**[Cite as *Ruble v. M &Y L Properties, Ltd.*, 2010-Ohio-6356.]**

0COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| THOMAS D. RUBLE, ET AL.<br><br>Plaintiffs-Appellants<br><br>-vs-<br><br>M & L PROPERTIES, LTD., ET AL.<br><br>Defendants-Appellees | JUDGES:<br>Hon. W. Scott Gwin, P.J.<br>Hon. William B. Hoffman, J.<br>Hon. Sheila G. Farmer, J.<br><br><br><br>Case No. 10-COA-006<br><br>O P I N I O N |
| CHARACTER OF PROCEEDING: | Appeal from the Municipal Court, Case No. 09-CV-H-1464 |
| JUDGMENT: | Affirmed |
| DATE OF JUDGMENT ENTRY: | December 20, 2010 |

APPEARANCES:

| For Plaintiffs-Appellees | For Defendants-Appellees |
|---|---|
| JOSIAH L. MASON<br>153 West Main Street<br>P.O. Box 345<br>Ashland, OH 44805 | VALERIE A. LANG<br>930 Claremont Avenue<br>P.O. Box 455<br>Ashland, OH 44805 |

*Farmer, J.*

{¶1} In February of 2004, appellants, Thomas Ruble and his daughter, Jennifer Ruble, rented an apartment in Ashland, Ohio. Landlords of the apartment were appellees, M & L Properties, LTD and Marc and Lisa Strickling.

{¶2} In 2006, water started seeping into appellants' basement. Appellants notified appellees and requested that the problem be repaired. An attempt to repair the problem occurred in July of 2008, but it was unsuccessful. No further repair work was done. Appellants contacted an attorney who sent a letter to appellees in June of 2008.

{¶3} In July of 2009, appellees gave appellants notice that they were to vacate the premises by the end of August.

{¶4} On August 28, 2009, appellants filed a complaint against appellees, claiming retaliatory eviction. Appellees filed a counterclaim for restitution of the premises. A bench trial commenced on November 25, 2009. By findings of fact, conclusions of law, and judgment entry filed February 1, 2010, the trial court found in favor of appellees on appellants' claims, and granted appellees restitution of the premises.

{¶5} Appellants filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶6} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT THERE WAS NO OBLIGATION OF APPELLEES TO REPAIR APPELLANTS' BASEMENT."

II

{¶7} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT THE APPELLANTS WERE NOT ENTITLED TO THE RELIEF THEY REQUESTED DUE TO THE CLAIM OF RETALIATORY CONDUCT ON THE PART OF APPELLEES, AND IN GRANTING APPELLEES COUNTERCLAIM AND ORDERING THAT APPELLANTS BE EVICTED FROM THE PREMISES."

III

{¶8} "THE COURT ERRED AS A MATTER OF LAW IN NOT AWARDING DAMAGES TO THE PLAINTIFFS-APPELLANTS."

IV

{¶9} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT THE APPELLANTS WERE MONTH TO MONTH HOLDOVER TENANTS WHEN IN FACT THEY WERE TENANTS BY THE YEAR."

V

{¶10} "THE COURT ERRED AS A MATTER OF LAW IN OVERRULING APPELLANTS' MOTION TO OFFER ADDITIONAL EVIDENCE AND IN OVERRULING APPELLANTS' MOTION FOR RECONSIDERATION OF THAT MOTION."

I

{¶11} Appellants claim the trial court erred in finding appellees did not have an obligation to repair the basement. Appellants claim the trial court neglected to make any findings as to appellees' obligations under R.C. 5321.04. We disagree.

{¶12} Appellants argue they were entitled to repairs for the water problem, and appellees were put on notice of the problem. It is true that numerous complaints were

made to appellees and appellees were unable or unwilling to address the problem. However, appellants were month-to-month tenants and their tenancy was continually renewed by appellees. There was no proof or detail of damages or loss in the records.

{¶13} Assignment of Error I is denied.

