

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

Duane J. Tillimon

Court of Appeals No. L-18-1237

Appellant

Trial Court No. CVG-17-12004

v.

Etta Tate

**DECISION AND JUDGMENT**

Appellee

Decided: July 12, 2019

\* \* \* \* \*

Duane J. Tillimon, pro se.

\* \* \* \* \*

**PIETRYKOWSKI, J.**

{¶ 1} Appellant, Duane J. Tillimon, appeals the judgment of the Toledo Municipal Court, Housing Division, awarding him \$3,171.27 for unpaid rent, utility bills, and property taxes, and awarding appellee, Etta Tate, \$2,654 on her counterclaim for unjust enrichment. For the reasons that follow, we affirm, in part, and reverse, in part.

## I. Facts and Procedural Background

{¶ 2} Appellant is the owner of a single family residence located at 3802 House of Stuart Avenue, Toledo, Ohio. On November 11, 2016, appellant and appellee executed a residential rental agreement whereby appellant agreed to lease the property to appellee for \$700 per month, beginning on January 1, 2017, and ending on December 31, 2020. Pursuant to the terms of the lease, appellee was responsible for paying all utilities and property taxes.

{¶ 3} Contemporaneous with the lease, appellant and appellee executed two addendums. The first was an option to purchase agreement. Under the option agreement, appellee agreed to pay, and in fact did pay, \$3,600 for the option to purchase the residence for \$42,100. The option could be exercised after one year from the option commencement date of January 1, 2017, and up to the option termination date of December 31, 2020, provided that appellee was still occupying the property and complying with all the terms and conditions of the residential rental agreement. At the time of closing, appellant agreed to return the \$3,600 option consideration and \$100 for every rent payment made on time, for a maximum return of \$7,200. In addition, the option to purchase agreement contemplated that appellee could be credited for work completed to the house, thereby further reducing the option price. Alternatively, if appellee elected to exercise the option with no credit for work completed, the option price would be \$28,000 minus the \$3,600 option consideration actually paid. If appellee did

not exercise the option, or if the option was terminated by virtue of an eviction action against appellee, the \$3,600 option consideration would be forfeited to appellant.

{¶ 4} The second addendum was a contract for repairs, and was an addendum to both the residential rental agreement and the option to purchase agreement. Under the contract for repairs, appellee was to be credited \$6,807.29 towards the option price of \$42,100 for work performed on the residence. That amount included \$634.83 for miscellaneous materials from Home Depot, \$275 to appellant for his labor in making miscellaneous repairs, \$3,494.27 for the replacement of carpet and vinyl flooring, \$1,785 for painting services, and \$618.91 as an overage for other repair items. The contract for repairs provided that “If Etta M. Tate does not purchase the house, improvements shall inure to the benefit of Duane J. Tillimon.”

{¶ 5} On August 11, 2017, appellant initiated the present action by filing a two-count complaint seeking to evict appellee, and to recover a monetary award for physical damage to the property and unpaid rent, utilities, and property taxes. Following a hearing on August 25, 2017, appellant voluntarily dismissed the first cause of action for eviction, after agreeing that appellee had vacated the property.

{¶ 6} Appellee was given until September 22, 2017, to file an answer to appellant’s complaint for damages. Appellee did not timely file an answer. On September 25, 2017, counsel for appellee filed a notice of appearance, and a request for an extension of time to file an answer. On the same day, appellant moved for a default judgment. The motion for default judgment was set for a hearing on November 14, 2017.

On the morning of the hearing, counsel for appellee filed a motion to vacate the default judgment. The matter was then referred to mediation, which concluded unsuccessfully.

{¶ 7} On December 18, 2017, appellee filed a motion for leave to file her answer and counterclaim, which the trial court granted. Appellant then moved for the court to reconsider its decision, which the court denied, finding that it was within its discretion to grant appellee's motion for leave, and that appellee's delay was the result of excusable neglect.

{¶ 8} Thereafter, on January 24, 2018, appellant filed a motion to compel discovery, in which he argued that appellee falsely, evasively, and incompletely answered his interrogatories, and refused to produce copies of the documents that she intended to introduce into evidence at trial. The trial court denied appellant's motion on January 29, 2018.

{¶ 9} A trial on appellant's claim, and appellee's counterclaim, was held on August 14, 2018. At the trial, appellant testified that appellee breached the residential rental agreement by not paying the real estate taxes or the August 2017 rent. In addition to the damages that the trial court awarded for unpaid rent, utilities, and property taxes, appellant testified that he incurred miscellaneous damages of \$16.08 for a single-use camera and film to take pictures of the residence, \$13.90 for the cost of developing the film, \$87.73 to replace a missing chandelier, \$42.87 to replace a "keyed-both-sides" deadbolt that appellee installed, which appellant testified was not allowed for a rental property, and \$14.86 to re-key the locks. Appellant also testified that he was entitled to

\$3,494.27, which was the estimated cost of replacing the carpeting and vinyl floors that was provided for in the contract for repairs, but which appellee never performed. Finally, appellant testified that he was entitled to \$375 in attorney fees, and \$105 for the cost of deposing appellee.

