[Cite as *Tillimon v. Williams*, 2015-Ohio-2102.]

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

Duane J. Tillimon	Court of Appeals No. L-08-1426
Appellant	Trial Court No. CI 200703024
v.	
Frances Williams, Individually and as Fiduciary of the Estate of Darnell Williams, Deceased	**DECISION AND JUDGMENT**
Appellee	Decided: May 29, 2015

* * * * *

Kevin Eff, for appellant.

Margaret M. Weisenburger, for appellee.

* * * * *

JENSEN, J.

Facts and Procedural History

{¶ 1} This case involves a claim for unpaid rent, utilities, and repairs to a rental home and for punitive damages. Appellant, Duane J. Tillimon, filed the complaint in the Lucas County Court of Common Pleas on April 12, 2007, against the estate of Darnell Williams and Ms. Frances Williams, in her personal capacity and as administratrix.

{¶ 2} Appellant leased the rental home, located in Toledo, Ohio, to Darnell Williams and Colette Williams beginning on October 1, 2003. The rental agreement was for a two-year term with the lease automatically renewing for a period of one year unless terminated by the parties.

{¶ 3} Colette Williams died on December 19, 2005. Darnell Williams died on March 15, 2006. Appellee, Frances Williams, is Darnell Williams' mother, and she was appointed administratrix of her son's estate on May 10, 2006. The estate of Colette Williams is not a party to this lawsuit.

{¶ 4} According to the record evidence, appellant submitted a claim for rent, repairs and utilities to Darnell Williams' estate on May 19, 2006. Appellee, as the administratrix, denied the claim on October 21, 2006. Appellant pursued the matter with the filing of the instant case in common pleas court on April 12, 2007. In it, appellant claimed damages in the amount of $7,172.27 as to the estate, and punitive damages in excess of $25,000 as to appellee for wrongfully refusing to pay appellant monies due to him under the rental agreement.

{¶ 5} On October 2, 2008, appellee filed a combined motion to dismiss and motion for summary judgment. Appellee argued that, under the statute of frauds provision set forth in R.C. 1335.05, she could not be held personally liable absent a written contract between herself and appellant to act as a surety for the debts of her son. As for the estate's liability, appellee argued that because appellant's complaint was filed

beyond the two-month time limitation set forth in R.C. 2117.12, it too was barred as a matter of law.

{¶ 6} Appellant did not object or otherwise respond to the motion.

{¶ 7} The trial court granted the combined motion on November 6, 2008. Appellant filed a notice of appeal on December 5, 2008. He raises one assignment of error for our review:

> THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THE LAWSUIT WAS UNDER THE AUTOMATIC STAY OF THE BANKRUPTCY COURT AT THE TIME SUMMARY JUDGMENT WAS GRANTED AWAITING FOR A DETERMINATION BY APPELLANT'S TRUSTEE WHETHER HE WAS GOING TO PROSECUTE OR ABANDON THE LAWSUIT, AND THERE WAS MERIT TO THE LAWSUIT BASED UPON THE EXHIBITS ATTACHED TO THE COMPLAINT AND THE ARGUMENT THAT WOULD HAVE BEEN MADE BY APPELLANT'S ATTORNEY IF SUMMARY JUDGMENT WOULD NOT HAVE BEEN PREMATURELY GRANTED AND THE MOTION FOR SUMMARY JUDGMENT WAS NOT TIMELY MADE.

{¶ 8} The matter was fully briefed in early 2009. On June 23, 2009, this court ordered the appeal stayed based upon appellant's filing for bankruptcy protection in the United States Bankruptcy Court, Northern District of Ohio.

{¶ 9} This court lifted the stay on July 28, 2014, and reinstated the case to the active docket, when it came to our attention that appellant's bankruptcy case was closed.

{¶ 10} Appellant has retained new appellate counsel, his former attorney having died during the pendency of the stay.

Law and Analysis

{¶ 11} Appellant raises three distinct arguments in his single assignment of error. First, appellant claims that the instant case was automatically stayed at the trial level by his filing for bankruptcy protection in federal court. Second, appellant suggests that summary judgment should not have been granted in appellee's favor because there was merit to his case. Third, appellant argues that the motion for summary judgment was untimely. We treat appellant's three potential assignments of error separately.

Appellant's Filing for Bankruptcy Protection

{¶ 12} The record is silent as to whether appellant ever advised the trial court that he had filed for bankruptcy protection. In his appellate brief, however, appellant states that he did, in fact, do so.

{¶ 13} The automatic stay provision set forth under Section 362, Title 11, U.S.Code ("Section 362") provides that a bankruptcy petition operates as a stay of "the commencement or continuation * * * of a judicial * * * action or proceeding *against the debtor* * * *." (Emphasis added.)