II

{¶14} Appellants claim the trial court erred in granting appellees' counterclaim for eviction. Appellants claim the trial court erred in finding that R.C. 5321.03 barred the defense of retaliatory eviction.

{¶15} As noted by the trial court in its conclusions of law at ¶30, "[r]etaliatory conduct may not be raised by a tenant to avoid a forcible entry and detainer action when a tenant is holding over his term. *Association Estates v. Samsa*, 2004-Ohio-6635 at ¶12."

{¶16} In their brief at 19, appellants argue that although no written lease existed since 2005, they were tenants on a year-to-year basis. We note the original lease was not attached or marked as an exhibit by either party. We find in appellants' October 12, 2009 response to appellees' counterclaim for eviction, they agreed they were month-to-month tenants:

{¶17} "Plaintiff admits that he is in possession of the premise located at 1022 Columbus Circle North, Ashland, Ashland County, Ohio, pursuant to a month-to-month tenancy, but denies each and every other allegation of the First Counterclaim."

{¶18} Therefore, we find through their admission, appellants were month-to-month tenants. The notice of eviction terminated appellants' occupancy in thirty days and was according to law for a month-to-month tenant:

{¶19} "(A) Notwithstanding section 5321.02 of the Revised Code, a landlord may bring an action under Chapter 1923. of the Revised Code for possession of the premises if:

{¶20} "(4) A tenant is holding over the tenant's term." R.C. 5321.03(A)(4).

{¶21} Given the fact that appellants were month-to-month tenants, an eviction action was lawful in this case.

{¶22} Appellants argue that despite the fact that they were month-to-month tenants, the defense of retaliatory eviction was still available to them:

{¶23} "(A) Subject to section 5321.03 of the Revised Code, a landlord may not retaliate against a tenant by increasing the tenant's rent, decreasing services that are due to the tenant, or bringing or threatening to bring an action for possession of the tenant's premises because:

{¶24} "(1) The tenant has complained to an appropriate governmental agency of a violation of a building, housing, health, or safety code that is applicable to the premises, and the violation materially affects health and safety;

{¶25} "(2) The tenant has complained to the landlord of any violation of section 5321.04 of the Revised Code;

{¶26} "(3) The tenant joined with other tenants for the purpose of negotiating or dealing collectively with the landlord on any of the terms and conditions of a rental agreement.

{¶27} "(B) If a landlord acts in violation of division (A) of this section the tenant may:

{¶28} "(1) Use the retaliatory action of the landlord as a defense to an action by the landlord to recover possession of the premises." R.C. 5321.02(A) and (B)(1).

{¶29} Appellants argue in *Voyager Village Limited v. Williams* (1982), 3 Ohio App.3d 288, 298-299, our brethren from the Second District found a month-to-month tenant who was defending an eviction as a "holdover" could raise the statutory defense of retaliatory eviction:

{¶30} "In light of the testimony that the park operator and its agents were aware of the complaints made by appellant and the tenant's association and that appellant had contacted a government agency about their complaints prior to the eviction proceedings, the testimony of Mr. Taylor was highly relevant to the motives of the appellee in terminating appellant's oral lease. We find that the trial court's exclusion of this evidence was prejudicial error, and we remand this matter to the trial court for a determination of whether the appellant sustained his burden in proving that the eviction proceedings were retaliatory in nature. The burden of proof required of appellant is by a preponderance of the evidence. If Mr. Williams does so, the landlord then has the burden of proving that there was a legitimate justification for the eviction proceedings. *Karas v. Floyd* (1981), 2 Ohio App.3d 4, 440 N.E.2d 563, 20 O.O.3d 439. In summation, if a month-to-month tenant can establish that the landlord had retaliatory motives in terminating the lease, he is entitled to protection under the Landlords and Tenants Act."

{¶31} In the *Karas* case cited by the *Voyager Village* court, the *Karas* court permitted testimony as to retaliatory actions by a landlord involving a month-to-month tenancy. The *Karas* court never addressed R.C. 5321.03(A)(4) however, it

acknowledged in addressing a retaliatory eviction claim, the landlord of a month-to-month tenancy may refute the claim with a showing of a legitimate reason.

