[Cite as *Stambaugh v. T.C. Wood Realty, Inc.*, 2010-Ohio-3763.]

COURT OF APPEALS
MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
EDIE STAMBAUGH, et al.,	:	Julie A. Edwards, P.J.
	:	William B. Hoffman, J.
Appellants-Defendants and Third- Party Plaintiffs	:	John W. Wise, J.
	:	
	:	Case No. 09 CA 00008
-vs-	:	
	:	
	:	O P I N I O N
T.C. WOOD REALTY, INC.		
Third-Party Defendant-Appellee		

CHARACTER OF PROCEEDING:	Civil Appeal from Morrow County Court of Common Pleas Case No. 2006 CV 504
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	July 29, 2010

APPEARANCES:

For Appellants-Defendants and Third-Party Plaintiffs	For Third-Party Defendant-Appellee
KEVIN P. COLLINS Collins & Lowther, LPA 132 South Main Street Marion, Ohio 43302	PAUL MICHAEL LAFAYETTE Reminger & Reminger Co., LPA 65 East State Street, 4th Floor Columbus, Ohio 43215

Hoffman, J.

{¶1} Defendants-appellants, Tim and Edie Stambaugh, appeal the April 30, 2009, Journal Entry of the Morrow County Court of Common Pleas. Third-party defendant-appellee is T.C. Wood Realty, Inc.

STATEMENT OF THE FACTS AND CASE

{¶2} On or about January 5, 2005, Appellants Tim and Edith Stambaugh (aka "Edie"), as owners, entered into a "Property Management and Exclusive Rental Agreement" with appellee T.C. Wood Realty, Inc., as agent. The agreement provided Appellee would rent and manage Appellants' property in exchange for a fee. The agreement further provided, in relevant part, as follows:

{¶3} "THE OWNER FURTHER AGREES TO:

{¶4} "1. Indemnify, defend, and save the Agent harmless from all suits in connection with the Property and from liability from damage to Property and injuries or death of any employee of the Agent or any contractor or other person whomsoever, and to at his own expense public liability insurance, minimum liability coverage of $1,000.000.00 and to furnish the Agent a certificate evidencing the existence of such insurance….

{¶5} "3. Indemnify and save Agents harmless against (i) all claims for damages arising out of alleged violation by Agent, in a representative capacity, or Owner, or both, of any constitutional provision, statue, ordinance or regulation, federal, state or local, which arise out of the offer to lease, leasing, management or operation of the Property hereunder or otherwise; and (ii) all expenses incurred by Agent in connection with the foregoing, including the reasonable fees and costs of counsel retained to defend Agent;

provided, however, that the provisions of this paragraph shall not apply if a court of competent jurisdiction makes a final determination, which is either upheld on appeal, or not appealed within the applicable period of time, that Agent intentionally violated any such constitutional provision, statute, ordinance or regulation."

{¶6} On or about August 29, 2005, Appellants, as lessors, and Matthew and Kali Sexton, as lessees, entered into a lease for the subject premises for a term of one year commencing on October 1, 2005. The lease provided that the Sextons were to pay rent at the rate of $675.00 a month to Appellee. The lease further provided that the Sextons' $675.00 security deposit was to be held by Appellee.

{¶7} Due to disagreements which arose between the Sextons and Appellants, the Sextons opted not to renew the lease, which expired on September 30, 2006. After a walk-through of the premises conducted on October 1, 2006, the Sextons asked for the return of their security deposit. Appellee was instructed by Appellant Edie Stambaugh to withhold the security deposit.

{¶8} After their security deposit was not returned to them, the Sextons, on December 12, 2006, filed a complaint against Appellants. The Sextons alleged Appellants violated R.C. 5321.16(B) by failing to return their security deposit to them or to give them an accounting of how the security deposit was applied. The Sextons sought the return of their security deposit as well as damages. In their complaint, the Sextons further alleged Appellants had defamed them.

{¶9} Thereafter, on January 18, 2007, Appellants filed an answer, counterclaim and third party complaint against Appellee. Appellants, in their third party complaint, alleged Appellee had breached the parties' agreement and was liable to them for all or

part of the Sextons' claim against Appellants. Appellee, in its answer to the third party complaint, alleged, in part, the third party complaint was barred by Appellants' contractual obligation to indemnify Appellee.

{¶10} On September 14, 2007, Appellee, with leave of court, filed an amended answer to the third party complaint and a counterclaim. In its counterclaim, Appellee alleged, in relevant part, as follows:

{¶11} "7. Defendant/Third-Party Plaintiffs are in breach of the terms of the contract as the terms of the contract provide that they hold third-Party Defendant, T.C. Wood Realty, Inc. harmless 'from all suits in connection with the property.' As a result of this litigation the Third-Party Defendant, T.C. Wood Realty, Inc. continue to incur costs and attorneys fees.

