[Cite as *Classic A Properties v. Brown*, 2003-Ohio-5850.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

CLASSIC A PROPERTIES,	:	
	:	
Plaintiff-Appellee,	:	Case No. 02CA2868
	:	
v.	:	
	:	
SHANNA BROWN,	:	DECISION AND JUDGMENT ENTRY
	:	
Defendant-Appellant.	:	**RELEASED 9/30/03**

APPEARANCES:

COUNSEL FOR APPELLANT:
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EVANS, P.J.

{¶1} Defendant-Appellant Shanna Brown appeals the judgment of the Portsmouth Municipal Court, which granted Plaintiff-Appellee Classic A Properties' motion for summary judgment on its complaint in forcible entry and detainer. Appellant asserts that the trial court erred by failing to dismiss the action for lack of jurisdiction and by granting appellee's motion for summary judgment.

{¶2} For the reasons that follow, we reverse the judgment of the trial court.

Trial Court Proceedings

{¶3} Plaintiff-Appellee Classic A Properties is the owner of Pleasant Valley Apartments located in Wheelersburg, Ohio. Defendant-Appellant Shanna Brown has been a tenant at Pleasant Valley Apartments since September 1996, her lease having been most recently renewed in August 2000. Pleasant Valley Apartments provides federally subsidized housing to tenants through rent subsidies administered by the United States Department of Agriculture, Rural Economic and Community Development Service (USDA). As such, appellee could only terminate, or not renew, a lease for specific reasons.

{¶4} During the time she occupied her apartment at Pleasant Valley Apartments, two fires occurred. The first fire happened in December 1996, as a result of grease on the stove igniting. The second fire occurred in September 2000, as a result of appellant smoking in bed. The local fire department was dispatched to the apartment for each fire. Upon arrival at the apartment for the second fire, the firefighters found the apartment engulfed in smoke and a mattress on fire in the bedroom and extinguished it.

{¶5} In May 2001, appellee gave appellant a ninety-day notice that it would not be renewing appellant's lease. Appellee informed appellant that the lease would not be renewed due to health and safety issues, particularly the aforementioned fires. Accordingly,

appellee instructed appellant to vacate the apartment no later than August 31, 2001. On September 17, 2001, appellee again sent appellant notice to vacate the apartment by September 21, 2001. Appellant did not vacate the premises, and appellee filed a complaint in forcible entry and detainer with the Portsmouth Municipal Court.

{¶6} Subsequently, appellant filed a motion for judgment on the pleadings and an answer to the complaint. Appellant asserted in her answer and motion that appellee was not permitted under federal regulations to terminate a lease simply because it had expired. Additionally, appellant asserted in her answer that appellee did not have good cause to terminate or non-renew the lease, and that appellee had continued to collect rent from the USDA on appellant's behalf, even after the initiation of the eviction action.

{¶7} Eventually, appellee moved for leave from the trial court to amend its complaint to clarify that the lease was not renewed due to the health and safety issues arising from the fires in appellant's apartment. Appellant opposed appellee's motion to amend the complaint, but the trial court granted appellee leave to amend the complaint.

{¶8} Appellee filed its amended complaint, and appellant filed an answer to the amended complaint and moved for judgment on the pleadings. Subsequently, the trial court granted the parties leave to file motions for summary judgment.

{¶9} Appellant filed her motion for summary judgment, in which she argued that appellee could not bring an eviction action based solely on the expiration of the lease due to federal regulations regarding subsidized housing. Appellant also argued that the fires could not be the basis for the eviction because the fires occurred before the lease had been renewed, even though one fire occurred after the most recent renewal of the lease. Additionally, appellant argued that the eviction notice issued by appellee failed to give notice of appellant's right to cure as found in the lease and federal regulations. Finally, appellant argued that appellee waived its eviction action by continuing to accept rent paid by the USDA.

{¶10} Appellee filed its motion for summary judgment arguing that appellant negligently caused the two fires in her apartment, endangering herself and the other tenants in the apartment complex. Appellee asserted that its ninety-day notice informed appellant of the specific breach of the lease and informed her of her rights to appeal the decision to not renew the lease to the USDA. Appellee argued that federal regulations permit the non-renewal of a lease based on the tenant's material breach of the lease or conduct that results in substantial physical damage to the apartment.