{¶32} In reading both of these appellate cases, we find the conclusions in *Voyager Village* are well based. Although a tenant may defend an eviction based on retaliation, the burden for the eviction can be countered with other legitimate reasons.

{¶33} In the case of *Associated Estates Realty Corp. v.Samsa,* Cuyahoga App. No. 84297, 2004-Ohio-6635, ¶12, relied upon by the trial court sub judice, our brethren from the Eighth District found the following:

{¶34} "Moreover, this court's holding in *Indian Hills Senior Community, Inc. v. Sanders* (Aug. 23, 2001), Cuyahoga App. No. 78780, is controlling and bars Samsa's counterclaim for retaliatory eviction. As held in *Indian Hills,* the 'retaliatory conduct of the landlord may not be raised as a defense in a forcible entry and detainer proceeding when the tenant is holding over his term.' Further, this court held 'nothing in R.C. 5321.02***precludes the nonrenewal of a lease upon the expiration of a term of tenancy.' Here, Samsa's lease naturally expired on November 1, 2002, but when Samsa failed to vacate the premises, he became a holdover tenant. When Samsa did not leave the premises, appellee filed its eviction action, to which Samsa answered and filed his counterclaim alleging, in essence, retaliatory eviction. Just like in *Indian Hills,* Samsa became a holdover tenant when he failed to move out at the end of the lease after appellee exercised its rights under the lease to not renew the lease. Thus, based on this court's holding in *Indian Hills,* the trial court did not err in granting summary judgment in favor of appellee."

{¶35} It is readily apparent that the appellate districts are in conflict relative to the impact of R.C. 5321.03.

{¶36} We note there are two distinctions in tenancy law: a tenant in sufferance and a tenant at will. A party whose lease has been terminated is a tenant in sufferance. A tenant in sufferance can be a trespasser and implies that there is no agreement as to a continued tenancy. A holdover tenant and a tenant at sufferance are the same. Either may be treated as a trespasser. See, *Steiner v. Minkowski* (1991), 72 Ohio App.3d 754, 762.

{¶37} "The characteristics of a tenancy at will, whether it is created by express contract or by implication of law, are 'uncertainty respecting duration and the right of either party to terminate it by proper notice***.' 3 Thompson on Real Property 33, Section 1020 (1959);***" *Myers v. East Ohio Gas Company* (1977), 51 Ohio St.2d121, 124. (Additional citations omitted.) "The law provides that a tenancy at will is created when possession of the premises is taken under an invalid lease. *Manifold v. Schuster* (1990), 67 Ohio App.3d 251, 586 N.E.2d 1142. Upon payment and acceptance of rent, the tenancy at will converts to a periodic tenancy. *Id.*" *Lewis v. Marcum,* Licking App. No. 2003CA00007, 2003-Ohio-3861, ¶16.

{¶38} By their continued agreement to carry forward the tenancy, appellants sub judice were tenants at will. Therefore, we conclude that under the distinction between the two tenancies, the exception of R.C. 5321.53 does not apply in this case as appellants were not holdover tenants.

{¶39} However, our inquiry does not stop at the aforementioned conclusion. Despite the ruling that retaliatory claims did not lie, the trial court addressed the issue of

whether there were any definitive actions by appellants that could have precipitated the eviction action.

{¶40} There was no testimony that appellants complained to an appropriate governmental agency [R.C. 5321.02(A)(1)], appellants' letters were never seen by appellees as they were certified and unclaimed [R.C. 5321.02(A)(2)], and there was no joint tenant collective negotiating group [R.C. 5321.02(A)(3)].