{¶12} "8. Defendant/Third-Party Plaintiffs breach of the contract entitles Third-Party Defendant, T.C. Wood Realty, Inc. to reasonable attorney's fees as designed by the contract.

{¶13} "9. As a result of the breach of contract by third-party Plaintiffs, Third-Party Defendant, T.C. Wood Realty, Inc. seeks damages in an amount not yet determined."

{¶14} The Sextons, on January 11, 2008, filed a voluntary dismissal of their second cause of action, which had alleged that appellants had defamed them.

{¶15} On January 25, 2008, Appellee filed a Motion for Summary Judgment. Appellee argued, in part, it was undisputed Appellant Edie Stambaugh had forbidden Appellee, Appellants' agent, from returning the security deposit to the Sextons, and under Ohio law, agents only have authority to perform acts which are authorized by their principals. Appellants did not file a response to the Motion for Summary Judgment.

{¶16} Via Journal Entry filed May 23, 2008, the trial court granted Appellee summary judgment on Appellant's third party complaint, but held Appellee's counterclaim against Appellants "remains to be litigated and determined."

{¶17} A bench trial was conducted on July 16, 2008, on Appellee's counterclaim. Via Journal Entry filed August 23, 2008[1], the trial court held Appellants, in accordance with the indemnification language contained in the "Property Management and Exclusive Rental Agreement", were obligated to reimburse Appellee for attorney's fees Appellee had expended in defending the complaint and in pursuing its counterclaim against Appellants "based upon the hold harmless and indemnity provisions of the contract." The trial court scheduled a hearing for April 14, 2009, on the issue of the amount of attorney's fees to be paid by Appellants to Appellee.

{¶18} As memorialized in a Journal Entry filed April 30, 2009, the trial court awarded Appellee attorney fees in the amount of $17,418.20.

{¶19} Appellants now raise the following assignments of error on appeal:

{¶20} "I. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE STAMBAUGHS BY RULING THE INDEMNIFICATION CLAUSE ENTITLED WOOD TO REIMBURSEMENT OF ATTORNEY FEES PAID BY OR ON BEHALF OF WOOD IN DEFENDING THE STAMBAUGHS' CLAIM AGAINST WOOD.

{¶21} "II. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE STAMBAUGHS BY RULING THE INDEMNIFICATION CLAUSE ENTITLED WOOD TO

[1] The trial court, in its Journal Entry, indicated it had been informed the Sextons' claims against Appellants were resolved. A Dismissal Entry dismissing the Sextons' claims against Appellants was filed on September 10, 2008.

REIMBURSEMENT OF ATTORNEY FEES PAID BY OR ON BEHALF OF WOOD IN PROSECUTING ITS COUNTERCLAIM AGAINST THE STAMBAUGHS.

{¶22} "III. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE STAMBAUGHS BY RULING THE INDEMNIFICATION CLAUSE ENTITLED WOOD TO REIMBURSEMENT OF ANY ATTORNEY FEES PAID ON BEHALF OF WOOD IN DEFENDING THE STAMBAUGH'S CLAIM AGAINST WOOD."

I, II, III

{¶23} In their three assignments of error, Appellants argue the trial court erred in holding the indemnification clause in the "Property Management and Exclusive Rental Agreement", entitled Appellee to be reimbursed for attorney's fees paid by or on behalf of Appellee in defending Appellants' claim against Appellee and in prosecuting Appellee's counterclaim against Appellants.

{¶24} "Generally, courts presume that the intent of the parties to a contract resides in the language they chose to employ in the agreement. * * * Only when the language of a contract is unclear or ambiguous, or when the circumstances surrounding the agreement invest the language of the contract with a special meaning will extrinsic evidence be considered in an effort to give effect to the parties' intentions. * * * When the terms in a contract are unambiguous, courts will not in effect create a new contract by finding an intent not expressed in the clear language employed by the parties." *Shifrin v. Forest Enterprises, Inc.,* 64 Ohio St.3d 635, 638, 1992-Ohio-28, 597 N.E.2d 499.

{¶25} As is stated above, the "Property Management and Exclusive Rental Agreement" states, in relevant part, as follows:

{¶26} "THE OWNER FURTHER AGREES TO:

{¶27} "1. Indemnify, defend, and save the Agent harmless from all suits in connection with the Property and from liability from damage to Property and injuries or death of any employee of the Agent or any contractor or other person whomsoever, and to at his own expense public liability insurance, minimum liability coverage of $1,000.000.00 and to furnish the Agent a certificate evidencing the existence of such insurance….

