result, RMI terminated the lease effective at the end of June 2013. In July 2013, the Frisches filed the instant complaint, alleging that RMI had terminated the lease without justification and owed additional rent and expenses from July 2013 through May 2015 under the lease. The Frisches also alleged that RMI had damaged the premises over and above ordinary wear and tear, and that RMI should compensate the Frisches for any broker's commission or expenses associated with securing a replacement tenant. RMI filed a counterclaim against the Frisches, alleging that the Frisches failed to keep the building in a safe condition, making the property untenable, and resulting in constructive eviction. RMI alleged that it had paid utility bills past July 2013 to prevent discontinuation of the utilities, and that the Frisches must reimburse RMI for those bills.

{¶6} RMI moved for summary judgment on the Frisches' claim for breach of lease and RMI's constructive-eviction counterclaim, relying primarily on an affidavit from Konerman, as well as the deposition of David. RMI argued that the evidence showed that the Frisches had failed to comply with RMI's demands.

{¶7} Konerman averred in his affidavit that, at the end of the 30-day period, rat feces and garbage had remained on the basement floor, a hole in the interior of the building that could harbor rats had been covered with a mat instead of repaired, a drain lid in the parking lot that could also serve as a rodent access point had not been screened, garbage behind the building had been covered with dirt instead of removed, vegetation along the property line had not been removed, and the premises had continued to leak. Konerman also averred that RMI had paid water, gas, and electric utility bills for the premises in the amount of \$17,174.62.

{¶8} In David's deposition, he testified that he did not know if any rats remained at the premises at the time of the deposition, but that he had hired a pest-control company to remediate the rats in May 2013, and that he had continued service with the pest-control company in the months that followed. As to eliminating rodent access points and harborage areas, David testified that, in the May/June 2013 timeframe, he had hired a contractor to re-concrete an area by the back door where rodents could enter, remove foliage along the building and back area, fill in an area behind an old stairway where garbage had been dumped, place a screen cover over a storm drain to keep rodents out, and cover an access hole in the interior hallway with an adhesive mat. As to cleanup of the basement where rodents had been found, David testified that he had hired a company to remove all of the equipment and debris from the basement area. Finally, as to roof leaks, David testified that he had paid to repair the roof, which had been damaged after a hail storm in January 2013, and that in the May/June 2013 timeframe, he had walked through the property and had not seen any evidence of new roof leaks.

{¶9} David also testified that he had walked through the property with Konerman and another RMI employee in June 2013, and that he had showed them the improvements. According to David, neither Konerman nor the other RMI employee had expressed dissatisfaction with the improvements made by David.

{¶10} The Frisches opposed RMI's summary-judgment motion and attached an affidavit from David, responding to Konerman's averments. David's averments generally summarized his deposition testimony; however, David specifically averred that he had not received any further reports of rodent activity since taking remedial actions in May/June 2013. David also averred that the drain lid that Konerman complained had not been covered had been remediated by covering the sewer pipe beneath the drain lid with mesh screening. Finally, David averred that the vegetation along the property line had not been removed because it was not on his property.

{¶11} Based on the parties' briefing, the trial court granted RMI's summary-judgment motion. This appeal by the Frisches ensued.

{¶12} In two assignments of error, the Frisches challenge the trial court's decision granting summary judgment in favor of RMI on its claim for breach of lease and on RMI's counterclaim for constructive eviction. Under Civ.R. 56(C), a motion for summary judgment may be granted only when no genuine issue of material fact remains to be litigated, the moving party is entitled to judgment as a matter of law, and it appears from the evidence that reasonable minds can come to but one conclusion, and with the evidence construed most strongly in favor of the nonmoving party, that conclusion is adverse to that party. *See Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996); *V.R. v. Cincinnati-Hamilton Cty. Community*

Action Agency, 1st Dist. Hamilton No. C-140230, 2014-Ohio-5061, ¶ 8. This court reviews a ruling on summary judgment de novo. *V.R.* at ¶ 8.

