[Cite as *Claypool v. Dews*, 2018-Ohio-5401.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
CARROLL COUNTY

JESSIE R. CLAYPOOL,

Plaintiff-Appellee,

v.

GREG DEWS,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 18 CA 0925

Civil Appeal from the
Carroll County Municipal Court of Carroll County, Ohio
Case No. CVI 1700437

BEFORE:
Cheryl L. Waite, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed.

Jessie R. Claypool, 61 East Humber Street, Fayetteville, Ohio 45118, *Pro se* Appellee, No Brief Filed.

Atty. Hwa Lumley, 63 East Main Street, Carrollton, Ohio 44615, for Defendant-Appellant.

Dated: December 31, 2018

WAITE, J.

{¶1} Appellant, Greg Dews, appeals a February 15, 2018 Carroll County Municipal Court judgment entry awarding double damages in the amount of $1,200 in favor of Appellee, Jessie R. Claypool in his action seeking a return of his security deposit after the termination of a residential lease. Appellant also appeals the trial court's finding that Appellee gave proper notice to terminate the month-to-month lease. We conclude the trial court did not abuse its discretion in granting damages to Appellee on his complaint for return of his security deposit. Moreover, the trial court did not err in finding Appellee gave proper notice of termination of the month-to-month lease. The judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} Appellee and his wife have a permanent residence elsewhere in the State of Ohio but due to the transitory nature of his occupation, he entered into short-term residential leases from time to time. Appellee entered into a lease with Appellant on March 11, 2017 for a house located in Carrollton, Ohio. A copy of the lease was admitted into evidence at trial. The terms specified that it was a month-to-month lease and that any notice to terminate "must comply with the applicable legislation of the State of Ohio." (3/11/17 Lease Agreement, ¶ 7.) Rent was charged at $800 per month, due on or before the 11th day of the month. The lease also provided a utility allowance, with Appellee being responsible for any utility charge over $200 in any month of the lease. Appellee paid a security deposit of $600 which was to be returned to Appellee at the end of the lease as long as there was only "reasonable wear and tear" to the property. (3/11/17 Lease Agreement, ¶ 12.)

{¶3} Appellee drafted a letter on October 6, 2017 notifying Appellant that he was terminating the month-to-month lease. Appellee testified that he included the letter in an envelope with the check for his final month's rent on October 13, 2017. This covered the rental fee until November 11, 2017. (2/15/18 Tr., p. 18.) As was their usual practice and as noted in the text message exchanges admitted at trial, Appellee placed the letter and check in Appellant's mailbox. (Plaintiff's Exh. 1.) Appellee testified Appellant clearly received the notification, because he cashed the rent check that had been enclosed with the notice. (2/15/18 Tr., p. 16.) Appellee vacated the premises on October 19, 2017 although he had paid rent until November 11th. He had a roommate who remained on the property until November 11th. This roommate took photographs of the property on the day he left. The photos were admitted into evidence in the trial court. While Appellee's roommate was not named on the lease agreement, Appellant was aware that Appellee had a roommate. (2/15/18 Tr., p. 8.) After several text messages between the parties, Appellant refused to return Appellee's security deposit.

{¶4} On December 19, 2017 Appellee filed a *pro se* complaint in Carroll County Municipal Court seeking the return of his security deposit. On February 6, 2018, Appellant filed a counterclaim against Appellee, alleging that Appellee failed to give proper notification he was terminating the lease. Appellant claimed he did not discover Appellee had vacated the premises until December 11, 2017. He also alleged that Appellee had exceeded the monthly utility amount by $27.15 in March of 2017 and by $585.86 in November of 2017 and that Appellee failed to pay the late fee of $5 per day as required under the lease agreement. As a result, Appellant sought $838.01 in

judgment against Appellee in addition to retention of the $600 security deposit. (2/6/18 Defendant's Counterclaim).

