[Cite as *Pedra Properties, L.L.C. v. Justmann*, 2015-Ohio-5427.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102909

PEDRA PROPERTIES, L.L.C.

PLAINTIFF-APPELLEE

vs.

HARVEY JUSTMANN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Shaker Heights Municipal Court
Case No. 14-CVG-00144

BEFORE: E.A. Gallagher, J., Celebrezze, A.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: December 24, 2015

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EILEEN A. GALLAGHER, J.:

{¶1} Defendant-appellant Harvey Justmann appeals from the judgment of the Shaker Heights Municipal Court in favor of plaintiff-appellee Pedra Properties, L.L.C. ("Pedra") on its claims for declaratory judgment and unpaid rent. Justmann contends that the trial court erred in determining that he did not lawfully terminate his lease pursuant to R.C. 5321.07(B) after he complained of continuing problems with water leaking from the walls and ceiling of his laundry room, which his landlord, Pedra, did not repair within thirty days. For the reasons that follow, we affirm the trial court's judgment.

Factual and Procedural Background[1]

{¶2} On July 30, 2012, Justmann and Pedra entered into a written lease agreement pursuant to which Justmann leased a three-bedroom, two- bathroom apartment in the Shaker Regency Apartments complex in Shaker Heights, Ohio. The apartment included a small laundry room with a stacked washer and dryer. The laundry room, located across the foyer from the front door of the apartment, comprised approximately 60 square feet of the 1200 square foot apartment and shared a common wall with the kitchen.

[1]The summary of the facts that follows is based on the factual findings set forth in the trial court's March 11, 2015 decision and judgment entry.

{¶3} The original term of the lease was from October 1, 2012 to September 30, 2013. The lease thereafter automatically renewed for an additional one-year term commencing October 1, 2013 and ending September 30, 2014. The rent for the renewal period was $1,355.00 a month. Justmann also paid a security deposit of $1,105.00.

{¶4} Beginning in February 2013, Justmann notified Pedra that water was leaking from the ceiling in his laundry room. The water was allegedly attributable to damage to the roof of the apartment complex. Due to the winter weather, Pedra was unable to repair the roof until April 2013. Repairs were then made to the roof and cosmetic repairs were made to walls and ceiling of the laundry room. In early May 2013, the laundry room ceiling again began to leak. Additional repairs were made. Pedra removed and replaced the ceiling and repainted the walls in the laundry room.

{¶5} In October 2013, the laundry room ceiling began to leak once again. Justmann reported the problem to Pedra. Pedra failed to correct the problem and, on November 25, 2013, Justmann sent an email to Pedra advising Pedra that he would place his rent into an escrow account beginning December 1, 2013. Pedra responded the same day, advising Justmann that if he did not pay his rent on time, he "may receive a 3 day notice to vacate the premises which begins the eviction process." Justmann did not escrow his rent; instead, he continued to timely pay

his rent to Pedra, but the problem was not resolved. The laundry room ceiling and walls were wet and water stains described as "blister[ing] and black spots" had formed on those walls. Two five-gallon buckets were placed on the floor of the laundry room to catch water dripping from the ceiling. Justmann was caused to empty the buckets and mop the laundry room floor. In addition, water began seeping through the adjoining kitchen wall causing damage to that wall.

{¶6} On December 24, 2013, Justmann delivered a letter to Pedra entitled "Regency Apartment 312 Maintenance Problems," detailing the history of the water leak in the laundry room and the continuing problems Justmann was experiencing with the leak. Justmann advised Pedra that if the problem was not fixed within 30 days, he would terminate the lease and deposit his rent with the Cuyahoga County Clerk of Courts or seek a court order requiring Pedra to make the necessary repairs and a rent reduction "because of the inconvenience of these ongoing problems."

{¶7} In January 2014, the city of Shaker Heights Housing Inspection Department issued a notice of code violation, identifying two violations of Section 1411.23 of the Shaker Heights Codified Ordinances related to the leaking ceiling in Justmann's laundry room. The notice directed Pedra to "[f]ind and correct [the] cause of water damage to ceiling and walls" and to replace the water damaged ceiling and walls in the laundry room within 30 days. Justmann also complained

to the Shaker Heights Health Department.[2] Representatives of both departments testified at trial regarding the condition of the laundry room. Pedra acknowledged the leak in the laundry room and testified that, due to weather conditions, it could not correct the problem until April 2014.