{¶28} "3. Indemnify and save Agents harmless against (i) all claims for damages arising out of alleged violation by Agent, in a representative capacity, or Owner, or both, of any constitutional provision, statue, ordinance or regulation, federal, state or local, which arise out of the offer to lease, leasing, management or operation of the Property hereunder or otherwise; and (ii) all expenses incurred by Agent in connection with the foregoing, including the reasonable fees and costs of counsel retained to defend Agent; provided, however, that the provisions of this paragraph shall not apply if a court of competent jurisdiction makes a final determination, which is either upheld on appeal, or not appealed within the applicable period of time, that Agent intentionally violated any such constitutional provision, statute, ordinance or regulation."

{¶29} We concur with the trial court the Property Management Agreement clearly and unambiguously required Appellants, as owners, to "indemnify, defend and save the Agent harmless from all suits in connection with the Property…" In the case sub judice, the trial court found, in its August 23, 2008 Journal Entry, at the walk-through on October 1, 2006, Appellants instructed Appellee not to return the $675.00 security deposit to the Sextons, and there was no evidence Appellee was given

authority by Appellants to release the security deposit to the Sextons. Appellants have not appealed such findings. As a result of the failure to return the security deposit to them or to provide them with an accounting of how the security deposit was applied, the Sextons sued Appellants for violating R.C. 5321.16(B). Appellants then filed a third-party complaint against Appellee, their agent. In its August 23, 2008 Journal Entry, the trial court noted "there is little difference between [Appellants'] Third Party Complaint and what would have occurred if the Sextons had brought a Complaint directly against [Appellee]. In that instance, [Appellants] would have been contractually obligated to defend [Appellee] from the claims brought by the Sextons. Instead, [Appellants] initiated an action against [Appellee], premised, at least in part, upon the claims asserted by [Appellants] (sic) against the Sextons (sic)."[2] Based upon the foregoing, we find the trial court did not err in holding the indemnification clause entitled Appellee to reimbursement for attorney's fees paid by or on behalf of Appellee in defending Appellants' claim against Appellee because the same was "in connection" with the subject property.

{¶30} Appellants, in their second assignment of error, contend the trial court erred in holding the indemnification clause entitled Appellee to reimbursement for attorney's fees paid by or on behalf of Appellee in prosecuting Appellee's counterclaim against Appellants.

{¶31} As stated above, Appellee filed a counterclaim against Appellants alleging, in relevant part, as follows:

[2] The claims were actually asserted by the Sextons against Appellants.

{¶32} "7. Defendant/Third-Party Plaintiffs are in breach of the terms of the contract as the terms of the contract provide that they hold third-Party Defendant, T.C. Wood Realty, Inc. harmless 'from all suits in connection with the property.' As a result of this litigation the Third-Party Defendant, T.C. Wood Realty, Inc. continue to incur costs and attorneys fees.

{¶33} "8. Defendant/Third-Party Plaintiffs breach of the contract entitles Third-Party Defendant, T.C. Wood Realty, Inc. to reasonable attorney's fees as designed by the contract.

{¶34} "9. As a result of the breach of contract by third-party Plaintiffs, Third-Party Defendant, T.C. Wood Realty, Inc. seeks damages in an amount not yet determined."

{¶35} Although Appellee is not entitled to reimbursement of attorney fees under the terms of the indemnification agreement for pursuit of its counterclaim, we find the attorney fees incurred by Appellee to enforce its indemnification rights are compensable consequential damages under its breach of contract claim against Appellants. The trial court specifically found in its August 25, 2008 Journal Entry Appellants' breached the contract and "… caused the damages that they had a contractual duty to prevent."

{¶36} While we acknowledge Ohio follows the American rule which provides in a breach of contract case each party is responsible for their own attorney fees except as otherwise provided for by statute or contract or when the opposing party acted in bad faith, vexatiously, wantonly, obdurately,[3] for malicious reasons or otherwise engaged in malicious conduct. The trial court specifically concluded in its August 25, 2008 Journal Entry (regarding Appellee's attempt to be certain the landlord/tenant law was being

[3] Webster's dictionary defines "obdurately" as stubbornly persistent in wrongdoing; hardened in feeling; resistant to persuasion.

followed) the Appellants "… appeared to be somewhat obstinate, at the very least unwilling to cooperate on the issue." Though not specifically labeled as such, we find the trial court essentially found (and the evidence supported) Appellants acted obdurately; therefore, attorney fees incurred to enforce Appellee's indemnification rights were recoverable for Appellants' breach of the contract.