{¶5} The matter came on for hearing on February 15, 2018. Appellee appeared *pro se.* Appellant was represented by counsel. A partial transcript of the proceedings has been made a part of the record. Both parties presented testimony regarding the details of the lease as well as the events surrounding Appellee's termination. Appellee presented a binder which included copies of all canceled rental checks, as well as a copy of the notification of termination letter and the text messages between the parties detailing their interactions relative to rental payments and various maintenance issues with the property. Appellee testified that he travels frequently for his occupation and this instance was the first time in his ten years of short term rental that he has had a security deposit withheld. (2/15/18 Tr., p. 3.) He testified that the notice of termination letter was dated October 6, 2017, but that he did not place it in Appellant's mailbox until October 13, 2017. (2/15/18 Tr., pp. 17-18.) Appellee also testified that he included the final month's rent, which covered the rent due and owing through November 11th, in the envelope with the notification letter and that Appellant had cashed this check. (2/15/18 Tr., pp. 15-16.) Appellee also presented copies of text messages he sent to Appellant stating that he delivered the notice and final rent check. (2/15/18 Tr., p. 18.) Appellee testified that he was scheduled to be out of the country on a vacation with his wife at the end of October, so he removed all of his items from the premises and vacated on October 9th. He instructed his roommate to remain at the property to clean and take pictures showing the status of the property before the roommate left on November 11th. (2/15/18 Tr., pp. 25-26.)

{¶6} Appellant testified that he did not know exactly when Appellee vacated the premises. He testified that he drove by the property on November 15th. Appellee's trailer was still there, so he assumed Appellee had not moved out, although he did not contact him or go to the door of the residence to find out. (2/15/18 Tr., pp. 24-25.) Appellee had earlier testified that while the trailer belonged to him, it was removed from the property when he left on October 9th. (2/15/18 Tr., p. 25.) Appellant's counsel stated in closing that Appellant never received Appellee's notice letter. (2/15/18 Tr., p. 24.)

{¶7} Regarding Appellant's counterclaim, he alleged he was not aware Appellee had vacated the premises until December 11th. At trial, he did not bring any evidence regarding his claim for additional fees, but the trial court provided him with an opportunity to retrieve certain documents from his vehicle before proceeding with the hearing on Appellant's counterclaim. The partial transcript filed with this Court reflects only that Appellant's claim for overages on the water bill was withdrawn. (2/15/18 Tr., p. 23.) The record contains no other evidence in support of his allegations regarding outstanding fees and utility payments in his counterclaim. Appellant also presented no evidence demonstrating that he provided Appellee with a statement for the alleged utility overages or any notice that Appellee owed fees, utility charge overages, or past due rent as alleged in Appellant's counterclaim.

{¶8} Again, only a partial transcript has been made part of this record. It includes the hearing on Appellant's claim which asks for return of his security deposit, but the only portion of this partial transcript that addresses Appellant's counterclaim is his counsel's closing argument. At the end of the presentation of evidence, the trial

court concluded that Appellee had provided the appropriate notice of termination of the lease agreement. The trial court also concluded that Appellant had not properly withheld Appellee's security deposit or met his burden in demonstrating Appellant was entitled to additional monies under the lease. In a judgment entry dated February 15, 2018, the trial court granted judgment in favor of Appellee regarding the security deposit and dismissed Appellant's counterclaim. Appellant brought this timely appeal asserting two assignments of error.

ASSIGNMENT OF ERROR NO. 1

> THE TRIAL COURT ERRED IN FINDING THAT APPELLEE HAD GIVEN APPELLANT PROPER NOTICE TO TERMINATE THE LEASE.

{¶9} Appellant contends the trial court erred in concluding that proper notice of the lease termination was given. Appellant argues that Appellee was required to provide notice of termination of the month-to-month lease by October 11, 2017, but Appellee testified that he delivered the notice on October 13, 2017. As Appellee did not meet the thirty-day notice requirement, the lease was not properly terminated and Appellant is entitled to an additional month of rent through December 11.

{¶10} The parties' lease states it was a month-to-month tenancy, which included the following language: "Any notice to terminate this tenancy must comply with the applicable legislation of the State of Ohio." (3/11/17 Lease Agreement, ¶ 7.)

{¶11} R.C. 5321.17(B) is the relevant statute in this matter, and provides:

> Except as provided in division (C) of this section, the landlord or the tenant may terminate or fail to renew a month-to-month tenancy by notice given the other at least thirty days prior to the periodic rental date.