{¶11} The trial court subsequently granted appellee's motion for summary judgment and denied appellant's motion for summary judgment. The trial court found that both state and federal law allow for the non-renewal of a lease due to threats to the safety of other tenants.

Judgment was entered in appellee's favor and appellant was ordered to vacate the premises.

The Appeal

{¶12} Appellant timely appealed the decision of the trial court and raises the following assignments error for our review.

{¶13} First Assignment of Error: "The trial court erred in failing to dismiss the action because it lacked jurisdiction over the case."

{¶14} Second Assignment of Error: "The trial court erred in granting summary judgment against the appellant as it was contrary to law and was an abuse of discretion."

{¶15} Appellant also moved for a stay of the trial court's judgment pending the outcome of this appeal. This Court stayed the judgment pending this decision.

I. Trial Court's Jurisdiction in Forcible Entry and Detainer Actions

{¶16} In her First Assignment of Error, appellant asserts that the trial court lacked jurisdiction to rule on the merits of a forcible entry and detainer action because appellee accepted rent subsidies on appellant's behalf after appellee issued the three-day notice. Appellant raised this issue in both her answer and motion for summary judgment, even though she did not specifically use the term "jurisdiction."

A. Summary Judgment Standard of Review

{¶17} We conduct a de novo review of a trial court's decision to grant summary judgment pursuant to Civ.R. 56. See *Renner v. Derin Acquisition Corp.* (1996), 111 Ohio App.3d 326, 676 N.E.2d 151. The Supreme Court of Ohio has established the test to be employed when making a determination regarding a motion for summary judgment.

{¶18} "Under Civ.R. 56, summary judgment is proper when '(1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.'" *Welco Industries, Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 346, 1993-Ohio-191, 617 N.E.2d 1129 (citations omitted). Therefore, upon review, we give no deference to the judgment of the trial court. See *Renner*, supra.

{¶19} Additionally, when a party to an action moves for summary judgment, the movant has the burden of showing that no genuine issue of material fact exists as to all essential elements of a claim, even those issues the opposing party would bear the burden of proving at trial. See *Vahila v. Hall*, 77 Ohio St.3d 421, 1997-Ohio-259, 674 N.E.2d 1164. However, a nonmoving party may not rest upon the allegations set forth in its pleadings in response to a properly supported summary judgment motion. See *State ex rel. Mayes v. Holman*, 76 Ohio St.3d 147, 1996-Ohio-420, 666 N.E.2d 1132. The

nonmoving party must show that a genuine issue of material fact remains to be tried, by pointing to specific facts in the record, either through affidavits or by other proper means. See id.

B. Supporting Documentation for Summary Judgment Motions

{¶20} At this juncture, we feel it necessary to address the need for supporting affidavits and documentation when moving for summary judgment. A trial court is permitted to consider "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact" when ruling on a motion for summary judgment. Civ.R. 56(C). Civ.R. 56(E) provides that, "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit."

{¶21} In the case sub judice, appellant filed her motion for summary judgment without any supporting affidavits. In support of the motion, appellant includes a copy of answers to interrogatories made by appellee's representative. On the other hand, appellee included an affidavit with its motion. That affidavit refers to other documents (i.e., the fire department's incident reports concerning the two fires). Appellee's documentation (i.e., incident

reports) was not provided for the trial court's review in the proper format. While the incident reports were referred to in appellee's affidavit, the attached copies were not sworn or certified copies.

{¶22} "Where the opposing party fails to object to the admissibility of the evidence under Civ.R. 56, the court may, but need not, consider such evidence when it determines whether summary judgment is appropriate." *Bowmer v. Dettelbach* (1996), 109 Ohio App.3d 680, 684, 672 N.E.2d 1081; see, also, *State ex rel. The V Cos. v.* Marshall, 81 Ohio St.3d 467, 1998-Ohio-329, 692 N.E.2d 198. Appellant did not object to the inclusion of the incident reports with the motion for summary judgment, and the trial court considered those reports in its decision. Since the trial court considered all of the documentary evidence in this case, and no one has objected on appeal, we will do so as well.[1]

C. Acceptance of Rent Subsidies After Notice to Vacate

{¶23} As we previously noted, appellant asserts that the trial court erred by failing to dismiss appellee's action. Appellant argues that by accepting the rent payments made on her behalf by the USDA, after issuing its three-day notice to vacate, appellee waived that notice. Accordingly, appellant asserts that the trial court was

[1] We further note that these incident reports only establish that two fires occurred in appellant's apartment and state the cause of the fires. Neither of these facts is contested by appellant. The fact that the two fires occurred is not at issue. The only issue is whether they provide sufficient justification for the non-renewal of appellant's lease.

without jurisdiction to hear appellee's forcible entry and detainer action.