{¶37} Appellants, in their third assignment of error, argue the trial court erred by ruling the indemnification clause entitled Appellee to be reimbursed for attorney fees that were paid on its behalf in defending Appellants' claims against Appellee.[4] Appellants note Appellee, which had professional liability insurance through XL Insurance, paid $1,000.00, to prosecute its counterclaim, and $2,500.00, as its deductible, and the remaining amount was paid by Appellee's professional liability insurer in defense of Appellee. In short, Appellants maintain "[a]t most, the indemnification clause would obligate [appellants] to payment of the costs actually expended by [appellee], i.e., $3,500.00."

{¶38} However, in *Holibaugh v. Cox* (1958), 167 Ohio St. 340, 148 N.E.2d 677, the Supreme Court of Ohio held:"An insured who is injured by a tortious act retains his ownership of the resultant claim for damages against the tort-feasor in that he may, in the absence of a motion or a raising of the issue of joinder, maintain an action thereon in his own name for the full amount of damages, even though he has made a partial assignment of the claim to an insurer." (Emphasis added). Id. at 345-346.

[4] While Appellants contend Appellee waived such issue by failing to raise it in the trial court, we disagree. We find Appellants sufficiently raised such issue at the hearing before the court on April 14, 2009. See Transcript at 33-34.

{¶39} In the case sub judice, XL Insurance acted as an assignee to Appellee's claim. Appellee, therefore, was entitled to recover from Appellants the full amount of attorneys fees it incurred in its defense.[5]

{¶40} Based on the foregoing, Appellants' assignments of error are overruled.

{¶41} Accordingly, the judgment of the Morrow County Court of Common Pleas is affirmed.

By: Hoffman, J.

Wise, J. concurs,

Edwards, P.J.,
concurs in part and dissents in part

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

_____
HON. JULIE A. EDWARDS

s/ John W. Wise
HON. JOHN W. WISE

[5] We further note the "Real Estate Professional Errors and Omissions Policy" entered into between Appellee and XL Insurance states that "[i]n the event of any payment under this policy, the company will be subrogated in the amount of such payment to all of the insured's rights of recovery…"

EDWARDS, P.J., Concurring In Part and Dissenting In Part Opinion

{¶42} I concur with the majority's analysis and disposition of appellants' first and third assignments of error.

{¶43} However, I respectfully disagree with the majority's analysis and disposition of appellants' second assignment of error. While the majority finds that appellee is not entitled to reimbursement of attorney fees under the terms of the indemnification agreement for pursuit of its counterclaim, the majority goes on to find that such fees are compensable damages under its breach of contract claim against appellants. I disagree. Attorney fees are arguably consequential damages in every breach of contract case. As noted by the majority, Ohio follows the "American Rule" which provides that each party is responsible for their own attorney's fees except as provided for in certain statutory actions or when the opposing party is found to have acted in bad faith, vexatiously, wantonly, obdurately, for oppressive reasons, or the party somehow engaged in malicious conduct. *Sorin v. Board of Educ. of Warrensville Heights Sch. Dist.* (1976), 46 Ohio St.2d 177, 180-81, 347 N.E.2d 527.

{¶44} The majority, in its decision, indicates that the trial court implicitly found that appellants had acted obdurately and that the evidence supported such a finding. The majority, on such basis, finds that appellee is entitled to attorney fees for pursuit of its counterclaim. While the trial court found that appellants were "somewhat obstinate," I do not believe that this arises to the level of "obdurate behavior" required for an award of attorney fees. Moreover, it is unclear whether or not the trial court awarded attorney fees on such basis. Appellee, in its brief, does not argue that it was entitled to reimbursement of attorney fees spent in pursuing its counterclaim on the basis that

appellants acted obdurately. I, therefore, respectfully disagree with the majority's decision.

{¶45} In the case sub judice, the contract at issue specifically limits appellee to recovery of attorney fees incurred in defending appellee. For such reason, I would sustain appellants' second assignment of error.

s/ Julie A. Edwards

Judge Julie A. Edwards

JAE/dr/rmn

[Cite as *Stambaugh v. T.C. Wood Realty, Inc.*, 2010-Ohio-3763.]

IN THE COURT OF APPEALS FOR MORROW COUNTY, OHIO

FIFTH APPELLATE DISTRICT

EDIE STAMBAUGH, et al.,	:	
Appellants-Defendants and Third-Party Plaintiffs	:	
-vs-	:	JUDGMENT ENTRY
T.C. WOOD REALTY, INC.	:	
Third-Party Defendant-Appellee	:	CASE NO. 09 CA 00008

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Morrow County Court of Common Pleas is affirmed. Costs assessed to Appellants.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

HON. JULIE A. EDWARDS

s/ John W. Wise
HON. JOHN W. WISE