{¶41} The testimony revealed that appellants had complained about the water intrusion for years and appellees attempted unsuccessfully and halfheartedly to solve the problem. As noted by the trial court in Finding of Fact No. 13, appellees first learned of appellants' dissatisfaction by their filing on August 3, 2009 of an Application to Deposit Rent in the Municipal Court:

{¶42} "Until Ruble so indicated on his August 3, 2009 Application to Deposit Rent with the Clerk (of this Court), M & L was not aware of any reports that Ruble had made to any governmental agency involving a violation of a building, housing, health or safety code that is applicable to the premises. M & L has not been cited by any governmental agency for any violation."

{¶43} Appellants filed the application after the notice to terminate tenancy was issued. Further, appellees presented a non-retaliatory reason for the termination of the tenancy. T. at 207, 209. In Conclusion of Law No. 33, the trial court specifically addressed the lack of any action by appellants that would deem appellees' actions as retaliatory:

{¶44} "M & L did not raise Ruble's rent or decrease any services due to Ruble following Ruble's complaints to M & L. M & L's non-renewal of Ruble's periodic tenancy does not fall within the 'retaliatory conduct' described in Ohio Rev. Code §5321.02."

{¶45} Accordingly, despite the ruling on holdover tenancy, the trial court addressed the defense of retaliation.

{¶46} Assignment of Error II is denied.

III

{¶47} Appellants claim the trial court erred in not awarding damages for personal property stored on pallets in the basement. We disagree.

{¶48} A judgment supported by some competent, credible evidence will not be reversed by a reviewing court as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279. A reviewing court must not substitute its judgment for that of the trial court where there exists some competent and credible evidence supporting the judgment rendered by the trial court. *Myers v. Garson,* 66 Ohio St.3d 610, 1993-Ohio-9.

{¶49} In Findings of Fact Nos. 17 and 24-25 and Conclusion of Law No. 39, respectively, the trial courts stated the following:

{¶50} "Ruble's own witness, professional home inspector Steve Freelon, testified that Ruble's apartment was habitable. On a scale of 1-10, Freelon rated the property a '5,' or 'average.' Freelon offered no testimony that the apartment was unsafe, unfit or uninhabitable.

{¶51} "Despite his current complaints about the basement, Ruble regularly uses it, as his washing machine, dryer and chest freezer are located there. Ruble stores

other personal property in the basement on pallets. Ruble nevertheless testified that the value of his tenancy is diminished by 10-15% due to disuse of the basement.

{¶52} "Among Ruble's personal property stored in the basement are some dressage journals which are of sentimental value to him. Some of the pages of those journals stick together from dampness. Ruble (who noticed that the basement was damp when he first moved into the property more than five years ago) presented no evidence as to the fair market value of the journals and testified that he would rather have the journals than their cash value. Ruble has not carried a renter's insurance policy. He also did not put a dehumidifier in his basement.

{¶53} "Because the Rubles are able to store personal property on pallets in the basement and have regularly used the basement to do laundry and to access the chest freezer there, the basement is not uninhabitable so as to abate Ruble's liability for rent pursuant to R.C. §5321.07. Based upon a preponderance of the evidence, this Court does not find Ruble's testimony that, as a tenant, he experienced a 10-15% diminution in rental property value (an amount lower than the monthly amount that Ruble has deposited with the court in any event) to be well-taken."

{¶54} From our review of the evidence, it is undisputed as appellant Thomas Ruble testified, during torrential downpours, there was water intrusion in the basement of the rental property. T. at 86. When there was water, it gathered in the low sections of the basement covering the floor, 10 to 35 percent. T. at 98. Appellants' expert testified that he viewed the cause of the problem to be the drainage and the landscaping was unable to accommodate the catch basin during a heavy rain. The correction would be to address the landscaping and formulate swales, add topsoil, and

create new drainage. T. at 45-46. The expert testified the dwelling was still habitable. T. at 61.

{¶55} Neither appellant was able to place any concrete dollar amount on water damages. The water and the moisture caused pages of journals to stick together. There was no concrete estimation of damages. T. at 102. Appellant Thomas Ruble opined that the rental value was diminished by 10 to 20 percent. T. at 103. No expert offered such an opinion. No living areas were in the basement. Appellant Jennifer Ruble testified she never went down to the basement because of the water and smell. T. at 70.

