[Cite as *Flower v. Hall*, 2014-Ohio-1671.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

William S. Flower	Court of Appeals No. S-13-033
Appellee	Trial Court No. 13CVH17
v.	
Amanda Hall	**DECISION AND JUDGMENT**
Appellant	Decided: April 18, 2014

* * * * *

Joseph F. Albrechta and John A. Coble, for appellee.

Christian R. Moore, for appellant.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} This is an appeal from the judgment of the Fremont Municipal Court, which granted summary judgment in favor of appellee, William Flower, in his action for breach of a commercial lease. We affirm, in part, and reverse, in part.

A. Facts and Procedural Background

{¶ 2} The undisputed facts are as follows. In early October 2011, Flower and appellant, Amanda Hall, entered into a commercial lease agreement for the rental of property that was to be used as a car lot. The lease term was for one year, with a monthly payment of $500 with a $50 late fee if the payment was made after the fifth day of the month. The agreement appears to be on a standard commercial lease form, with specific terms handwritten into blank spaces. Beginning in May 2012, Hall stopped making payments on the lease. By mid-June 2012, Hall abandoned the lease property.

{¶ 3} Flower initiated the present lawsuit in Fremont Municipal Court. In his complaint, he sought damages of $3,000 for unpaid rent and attorney fees of no less than $1,500.[1] Hall filed an answer in which she asserted that Flower breached the lease first by failing to fix a water leak and that Flower failed to mitigate his damages by not attempting to re-lease the property.

{¶ 4} Thereafter, Flower moved for summary judgment. Attached to his motion was a copy of the lease agreement, a ledger of Hall's payments, an itemized bill from Flower's attorney totaling $1,623.75, and Flower's affidavit. In the affidavit, Flower stated that the parties entered into a lease agreement, Hall stopped making payments, the remaining balance owed was $3,000, and Flower has incurred $1,623.75 in attorney fees.

[1] Flower initially included a claim for forfeiture of the security deposit based on Hall's leaving buckets of oil on the property. However, Flower later withdrew that claim, and it is not before us.

{¶ 5} Hall responded to the motion for summary judgment, arguing that Flower constructively breached the lease first when he induced her into signing the lease by promising that all was well with the utilities when, in fact, there was a leak in the water line. Further, Hall argued that Flower breached the lease when he refused to fix the water line, but instead told Hall to "break the lease." In addition to the constructive breach argument, Hall argued that Flower has failed to put forth any evidence that he attempted to mitigate damages. Finally, she argued that attorney fees are only allowable in cases of bad faith or where authorized by a specific statute. Attached to Hall's memorandum was her affidavit in which she averred that in March 2012, she learned that there was a leak in the water line and the water department refused to turn on service until it was fixed, that Flower refused to fix the water line, that Flower told her repeatedly to break the lease, and that she has no knowledge of any mitigation efforts made by Flower.

{¶ 6} Flower responded to Hall's opposition, arguing that the terms of the lease precluded Hall's argument of constructive breach. Flower points to paragraph three of the lease, which provides:

> **3. Care and Maintenance of Premises.** Lessee acknowledges that the premises are in good order and repair, unless otherwise indicated herein. Lessee shall, at his own expense and at all times, maintain the premises in good and safe condition, including plate glass, electrical wiring, plumbing and heating installations and any other system or equipment upon the premises and shall surrender the same, at termination hereof, in as good

> condition as received, normal wear and tear excepted. Lessee shall be responsible for all repairs required, excepting the roof, exterior walls, structural foundations * * *.

Flower concludes, based on this provision, that even if a leak existed, the burden to repair such leak falls on Hall. Thus, he did not breach the lease. As to mitigation of damages, Flower argues that Hall has the burden to prove lack of mitigation as an affirmative defense, and she has failed to produce any evidence to that end. Finally, Flower argues that attorney fees are proper where the parties have contracted for them, as they did in paragraph 19 of the lease, which states:

> **19. Attorney's Fees.** In case suit should be brought for recovery of the premises, or for any sum due hereunder, or because of any act which may arise out of the possession of the premises, by either party, the prevailing party shall be entitled to all costs incurred in connection with such action, including a reasonable attorney's fee.

{¶ 7} Upon review of the parties' filings, the trial court granted the motion for summary judgment. Regarding the water line issue, the court reasoned that the lease provides that Hall acknowledged that the premises was in "good order and repair" and that Hall was responsible for all maintenance and repair other than those items specifically enumerated in the lease, which did not apply. Thus, the court concluded that Hall was the first to breach the lease agreement when she failed to make the monthly payments. Consequently, the court granted judgment for Flower in the amount of

$4,123.75 for unpaid rent and attorney fees as provided in the parties' agreement, less the security deposit of $500.

B. Assignments of Error

{¶ 8} Hall has timely appealed the trial court's judgment, asserting three errors for our review:

> 1. The trial court erred in granting summary judgment against defendant/appellant Hall because issues of material fact remained to be litigated.
>
> 2. The trial court erred in awarding attorney's fees in the amount of $1,623.75 to plaintiff/appellant [sic].
>
> 3. The trial court erred in awarding attorney fees in the amount of $1,623.75 to plaintiff/appellant [sic] without first determining the reasonableness of those fees.