{¶13} The issue here is whether the Frisches failed to remedy the conditions on the property within the 30-day period, and whether the conditions at the end of the period amounted to a constructive eviction, such that summary judgment in favor of RMI was appropriate. Constructive eviction has been defined as “such a failure or interference on the part of the landlord with the intended enjoyment of the leased premises as to be of a substantial nature and so injurious to the tenant as to deprive him of the beneficial enjoyment of the leased premises.” *Nye v. Schuler*, 110 Ohio App. 443, 445-446, 165 N.E.2d 16 (4th Dist.1959); see *JAL Dev., Ltd. v. LivFitNutrition, LLC*, 1st Dist. Hamilton No. C-130769, 2014-Ohio-3830, ¶ 11 (“A constructive eviction requires that the tenant be compelled to abandon the premises as a result of actions by the landlord.”). As a general matter, a tenant that has been constructively evicted has no obligation to pay rent. *JAL Dev., Ltd.* at ¶ 11, citing *GMS Mgt. Co. v. Datillo*, 8th Dist. Cuyahoga No. 75838, 2000 Ohio App. LEXIS 2626, *29 (June 15, 2000).

{¶14} Relying on Konerman’s affidavit, RMI argues that the Frisches failed to comply with RMI’s demands to eliminate rats from the premises, clean the basement, eliminate rat access points and harborage areas, and repair roof leaks. According to David’s deposition and affidavit, however, the Frisches hired contractors to manage the pest-control issue, with no reported problems, the basement had been cleaned, and the rat access points and harborage areas had been repaired. As to the roof leaks, David had repaired any leaks and did not see any evidence of new leaks. Construing the evidence most strongly in favor of the

Frisches, a genuine issue of material fact exists as to whether the Frisches failed to comply with RMI's demands such that RMI was deprived of any beneficial use and enjoyment of the property. *See Nye* at 445-446; *JAL Dev., Ltd.* at ¶ 11; Civ.R. 56. Thus, the trial court erred in granting summary judgment in favor of RMI on the Frisches' claim for breach of lease and on RMI's counterclaim for constructive eviction.

{¶15} The Frisches also alleged in their complaint that RMI had damaged the premises over and above ordinary wear and tear. Although RMI had not moved for summary judgment on this claim, the trial court nevertheless "dismissed" the entirety of the Frisches' complaint with prejudice, in addition to granting RMI's motion for summary judgment. But the Frisches failed to assign as error or to make any argument with regard to the dismissal of their property-damage claim. Thus, we will not reverse that portion of the trial court's decision. *See Berger v. Wade*, 1st Dist. Hamilton No. C-120863, 2014-Ohio-1262, ¶ 25, citing App.R. 16(A) ("To receive consideration on appeal, trial-court errors must be argued and supported by citation to the record.").

{¶16} The Frisches also sought damages for any expenses incurred in securing a new tenant. At David Frisch's deposition, he testified that these expenses include "financial concessions" incurred by the Frisches in securing a new tenant, which, at the time of his deposition, would have included a possible \$25,000 contribution from the Frisches to remodel the space for a potential tenant. RMI moved for summary judgment specifically as to the financial-concession damages. The Frisches did not respond to RMI's summary-judgment motion with respect to the financial-concession damages, and they again do not argue or support that the

trial court erred in granting summary judgment on this basis. Therefore, we will not reverse that portion of the trial court's decision. *See id.*; Civ.R. 56(E). We affirm that portion of the trial court's decision granting summary judgment in favor of RMI as to the Frisches' claim for financial-concession damages, and dismissing their claim for damages to the premises above ordinary wear and tear.

{¶17} In conclusion, we sustain the Frisches' assignments of error to the extent that we determine that the trial court erred in granting summary judgment in favor of RMI on the Frisches' claim for breach of lease and on RMI's counterclaim for constructive eviction, and that portion of the trial court's decision is reversed, and the cause is remanded for further proceedings.

Judgment affirmed in part, reversed in part, and cause remanded.

HENDON, P.J., and HILDEBRANDT, J., concur.

LEE HILDEBRANDT, JR., retired, from the First Appellate District, sitting by assignment.

Please note:

The court has recorded its own entry on the date of the release of this opinion.