{¶12} Appellee in this matter was required by the terms of the lease, which incorporated the statute, to provide Appellant with notice of his intent to terminate the lease within thirty days. The record reflects that Appellee provided somewhat shorter notice because he delivered the notification letter on October 13th rather than October 11th. The question before us becomes whether this notice is sufficient to serve as notice to Appellant of his intent to terminate this lease.

{¶13} The Eighth Appellate District has held that "hypertechnical construction" of a residential lease provision should not be required where a party has substantially complied with a notice provision. *Meadowbrook Development Corp. v. Roberts,* 8th Dist. No. 79747, 2001-Ohio-4176, 2001 WL 1654540, *4. Citing a Tenth District case, *McGowan v. DM Group IX,* 7 Ohio App.3d 349, 455 N.E.2d 1052, the *Meadowbrook* court concluded that although the party did not provide written notice within the time period required under the lease, there was actual notice in the form of oral communications well before the time period required for written notice under the lease. *Id.* In *Meadowbrook*, the court held:

> As in *McGowan*, appellant is attempting to take advantage of a hypertechnical construction of this particular lease provision. "[W]here a tenant has timely substantially complied, but not in writing, with the lease provision, and the landlord has actual knowledge of the tenant's intent to vacate at the expiration of the lease term, to require further written notice would be both hypertechnical and unconscionable."

Id. at *9, citing, *McGowan* at syllabus.

{¶14} The Eighth District reaffirmed that decision in another recent landlord tenant matter concluding that a strict application of a residential lease would be "hypertechnical and unconscionable." *Continental Ents., Ltd. v. Hunt,* 8th Dist. No. 102200, 2015-Ohio-5411, ¶ 28 quoting, *Meadowbrook* at *10-11.

{¶15} Both the Eleventh and Third Districts have held that a party has substantially complied with the notice provision of a lease agreement when oral notice had been given well in advance of termination in the absence of written notification. See *Ballard v. KMG Investors, Ltd. Partnership,* 3d Dist. No. 14-92-5, 1993 WL 293944 (Aug. 3, 1993); *Seginak v. ABC Mgt. Co.,* 11th Dist. No. 3816, 1987 WL 17258 (Sept. 18, 1987).

{¶16} Appellee's letter terminating the lease included the final rent check. The letter was admitted into evidence at trial and stated:

> I am writing you to let you know about my rental agreement. I will be moving out and this will be the last rent check given to you for I am giving you notice that I will no longer be employed after November 11, 2017. Thank you for your help and hope you have a happy Halloween. Jessie Claypool 10/06/17

(Plaintiff's Exh. 1.)

{¶17} At trial, Appellee testified that the letter was dated October 6, 2017 but that he did not place it in Appellant's mailbox until October 13, 2017. (2/15/18 Tr., pp. 17-18.) Appellee also testified that he included the last month's rent in the envelope with the notification letter and that Appellant cashed the check. (2/15/18 Tr., pp. 15-16.)

{¶18} As the record here contains no actual testimony from Appellant about his counterclaim, we cannot consider any references to his alleged statements to the trial court he has included in his brief in this matter. At trial, Appellant's counsel argued that Appellant never received a written notice of termination. (2/15/18 Tr., p. 24.) As earlier stated, Appellee testified that he placed the notice of termination letter in the envelope with his final rent payment and that payment was cashed. Despite the contention of counsel that the letter was not received, counsel is actually arguing that this notice was insufficient because it was delivered on October 13th and not October 11th. Hence, counsel is apparently conceding that notice was received. Appellant testified that he drove by the property on November 15th. Since Appellee's trailer was still there he assumed Appellee had not moved out although he did not attempt to contact him or go to the door of the residence to check. (2/15/18 Tr., pp. 24-25.) Appellee testified that he took his trailer with him on October 9th as he was leaving the country to go on a Mediterranean cruise with his wife, and that his roommate had his own truck, which he loaded with his belongings when he, in turn, left the premises on November 11th. (2/15/18 Tr., pp. 25-26.) It is apparent that there was conflicting testimony, here, and that the trial court determined that Appellee was more credible.