II. Analysis

{¶ 9} We review summary judgment decisions de novo, applying the same standard as the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). Under Civ.R. 56(C), summary judgment is appropriate where (1) there is no genuine issue as to any material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion, and viewing the evidence in the light most favorable to the non-moving

party, that conclusion is adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

A. Genuine Issue of Material Fact

1. Constructive Eviction

{¶ 10} In her first assignment of error, Hall initially argues that summary judgment was inappropriate because a genuine issue of material fact exists on whether she was constructively evicted by Flower's failure to supply water to the property. Specifically, Hall contends that the repair of the water line would require the breaking of concrete, which she believes is prohibited by the lease unless permission is granted. Alternatively, Hall contends that because the repair would require the breaking of concrete, it is a structural foundation repair, which is Flower's responsibility.

{¶ 11} Flower, on the other hand, argues that Hall's affidavit contains no evidentiary quality material demonstrating that a leak existed. Further, even if it could be proven that a leak existed, Flower asserts that the unambiguous language of the lease agreement assigns the responsibility to fix the leak to Hall. Therefore, Flower contends that reasonable minds could only conclude that he did not breach the lease, and thus he is entitled to summary judgment.

{¶ 12} We agree with Flower. Even assuming that Hall has provided evidentiary quality material to prove that a water leak existed, the terms of the lease assign responsibility for repairing such leak to her. Paragraph three of the agreement expressly states that the lessee shall, at her own expense, maintain the plumbing installations in

good and safe conditions. The agreement further provides that lessee is responsible for all repairs except to the roof, exterior walls, and structural foundation. Here, the repair of a water line, even if it requires the breaking of some concrete, does not constitute a structural foundation repair. Therefore, we hold that no genuine issue of material fact exists on whether Hall was constructively evicted by Flower's failure to supply water to the premises.

2. Mitigation of Damages

{¶ 13} Hall alternatively argues that summary judgment was inappropriate because a genuine issue of material fact exists with regard to Flower's duty to mitigate. Flower responds that Hall's singular affidavit statement—"I have no knowledge of [Flower] attempting to rent this building out to anyone else to mitigate his alleged damages"—is insufficient to create a genuine issue of material fact for purposes of defeating summary judgment. Again, we agree with Flower.

{¶ 14} In Ohio, "[a] lessor has a duty to mitigate damages caused by a lessee's breach of a commercial lease if the lessee abandons the leasehold." *Frenchtown Square Partnership v. Lemstone, Inc.*, 99 Ohio St.3d 254, 2003-Ohio-3648, 791 N.E.2d 417, ¶ 21. "Failure to mitigate damages caused by a breach of a commercial lease is an affirmative defense." *Id.* As an affirmative defense, Hall has the burden of demonstrating through evidence a genuine issue of material fact. *Todd Dev. Co., Inc. v. Morgan*, 116 Ohio St.3d 461, 2008-Ohio-87, 880 N.E.2d 88, ¶ 23-24 ("Our holding today * * * [requires] a nonmoving party to respond to a motion for summary judgment with

evidence creating a genuine issue of material fact. A plaintiff or counterclaimant moving for summary judgment does not bear the initial burden of addressing the nonmoving party's affirmative defenses.").

{¶ 15} Here, Hall's statement in her affidavit is not of evidentiary quality because it is not made on personal knowledge. *See* Civ.R. 56(E) ("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."); Evid.R. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). Indeed, Hall admits in her averment that she "ha[s] no knowledge." Therefore, we hold that Hall has not demonstrated a genuine issue of material fact regarding mitigation of damages.

{¶ 16} Accordingly, Hall's first assignment of error is not well-taken.

B. Attorney Fees

{¶ 17} Hall's second and third assignments of error challenge the trial court's award of attorney fees. Thus, we will address them together. In her second assignment of error, Hall argues that the attorney fee provision in the lease is unenforceable. In her third assignment of error, she argues that even if the provision is enforceable, the trial court failed to make the required determination that the fees were fair, just, and reasonable. Flower, in response, argues that the attorney fee provision is enforceable, and further that the fee awarded was reasonable.

{¶ 18} On this subject, the Ohio Supreme Court has stated, "Attorney fees may be awarded when a statute or an enforceable contract specifically provides for the losing party to pay the prevailing party's attorney fees, or when the prevailing party demonstrates bad faith on the part of the unsuccessful litigant." *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306, 906 N.E.2d 396, ¶ 7. "When the right to recover attorney fees arises from a stipulation in a contract, the rationale permitting recovery is the 'fundamental right to contract freely with the expectation that the terms of the contract will be enforced.'" *Id.* at ¶ 8, quoting *Nottingdale Homeowners' Assn., Inc. v. Darby*, 33 Ohio St.3d 32, 36, 514 N.E.2d 702 (1987). "The presence of equal bargaining power and the lack of indicia of compulsion or duress are characteristics of agreements that are entered into freely." *Id.* "In these instances, agreements to pay another's attorney fees are generally 'enforceable and not void as against public policy so long as the fees awarded are fair, just and reasonable as determined by the trial court upon full consideration of all of the circumstances of the case.'" *Id.*, quoting *Nottingdale* at syllabus.