{¶ 14} "As a general rule, the filing of a bankruptcy petition operates to stay, among other things, the continuation of a judicial proceeding *against the debtor* that was

commenced before the [bankruptcy] petition." (Emphasis added.) *Greenwood v. Greenwood*, 6th Dist. Lucas No. L-12-1094, 2013-Ohio-5339, ¶ 16, quoting *Dominic's Restaurant of Dayton, Inc. v. Mantia*, 683 F.3d 757, 760 (6th Cir.2012). "[T]he automatic stay provision of the bankruptcy code does not freeze litigation where the debtor is the plaintiff." *Martin-Trigona v. Champion Fed. Sav. & Loan Ass'n*, 892 F.2d 575, 577 (7th Cir.1989). *See Worth v. Tamarack Am., a Div. of Great Am. Ins. Co.*, 47 F.Supp.2d 1087, 1099 (S.D.Ind.1999), *aff'd*, 210 F.3d 377 (7th Cir. 2000) ("For in any event the automatic stay is inapplicable to suits by the * * * 'debtor' * * *."). Thus, the trial court was not required to stay the proceedings.

{¶ 15} Moreover, it appears from the limited record before us that, to the extent that the bankruptcy trustee had an interest in appellant's cause of action herein, the trustee opted not to exercise that right. "[E]ven though a lawsuit may be an asset of the bankruptcy estate, a bankruptcy trustee may abandon the litigation, leaving the debtor/plaintiff to continue the fight outside the purview of the bankruptcy action." *Worth* at 1099.

{¶ 16} Appellant's first argument is not well-taken.

Appellant's Failure to Object to Appellee's Motion for Summary Judgment

{¶ 17} Second, appellant suggests that summary judgment should not have been granted in appellee's favor because there was merit to his case. Appellant does not challenge the trial court's dismissal of his case under Civ.R. 12(B)(6).

{¶ 18} Appellant did not object to the summary judgment motion. By local rule, however, he had "14 days after service" of the motion to do so. Gen. R. 5.04(D).

{¶ 19} Appellant now claims that if he had objected, he would have argued that "[his] claim was supported by the contract attached to the Complaint and Ohio Law * * *." Appellant argues generally that, under Ohio law, the death of a tenant does not terminate a rental agreement. Appellant does not address the statute of frauds or timeliness arguments raised by appellee.

{¶ 20} A litigant's failure to raise an issue before the trial court waives that party's right to raise the issue on appeal. *Estate of Hood v. Rose,* 153 Ohio App.3d 199, 2003-Ohio-3268, 792 N.E.2d 736, ¶ 10 (4th Dist.). "More specifically, a party who does not respond to an adverse party's motion for summary judgment may not raise issues on appeal that should have been raised in response to the motion for summary judgment." (Citations omitted.) *Gentile v. Ristas,* 160 Ohio App.3d 765, 2005-Ohio-2197, 828 N.E.2d 1021, ¶ 74 (10th Dist.). We decline to address appellant's belated argument raised herein.

{¶ 21} Moreover, we have examined the evidence and find that appellee put forth evidence demonstrating the absence of a genuine issue of material fact. Further, appellant failed below, and herein, to put forth specific facts showing an issue for trial. Appellee was entitled to judgment as a matter of law pursuant to Civ.R. 56 and *Dresher v. Burt,* 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). Appellant's second argument is not well-taken.

Timeliness of Appellee's Motion for Summary Judgment

{¶ 22} Finally, appellant argues that it was an abuse of discretion to grant appellee's motion for summary judgment because the motion was "filed after the Pretrial Order deadline to file such a motion."

{¶ 23} In its initial pretrial order, the trial court set a summary judgment deadline of January 4, 2008, and a trial date of April 14, 2008. On April 14, 2008, the court continued the trial to November 10, 2008, but it did not set a new summary judgment deadline. Appellee filed the motion on October 2, 2008. The trial court granted it by judgment entry journalized on November 5, 2008.

{¶ 24} Civ.R. 56(B) provides that a party against whom a claim is asserted may "at any time" move for summary judgment. The rule continues, however, that "[i]f the action has been set for * * * trial [then] a motion for summary judgment may be made only with leave of court."

{¶ 25} Here, although appellee did not seek leave prior to filing the motion, a "trial court may grant leave by ruling on the merits of the summary judgment motion." *Woodman v. Tubbs Jones*, 103 Ohio App.3d 577, 582, 660 N.E.2d 520 (8th Dist.1995), citing *Indermill v. United Savings, Inc.*, 5 Ohio App.3d 243, 451 N.E.2d 538 (9th Dist.1982). It is within the discretion of the trial court to grant leave to file summary judgment, even if the case is set for trial. *Woodman* at 582. We see no abuse of discretion by the trial court in granting leave and in ruling on the motion. Appellant's third argument is not well-taken.

{¶ 26} Finding appellant's sole assignment of error not well-taken, we affirm the judgment of the Lucas County Court of Common Pleas. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

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

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.

_____
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.