{¶8} On January 27, 2014, Justmann sent a letter advising Pedra that he was terminating the lease.[3] On February 4, 2014, Pedra filed a complaint for rent and declaratory judgment against Justmann in the Shaker Heights Municipal Court. Pedra sought (1) a declaration that the lease was in full force and effect through September 30, 2014 and (2) money damages in the amount of the unpaid rent and late fees due under the lease agreement after Justmann terminated the lease on January 27, 2014. Justmann filed an answer and counterclaim for breach of contract and retaliation. Justmann denied that any amounts were due under the

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[2] The record includes an unsigned letter dated February 18, 2014 from Christy Armstrong, Chief Sanitarian and Environmental Health Director for the City of Shaker Heights, in which she indicates that, during her inspection of the premises, she observed water damage to the laundry room walls and ceiling, water leaking from the ceiling access hatch into buckets underneath and mold "beginning to grow" on the portion of the laundry room wall that was water damaged. The letter is marked as Exhibit D and is included in the record as one of "defendant's exhibits." However, it is not referenced in the trial court's decision and journal entry.

[3]Although a copy of the unsigned letter, marked as Exhibit I, is included in the record as one of "defendant's exhibits," it is not referenced in the trial court's decision and journal entry. In the letter, Justmann states that he is "electing to terminate [his] lease" in accordance with R.C. 5321.07 due to Pedra's failure to fulfill its obligations under R.C. 5321.04, including the "maintenance problems" specified in his December 24, 2013 letter and the city's housing inspection notice dated January 3, 2014. He indicated that he would continue to pay rent "until [he] * * * found suitable housing" and would then "vacate the premises."

lease agreement and asserted that Pedra's claims were barred because (1) the apartment was "largely uninhabitable for the majority of time he lived in it," (2) Pedra had violated the warranty of habitability, (3) he had been constructively evicted from the apartment and (4) he had lawfully terminated the lease pursuant to R.C. 5321.02 and 5321.07. Justmann further alleged that Pedra had wrongfully retaliated against him by threatening to bring an action for possession of the premises after Justmann contacted Shaker Heights officials regarding the alleged building and health code violations and breached the lease by failing to keep the apartment in a habitable condition resulting in his loss of use and quiet enjoyment of a portion of the apartment. Justmann sought to recover his moving expenses, back rent, additional rent for his new apartment and attorney fees and costs.

{¶9} Justmann paid his monthly rent through February 2014 and vacated the premises on February 28, 2014. In April 2014, Pedra fixed the leak and thereafter repaired the laundry room.

{¶10} The case proceeded to a bench trial. Neither party made a request for findings of fact or conclusions of law. On March 11, 2015, the trial court issued its decision, entering judgment in favor of Pedra on its complaint and awarding Pedra $1,921.16 in damages plus costs. The trial court dismissed Justmann's counterclaim with prejudice.

{¶11} This appeal followed. Justmann has raised the following assignment of error for review:

> The trial court erred as a matter of law in granting judgment in favor of the plaintiff as to the plaintiff's claims for contract action upon a lease and action for a declaratory judgment.

Law and Analysis

{¶12} Ohio's landlord-tenant statute, R.C. 5321.01, et seq. imposes duties on landlords that did not exist at common law and provides tenants with leverage to redress breaches of those duties. *Miller v. Ritchie*, 45 Ohio St.3d 222, 224, 543 N.E.2d 1265 (1989). As it relates to this case, R.C. 5321.04(A) requires that a landlord "[c]omply with the requirements of all applicable building, housing, health, and safety codes that materially affect health and safety." R.C. 5321.04(A)(1). It also requires that a landlord "[m]ake all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition." R.C. 5321.04(A)(2). R.C. 5321.07(A) provides, in pertinent part:

> If a landlord fails to fulfill any obligation imposed upon him by section 5321.04 of the Revised Code, * * * or any obligation imposed upon him by the rental agreement, if the conditions of the residential premises are such that the tenant reasonably believes that a landlord has failed to fulfill any such obligations, or if a governmental agency has found that the premises are not in compliance with building,

> housing, health, or safety codes that apply to any condition of the premises that could materially affect the health and safety of an occupant, the tenant may give notice in writing to the landlord, specifying the acts, omissions, or code violations that constitute noncompliance.