{¶19} There is a fairly longstanding line of cases demonstrating that equitable considerations will be utilized to determine whether notice of termination was properly provided in a residential lease. These all concern oral notification of termination of the lease which occurred before the written notification was required. In those cases, the tenant failed to provide written notification. In the matter before us, there is no record of earlier oral notification, but Appellee missed the date the written notification was due by

one day. The trial court concluded that Appellee substantially complied with the notification of termination requirement under the lease when he placed the written notification in Appellant's mailbox two days after it was due. This lapse was insignificant, here, because the short delay still provided ample notice to Appellant that Appellee was terminating the month-to-month lease, which is the underlying purpose of a notification provision within a lease contract. Because Appellee substantially complied with his requirement, this record shows the trial court did not err in concluding that Appellee provided adequate notice of termination of the lease. Appellant's first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

> THE TRIAL COURT ERRED IN AWARDING RETURN OF THE SECURITY DEPOSIT AND DAMAGES TO APPELLEE.

{¶20} Appellant counterclaimed in this matter, seeking to retain the security deposit and seeking additional damages. A security deposit is defined as "any deposit of money or property to secure the performance by the tenant under a rental agreement." R.C. 5321.01(E). Application of a security deposit to monies owed by a landlord under a rental agreement are governed under R.C. 5321.16(B) which reads:

> Upon termination of the rental agreement any property or money held by the landlord as a security deposit may be applied to the payment of past due rent and to the payment of the amount of damages that the landlord has suffered by reason of the tenant's noncompliance with section 5321.05 of the Revised Code or the rental agreement. Any deduction from the security deposit shall be itemized and identified by the landlord in

> a written notice delivered to the tenant together with the amount due, within thirty days after termination of the rental agreement and delivery of possession. The tenant shall provide the landlord in writing with a forwarding address or new address to which the written notice and amount due from the landlord may be sent. If the tenant fails to provide the landlord with the forwarding or new address as required, the tenant shall not be entitled to damages or attorneys fees under division (C) of this section.

{¶21} R.C. 5321.16(C) further states:

> If the landlord fails to comply with division (B) of this section, the tenant may recover the property and money due him, together with damages in an amount equal to the amount wrongfully withheld, and reasonable attorneys fees.

{¶22} Where a tenant fails to give the required notice of intent to terminate a lease within the prescribed time period in a month-to-month tenancy, the landlord may be able to apply the security deposit to the amount due in rent or other damages. *Simone v. Hill N' Dale Homes,* 7th Dist. No. 89-B-9, 1989 WL 158232, *1, citing *Bowman v. Community Mgt. Corp.,* 14 Ohio App.3d 31, 469 N.E.2d 1038 (1st Dist.1984), syllabus. However, the landlord cannot simply declare a security deposit forfeit. In order to recover rental monies or other damages under the rental agreement, the landlord must properly establish those damages according to the terms of the lease agreement and R.C. 5321.16(B). The landlord also has a duty to provide the tenant with adequate written notice of the deductions intended to be taken from the security

deposit within thirty days after termination of the lease and delivery of possession. *Simone*, *supra*, *2. The tenant has a duty to provide a forwarding address to the landlord. If a landlord has wrongfully withheld a tenant's security deposit, the landlord is liable for damages equal to twice the amount that was wrongfully withheld as well as reasonable attorney fees, even if the landlord complied with the written itemized deduction requirement. *Smith v. Padgett,* 32 Ohio St.3d 344, 513 N.E.2d 737 (1987), paragraph three of the syllabus.

{¶23} Here, Appellee included his forwarding address in the October 6th written notification letter. Appellee testified at trial that it was only on the day of trial that Appellee saw Appellant's counterclaim for damages and that he had not been notified previously of any alleged itemized damages regarding the rental agreement. (2/15/18 Tr., p. 7.) The record reflects that Appellee left the final rent check and termination in the mailbox at the residence as was the usual practice between the parties. Appellee also testified that his roommate remained at the premises until November 11th and took pictures of the interior on that date to demonstrate that there was no damage beyond wear and tear on the property. We note that Appellant raises no arguments relating to possession in this matter, but solely relies on his alleged lack of notice.