{¶ 19} In support of her argument that the attorney fee provision is unenforceable, Hall cites our decisions in *K & A Cleaning, Inc. v. Materni*, 6th Dist. Lucas No. L-05-1293, 2006-Ohio-1989, *Norfolk S. Ry. Co. v. Toledo Edison Co.*, 6th Dist. Lucas No. L-06-1268, 2008-Ohio-1572, and *Executive Business Centres, Inc. v. Transpacific Mfg., Ltd.*, 6th Dist. Lucas No. L-08-1060, 2009-Ohio-516.

{¶ 20} In *K & A Cleaning*, we remarked that attorney fee provisions in contracts are not enforceable "(1) when the parties do not share an equal bargaining position; (2) when the terms of the provision are not freely negotiable; (3) when the attorney fee provision promotes litigation or illegal acts; or (4) when the attorney fee provision acts as a penalty." *K & A Cleaning* at ¶ 10, quoting *Motorist Ins. Cos. v. Shields*, 4th Dist. Athens No. 00CA26, 2001 WL 243285, *4 (Jan. 29, 2001). In that case, we held that an attorney fee provision that did not create a mutual obligation, but rather only required one party to pay the attorney fees of the other in the event of a breach, operated as a penalty and encouraged litigation, and was therefore unenforceable. *Id.* at ¶ 11.

{¶ 21} Later, in *Norfolk*, we stated that attorney fee provisions are enforceable where "there are equal bargaining positions, the parties are of similar sophistication, and both parties had the opportunity to obtain counsel to review the provision and negotiate its terms." *Norfolk* at ¶ 64. There, we concluded the provision was enforceable, and was not a penalty, because Norfolk and Toledo Edison were equally positioned and sophisticated. *Id.* at ¶ 65.

{¶ 22} Finally, in *Executive Business*, we examined *K & A Cleaning* and *Norfolk*, but found the law as stated in *Big Lots Stores, Inc. v. Luv N' Care, Ltd.*, 6th Cir. No. 07-4296, 2008 WL 5110961 (Dec. 4, 2008), to be the most applicable. That statement of the law provided, "recovery of attorney fees pursuant to a contractual provision is not permitted unless the parties specifically negotiated the contractual term so providing." *Executive Business* at ¶ 55. Based on that reasoning, we held that because there was no

evidence or allegation that the parties specifically negotiated the "boilerplate attorney fee provision," the provision was unenforceable. *Id.*

{¶ 23} Applying these cases to the present situation, we find that unlike *K & A Cleaning*, the attorney fee provision at issue potentially benefits either party, as it operates to entitle the prevailing party to attorney fees in any action arising out of the possession of the premises. Furthermore, we find that, similar to *Norfolk*, the parties are of equal bargaining strength, are similarly sophisticated, and there is no indication that the parties could not have obtained counsel to review the agreement. As a final matter, although the continued viability of the distinction regarding boilerplate terms as stated in *Executive Business* appears to be called into question by the contemporaneous Ohio Supreme Court decision in *Wilborn*, *supra*, we need not address that issue here because the lease in question demonstrates that its terms were negotiated. Throughout the three-page lease, the parties filled in blank spaces with specific terms, added terms that were not included on the form, and crossed out other terms that were included. Thus, we must conclude that the parties intended to leave the attorney fee provision as part of the agreement. *See, e.g., Handler v. Southerland Custom Builders, Inc.*, 8th Dist. Cuyahoga No. 86956, 2006-Ohio-4371, ¶ 24-25 (arbitration clause on a pre-printed contract upheld where parties made changes to other parts of the contract through handwritten notations and the arbitration clause was neither hidden nor written in fine print).

{¶ 24} Nevertheless, we agree with Hall that the trial court did not determine that the attorney fees awarded were fair, just, and reasonable as required by *Wilborn*, 121

Ohio St.3d 546, 2009-Ohio-306, 906 N.E.2d 396 at ¶ 8. Therefore, we hold that the trial court erred in awarding attorney fees in its decision granting summary judgment. On remand, the trial court must give full consideration to the circumstances of the case in determining whether the attorney fees are fair, just, and reasonable such that the attorney fee provision is enforceable.

{¶ 25} Accordingly, Hall's second and third assignments of error are well-taken to the extent that they challenge the trial court's failure to determine that the fees are reasonable.

III. Conclusion

{¶ 26} For the foregoing reasons, the judgment of the Fremont Municipal Court is affirmed, in part, and reversed, in part. The matter is remanded to the trial court for a determination of whether the requested attorney fees are fair, just, and reasonable in accordance with *Wilborn*. Costs of the appeal are assessed to Hall pursuant to App.R. 24.

Judgment affirmed, in part,
and reversed, in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.

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JUDGE