{¶24} Chapter 1923 of the Ohio Revised Code governs forcible entry and detainer actions. The code provides that a party desiring to commence a forcible entry and detainer action must notify the adverse party to leave the premises, the possession of which the action is about to be brought, three or more days before beginning the action. See R.C. 1923.04(A). "Proper service of a [] three-day notice to leave [the] premises is a condition precedent to beginning [] an action in forcible entry and detainer." 37 Ohio Jurisprudence 3d, Section 85, Ejectment and Related Remedies; see, also, *Manifold v. Schuster* (1990), 67 Ohio App.3d 251, 260-261, 586 N.E.2d 1142; *Sternberg v. Washington* (1960), 113 Ohio App. 216, 220-221, 177 N.E.2d 525 (holding that, "In the absence of a showing that [the three-day] notice was properly served, the trial court lacked jurisdiction to proceed [to the merits of the forcible entry and detainer action]). Thus, if the required three-day notice is not properly served upon a tenant, or is waived by the landlord, the trial court is without jurisdiction to consider the merits of the landlord's forcible entry and detainer action. See *Manifold* and *Sternberg*, supra; see, also, *Associated Estates Corp. v. Bartell* (1985), 24 Ohio App.3d 6, 9, 492 N.E.2d 841 (stating, "if the lessor waives the notice to vacate, the action has not been properly

commenced and the trial court commits reversible error if it proceeds on the merits of the case.").

{¶25} "Generally, whether the landlord waives the notice requirement is a question of fact." *Associated Estates Corp. v. Bartell*, 24 Ohio App.3d at 9, citing *Presidential Park Apts. v. Colston* (App.1980), 17 O.O.3d 220, 221. "By accepting '*future rent payments*,' after serving a notice to vacate, the landlord is deemed to have waived the notice to vacate as a matter of law since such acceptance is inconsistent with the landlord's notice to vacate. ***. The landlord does not waive the notice to vacate if, during pendency of the suit, the landlord accepts rent from a tenant in occupancy for 'liability already incurred.'" Id.; see, also, *Bristol Court v. Jones* (Sept. 29, 1994), Pike App. No. 93CA520; *Sheridan Manor Apartments v. Carter* (Dec. 22, 1992), Lawrence App. No. 92CA4.

{¶26} In the case sub judice, appellant's rent was being fully subsidized by the federal government. In other words, the USDA was paying rent to appellee on appellant's behalf. According to appellee's own answers to appellant's interrogatories, appellee accepted rent payments from the USDA on appellant's behalf after it had served its three-day notice on appellant. These payments were not for rent that was past due. Appellee's acceptance of appellant's rent payments, even if made by the USDA, is inconsistent with its demand that appellant vacate the apartment. Accordingly, appellee waived its three-day notice served upon appellant and the trial court

erred in proceeding to address the merits of the forcible entry and detainer action. See *Manifold*, *Sternberg*, and *Bartell*, supra.

{¶27} Therefore, we sustain appellant's First Assignment of Error.

II. Remaining Assignment of Error

{¶28} Based on our disposition of appellant's First Assignment of Error, we find that the remaining assignment of error is rendered moot. See App.R. 12(A)(1)(c).

Conclusion

{¶29} Since appellee waived its three-day notice to vacate the premises by accepting future payments of rent on appellant's behalf from the USDA, the trial court was without jurisdiction to address the merits of appellee's forcible entry and detainer action. Accordingly, we sustain appellant's First Assignment of Error. Therefore, we reverse the judgment of the trial court and remand for further proceedings not inconsistent with this opinion.

Judgment reversed and remanded.

JUDGMENT ENTRY

It is ordered that the **JUDGMENT BE REVERSED** and the cause remanded to the trial court for further proceedings consistent with this opinion, costs herein taxed to appellee.

The Court finds that there were reasonable grounds for this appeal.

It is further ordered that a special mandate issue out of this Court directing the **PORTSMOUTH MUNICIPAL COURT** to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this Entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, J., and Kline, J.: Concur in Judgment Only.

FOR THE COURT

BY: _____
David T. Evans
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.