{¶13} If the landlord receives the notice and, after receipt of the notice, "fails to remedy the condition within a reasonable time considering the severity of the condition and the time necessary to remedy it, or within thirty days, whichever is sooner," and the tenant is "current in rent payments due under the rental agreement," the tenant may do one of the following:

> (1) Deposit all rent that is due and thereafter becomes due the landlord with the clerk of the municipal or county court having jurisdiction in the territory in which the residential premises are located;
>
> (2) Apply to the court for an order directing the landlord to remedy the condition * * *[; or]
>
> (3) Terminate the rental agreement.

R.C. 5321.07(B).

{¶14} Justmann argues that because he notified Pedra of the ongoing issues with the leaking ceiling in his laundry room and because Pedra did not fix the problem with the leaking ceiling within 30 days, he had a right to terminate the

lease under R.C. 5321.07(B) and that the trial court erred, as a matter of law, in concluding otherwise. We disagree.

{¶15} As an initial matter, we note that no transcript of the trial court proceedings, App.R. 9(C) statement of the evidence or proceedings or App.R. 9(D) agreed statement has been filed with this court. As the appellant, Justmann is responsible for providing this court with the complete record of the facts, testimony and evidentiary matters necessary to support his assignment of error so that we can properly evaluate the trial court's decision. App.R. 9; *Urban Partnership Bank v. Mosezit Academy, Inc.*, 8th Dist. Cuyahoga No. 100712, 2014-Ohio-3721, ¶ 20; *Sagert v. Elden Props. L.P.*, 6th Dist. Erie No. E-07-036, 2008-Ohio-1861, ¶ 17. This duty falls upon Justmann because he, as the appellant, bears the burden of showing error by reference to matters in the record. App.R. 9(B), 12(A)(2), 16(A). Where the record has no transcript or an appropriate substitute for the transcript under App.R. 9(C) or (D), the appellate court "must presume regularity in the proceedings on any finding of fact made by the trial court." *Calabrese v. Zmijewski*, 8th Dist. Cuyahoga No. 86185, 2006-Ohio-2322, ¶ 10, citing *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 400 N.E.2d 384 (1980); *see also Urban Partnership Bank* at ¶ 20 ("In the absence of evidence that is necessary to resolve an assignment of error, a reviewing court must presume the regularity of the trial

court's proceedings and affirm the trial court's judgment."), citing *Tabbaa v. Raslan*, 8th Dist. Cuyahoga No. 97055, 2012-Ohio-367, ¶ 10-12.

{¶16} According to Justmann, no transcript of the trial is available because the parties did not request that the trial court proceedings be stenographically recorded.[4] Justmann, however, asserts that a transcript is "not necessary for this appeal" because the appeal is based on a purely legal issue, i.e., "plain error by the trial court in finding that Mr. Justmann did not lawfully terminate his lease pursuant to [R.C.] 5321.07." While it is possible to review purely legal issues in the absence of a transcript or transcript alternative, *see, e.g., Hepfner v. Hepfner*, 7th Dist. Columbiana No. 05 CO 66, 2007-Ohio-595, ¶ 5, in this case, we must apply R.C. 5321.04 and 5321.07 to the underlying facts in order to determine the merits of Justmann's appeal. The trial court's factual findings are integral to the evaluation of the legal error Justmann claims the trial court made.

{¶17} Justmann's argument centers around the "30-day provision of [R.C.] 5321.07(B)." Justmann argues that the trial court "misstated and misapplied" that provision when determining whether Justmann lawfully terminated his lease. Specifically, Justmann contends that the trial court erred in considering whether Pedra fixed the leak "within a reasonable time," rather than whether it fixed the leak "within a reasonable time * * * or within thirty days, whichever is sooner." He

asserts that "[u]nder [the] express provisions of R.C. 5321.07, upon receipt of notice from a tenant, a landlord has a reasonable amount of time, but no more than thirty days, to address problems like the ones that occurred with the [a]partment in this case" and that the trial court committed "one very clear and plain error of law" when it determined that it was reasonable for Pedra to "wait well beyond thirty days (due to the winter season)" before fixing the leaking ceiling. Justmann relies on the following statement by the trial court in its decision and judgment entry for his assignment of error:

> If the failure is not remedied within a reasonable time, the tenant has several statutory options, including the right to terminate the rental agreement. [R.C.] 5321.07. *Baldwin's Ohio Handbook Series Ohio Landlord Tenant Law*, Common grounds for construct[ive] eviction — Uninhabitability of leased premises, Section 13:22 (2014-15 ed.).