{¶56} Upon review, we find the trial court's conclusion that appellants failed to establish damages or loss of habitation of the premises was substantiated by the evidence.

{¶57} Assignment of Error III is denied.

IV

{¶58} Appellants claim the trial court erred in finding they were month-to-month tenants. We disagree.

{¶59} As we noted in Assignment of Error II, appellants admitted in their answer to the counterclaim that they were month-to-month tenants. Further, the original lease was not pled or placed into evidence for the trial court to determine if it was a yearly lease with an aggregate amount or a monthly payment lease for one year.

{¶60} Assignment of Error IV is denied.

V

{¶61} Appellants claim the trial court erred in denying their motion to reconsider and/or motion to offer additional evidence. We disagree.

{¶62} The Ohio Rules of Civil Procedure do not provide for motions for reconsideration, therefore such motions are considered a nullity. *Pitts v. Dept. of Transportation* (1981), 67 Ohio St.2d 378.

{¶63} At best, appellants' request was tantamount to a motion for new trial pursuant to Civ.R. 59(A):

{¶64} "**(A) Grounds**

{¶65} "A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:

{¶66} "(1) Irregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial;

{¶67} "(2) Misconduct of the jury or prevailing party;

{¶68} "(3) Accident or surprise which ordinary prudence could not have guarded against;

{¶69} "(4) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice;

{¶70} "(5) Error in the amount of recovery, whether too large or too small, when the action is upon a contract or for the injury or detention of property;

{¶71} "(6) The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case;

{¶72} "(7) The judgment is contrary to law;

{¶73} "(8) Newly discovered evidence, material for the party applying, which with reasonable diligence he could not have discovered and produced at trial;

{¶74} "(9) Error of law occurring at the trial and brought to the attention of the trial court by the party making the application.

{¶75} "In addition to the above grounds, a new trial may also be granted in the sound discretion of the court for good cause shown.

{¶76} "When a new trial is granted, the court shall specify in writing the grounds upon which such new trial is granted.

{¶77} "On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and enter a new judgment."

{¶78} In their motion, appellants sought to present additional witnesses, fellow tenants who were their next-door neighbors, and the argument that they were unaware of the reason for appellees' eviction decision (disturbance of neighbors). We find neither of these qualify under the rule for a new trial.

{¶79} Assignment of Error V is denied.

{¶80} The judgment of the Municipal Court of Ashland County, Ohio is hereby affirmed.

By Farmer, J.

Gwin, P.J. concur and

Hoffman, J. concurs separately.

s/ Sheila G. Farmer

s/ W. Scott Gwin

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*Hoffman, J., concurring*

**{¶81}** I concur in the majority's analysis and disposition of Appellants' Assignments of Error Nos. III, IV, and V.

**{¶82}** I concur in the majority's disposition of Appellants' Assignment of Error No. 1 based upon its discussion of Appellants' Assignment of Error No. III. I do not believe the lack of "proof or detail of damages or loss" in the record is disposition of the issue raised (Majority Opinion at ¶12).

**{¶83}** Finally, in concur in the majority's disposition of Appellants' Assignment of Error No. 2. Unlike the majority, I believe Appellants were holdover tenants and their retaliation claim was properly dismissed based upon the authority of *Associated Estates Realty Corp. v. Samsa*, 2004-Ohio-6635, as cited by and relied upon by the trial court.

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HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR ASHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

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|---|---|---|
| THOMAS D. RUBLE, ET AL. | : | |
| Plaintiffs-Appellants | : | |
| -vs- | : | JUDGMENT ENTRY |
| M & L PROPERTIES, LTD., ET AL. | : | |
| Defendants-Appellees | : | CASE NO. 10-COA-006 |

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Municipal Court of Ashland County, Ohio is affirmed. Costs to appellants.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ William B. Hoffman

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