{¶24} Appellee also testified that he and Appellant exchanged numerous text messages beginning October 13th in which he stated that he was terminating the lease and had sent the rent check. The texts were admitted into evidence at trial. Appellee repeated his forwarding address in the text messages and repeatedly requested the return of the security deposit. (Plaintiff's Exh. 1.) In those messages Appellant does not mention alleged damages due under the lease until December 14, 2017, when he

texted, "You was over limit on your utilities." On December 24, 2017, after Appellee again requested his security deposit, Appellant sent three texts:

> 1/3 I received a 500.00water bill you need to rend me a check for. You did not give the required 30 days notice. You didnt even tell me you left. I found yo
>
> 2/3 u gone the day i came for the rent. Ohio law requires 30 days. You owe utilities and clean up. You slandered my rental calling me names & raying bedbugs
>
> 3/3 Pleare send money you owe me 1200.00. thank you in advance. [sic]

(Plaintiff's Exh. 1.)

{¶25} In his counterclaim filed February 6, 2018, one week prior to the trial, Appellant lists as damages: (1) a March of 2017 utility overage beyond the $200 allowance of $27.15; (2) an unspecified utility overage in November of 2017 of $585.86; (3) a $5 late fee per day because the November 2017 rent was allegedly paid five days late, totaling $25.00; (4) a December of 2017 rent in the amount of $800 because Appellant was not aware that Appellee intended to terminate the lease until December 11, 2017.

{¶26} Again, the partial transcript filed with us is lacking any reference to Appellant's counterclaims other than a final argument by counsel. There is no evidence in the record that Appellant attempted to provide written notice to Appellee of any deductions from the security deposit and Appellant fails to cite to any evidence of record demonstrating the validity of the fees alleged in his counterclaim. The trial court noted:

> You know -- and then if you didn't go over there on November 11th and take possession, Mr. Dews, I think you just did a lot of things really loosey-goosey here. And this is a business relationship. You've got to be a little more -- you know -- if you're just going to give the deposit back then it's no big deal. You can do it on a handshake and you can, you know, just send him the check or whatever.
>
> But you're going to withhold a deposit, then you got to follow the law. And the law says that you have to give an itemized -- they have to notify you and give you, you know, their forwarding address. And then you have 30 days to send an itemization. But, like I said, you get another bite at this apple to try to see whether there's any monies that you should have withheld from the deposit that you could have withheld. I can still give you credit for that. But I'm just not seeing that.
>
> And now the problem is you broke all the rules that are required of landlords when it comes to deposits. And the law says, the statute and the case law says, that the Court must order double damages. That's the law.

(2/15/18 Tr., p. 27.)

{¶27} This record shows Appellant failed to meet the burden of providing written notice of any proposed deductions from the security deposit to Appellee within thirty days of termination of the lease. Further, there is no evidence of record to support the fees alleged in his counterclaim. Again, while Appellee placed the letter notifying Appellant of his termination of the lease in Appellant's mailbox two days late, Appellee

substantially complied with the notice requirement. Hence, Appellant is also not entitled to an extra month of rent. As there is no transcript of Appellant's testimony at trial regarding his counterclaim, we must presume regularity of that portion of the proceedings. *State v. Dumas*, 7th Dist. No. 06 MA 36, 2008-Ohio-872, ¶ 14, citing *State v. Johnson*, 9th Dist. No. 02CA008193, 2003-Ohio-6814, at ¶ 9. Pursuant to R.C. 5321.16(C), once the trial court ruled that Appellee was entitled to the payment of his security deposit, he was also entitled to damages equal to the amount of the security deposit wrongfully withheld. R.C. 5321.16(C). As such, the trial court did not abuse its discretion in awarding Appellee damages and the return of his security deposit. Appellant's second assignment of error is without merit and is overruled.

{¶28} Therefore, based on the foregoing, Appellant's assignments of error are without merit and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Robb, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Carroll County Municipal Court of Carroll County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.