{¶18} We agree with Justmann that "R.C. 5321.07(B) gives a landlord thirty days, *at the most*, to remedy a condition that violates the obligations imposed by R.C. 5321.04 or that a tenant reasonably believes to violate those obligations." (Emphasis sic). *CMB Partnership v. Baker*, 2d Dist. Montgomery No. 18159, 2000 Ohio App. LEXIS 2315, *10 (June 2, 2000). However, Justmann's argument presumes that he satisfied the other requirements for terminating his lease under R.C. 5321.07. Although there appears to have been no dispute that Justmann was current with his rent payments, that he gave (and Pedra received) proper notice of

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[4]Copies of the exhibits that were admitted into evidence at trial are included in the record.

the leak and that Pedra failed to remedy the condition within 30 days, there was clearly a dispute as to the remaining requirement, i.e., whether Pedra's failure to remedy the leak fell within the scope of R.C. 5321.07(A) in the first instance.

{¶19} It is not a landlord's failure to fix any problem or to remedy any condition "within a reasonable time * * * or within thirty days, whichever is sooner" that gives a tenant a right to terminate his lease under R.C. 5321.07(B). The tenant must establish that the landlord failed to fulfill an obligation imposed by R.C. 5321.04 or the rental agreement, that the conditions of the residential premises were such that the tenant reasonably believed that the landlord had failed to fulfill such an obligation or that a governmental agency found that the premises were not in compliance with building, housing, health or safety codes that could materially affect the health and safety of an occupant.[5] R.C. 5321.07(A); *see also Wenzke v. Baird*, 6th Dist. Lucas No. L-13-1244, 2014-Ohio-3069, ¶ 13 ("[T]he remedies available under R.C. 5321.07(B) require a tenant to show that the landlord violated (1) the lease agreement, (2) a building code that could materially affect health and safety, or (3) R.C. 5321.04.").

{¶20} Absent a finding that a housing code violation materially affects an occupant's health and safety, a housing code violation does not support a claim

[5]Justmann has not claimed that Pedra failed to fulfill an obligation imposed by the rental agreement. Accordingly, we do not address that provision of the statute here.

under R.C. 5321.04(A)(1) or 5321.07(A). *See, e.g., Wenzke* at ¶ 15, 17 ("Both R.C. 5321.07(A) and 5321.04(A)(1) pertain to building codes that materially affect health and safety."). Likewise, a tenant must show that a condition exists that renders the premises unfit or uninhabitable in order to terminate a lease based on R.C. 5321.04(A)(2). Conditions or defects that are a mere annoyance or inconvenience do not render a premises unfit or uninhabitable. *See, e.g., Wenzke* at ¶ 18-19 ("'The warranty is one of habitability and is not a warrant against all discomfort and inconvenience.' * * * 'The meaning and interpretation of the statutory phrase "fit and habitable" will not be liberally construed to include that which does not clearly fall within the import of the statute. * * * Fitness and habitability [entail] such defects as lack of water or heat, faulty wiring or vermin infestations' * * *."), quoting *Weingarden v. Eagle Ridge Condominiums*, 71 Ohio Misc.2d 7, 13, 653 N.E.2d 759 (M.C.1995), and *Gress v. Wechter*, 6th Dist. Huron No. H-12-023, 2013-Ohio-971, ¶ 20; *see also Stiffler v. Canterbury Runn Apts.*, 2d Dist. Montgomery No. 19308, 2002-Ohio-5382, ¶ 11 (apartment "infiltrated by leaking water, sewage, growing mold, soaked carpets, and a sagging ceiling" was uninhabitable); *Bogner v. Titleist Club, LLC*, 6th Dist. Wood No. WD-06-039, 2006-Ohio-7003 (trial court properly granted summary judgment on tenants' claims for negligence, constructive eviction and breach of the warranty of habitability based on "persistent moisture/mold/mildew problems" where, "although annoying

and perhaps the cause of some discomfort," tenants presented no evidence to establish that the mold constituted a hazard that was serious enough to require tenants to vacate the premises); *Ruble v. M & L Properties, Ltd.*, 5th Dist. Ashland No. 10-COA-006, 2010-Ohio-6356, ¶ 53-56 (trial court properly determined that rental property was not uninhabitable so as to abate tenants' liability for rent pursuant to R.C. 5321.07 where, even though there was water intrusion in the basement of the rental property during torrential downpours and one of the tenants testified that she "never went down to the basement because of the water and smell," trial court found that tenants were still able to store personal property on pallets in the basement and regularly used the basement to do laundry and to access a chest freezer).

{¶21} In this case, the trial court found that "[f]rom the photographs presented at trial * * * other than the laundry room, the Apartment was in good condition." The trial court further found that "[s]ince the laundry room comprised approximately 0.05%[6] of the space in the Apartment, the laundry room did not cause the Apartment to be uninhabitable or a threat [to] the Defendant's health or safety" and that "although annoying, the laundry room leak did not constitute a constructive eviction." Justmann has not challenged these findings. Based on its

[6]Although the trial court indicated that the 60 square feet laundry room comprised 0.05% of the living space of the 1200 square foot apartments, it actually comprised 5% of the apartment's living

findings, the trial court determined, "[i]n light of all of the circumstances," that Justmann "was not justified in terminating his lease early." We cannot say, based on the record before us, that this determination was error.

{¶22} We have reviewed the photographs of the apartment that were admitted into evidence and included in the record. The photographs show water damage, including water stains and bubbling or peeling paint, on a portion of the ceiling, the ceiling hatch and portions of the walls of a small laundry room along with two plastic buckets, presumably used to collect water from the leak. There is nothing in the record that suggests that Justmann was unable to use the washer and dryer in the laundry room as a result of the leak. The remainder of the apartment appears to be well-maintained and in very good condition. Thus, the photographs support the conclusion that the conditions resulting from the leak did not render the apartment unfit or uninhabitable, did not materially affect Justmann's health and safety and were not such that Justmann could have reasonably believed that they rendered the apartment unfit or uninhabitable or materially affected his health and safety. Without a transcript, we do not know what testimony was introduced on these issues. As such, we must presume regularity. *See, e.g.*, *Keener v. Ewert*, 67 Ohio App.2d 17, 18, 425 N.E.2d 914 (6th Dist.1979) ("In the absence of a transcript of the proceedings or a substitute for the same as provided by App.R. 9,

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space.

the factual findings made by the Municipal Court must be deemed supported by the evidence adduced."); *see also Toyota Motor Credit Corp. v. Delaine*, 7th Dist. Mahoning No. 05 MA 190, 2006-Ohio-4681, ¶ 1-3, 5, 16-18, 25 (where consumer did not file a transcript in consumer's appeal of judgment entered against her in credit corporation's suit for breach of auto lease agreement after consumer turned in vehicle before the lease expired, correctness of trial court proceedings had to be presumed; despite consumer's assertion that no transcript was required because the only issues on appeal were legal issues, transcript was, in fact, required to resolve issues raised on appeal because, while the consumer cited various statutes in her appellate arguments, those statutes had to be applied to the underlying facts to determine the merits of the appeal).

{¶23} Given that the trial court specifically found that the leak did not render the apartment uninhabitable and did not materially affect Justmann's health and safety and that, in the absence of a transcript of the trial court proceedings or an appropriate transcript substitute under App.R. 9(C) or (D), we must presume the correctness of those proceedings, R.C. 5321.04(A)(1), (2) and 5321.07(A) did not apply and Justmann, therefore, did not have a right to terminate his lease under R.C. 5321.07(B).

{¶24} Thus, even if the trial court misstated the length of time a landlord has to remedy a condition after receipt of notice under R.C. 5321.07(A) or misapplied

that provision in its March 15, 2014 decision, any such error was not prejudicial and does not warrant reversal of the trial court's judgment.

{¶25} Justmann's sole assignment of error is overruled.

{¶26} Judgment affirmed.

It is ordered that appellee recover from appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

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EILEEN A. GALLAGHER, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
EILEEN T. GALLAGHER, J., CONCUR