{¶ 10} After appellant rested, appellee testified on her own behalf. Appellee testified that she first agreed to rent the house in October 2016, but it was in poor condition at that time. In order to make it livable, she performed work on the house prior to signing the residential rental agreement, and throughout the time she resided there. Appellee submitted receipts for the work that was done, including a new front door and garage door, a metal grate over a back window, plumbing work and new fixtures, and other miscellaneous repairs. Appellee calculated that she spent \$2,654 on those repairs. Appellee also testified regarding the locks and the chandelier for which appellant was requesting damages. Appellee testified that she replaced the locks for her security, and she did not think of the property as a rental property, because she thought she was going to own it one day. As to the chandelier, appellee testified that it was a light fixture, not a chandelier, and that she took it down because it did not work. On cross-examination, appellant asked appellee if she had any correspondence or documentation wherein he authorized her to perform repairs beyond what was listed on the contract for repairs. Appellee replied that she did not know that she needed such authorization.

{¶ 11} After appellee's testimony, she moved to admit several exhibits, including the composite exhibit of her receipts for repairs. Appellant objected on the grounds that

those documents were not provided in discovery, despite being requested. Counsel for appellee responded that appellant has had the documents, and that they were submitted in mediation. The trial court, at that time, accepted the exhibits and took appellant's objection under advisement. Later, in its written judgment entry, the court overruled appellant's objection.

{¶ 12} Appellant then provided brief rebuttal testimony. Regarding the contract for repairs, appellant testified that the contract contained the only repairs that he authorized to be done to the house, and that he did not know ahead of time about the other repairs that appellee made.

{¶ 13} Following the trial, the court entered its written judgment on October 11, 2018. In its judgment entry, the trial court found that appellant was entitled to the unpaid rent, utilities, and property taxes, totaling \$3,121.27. The court found that appellant was not entitled to the \$3,494.27 provided for in the contract for repairs for new flooring, as such an award would be deemed unjust enrichment. The trial court also denied appellant's request for reimbursement for the disposable camera and film, the chandelier, the replacement lock and the cost to re-key the locks, attorney fees, and deposition costs. As to appellee's counterclaims, the trial court found that appellee was entitled to \$2,654 for the materials purchased to improve the property on the theory of unjust enrichment. However, the trial court denied her request for return of the \$3,600 option consideration. Therefore, the trial court entered a net judgment in favor of appellant in the amount of \$473.27.

## II. Assignments of Error

{¶ 14} Appellant has timely appealed the trial court's October 11, 2018 judgment, and now asserts three assignments of error for our review:<sup>1</sup>

1. The trial court committed reversible error, and abused its discretion, when the trial court vacated appellant's default judgment and granted appellee's motion for leave to file an answer and counterclaim.

2. The trial court committed reversible error, and abused its discretion, when the trial court denied appellant's motion to compel discovery when the discovery went to the material facts of the counterclaim.

3. The trial court committed reversible error, and abused its discretion, in its final judgment by denying the appellant damages that were proven and not disputed by appellee, and by granting the appellee's alleged damages that were disputed by appellant and not proven by appellee, and by admitting into evidence documents that appellee refused to produce both in discovery and at appellee's deposition, and by considering the doctrine of unjust enrichment when there was an expressed [sic] contract covering the same subject, such all being against the manifest weight of the evidence.

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<sup>1</sup> Appellee has not provided a brief in response.

### III. Analysis

#### A. Motion for Leave to File Delayed Answer and Counterclaim

{¶ 15} In his first assignment of error, appellant argues that the trial court abused its discretion in vacating the default judgment and allowing appellee to file an answer and counterclaim. Initially, we note that the trial court never granted appellant’s motion for a default judgment. Thus, we will examine only the court’s decision to allow appellee to file an untimely answer and counterclaim.

{¶ 16} We review a trial court’s decision on a motion for leave to file a late pleading for an abuse of discretion. *Davis v. Immediate Med. Servs., Inc.*, 80 Ohio St.3d 10, 14, 684 N.E.2d 292 (1997). An abuse of discretion connotes that the trial court’s attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 17} “Civ.R. 6(B)(2) allows for an extension of time to file a late pleading within the trial court’s discretion ‘upon motion made after the expiration of the specified period \* \* \* where the failure to act was the result of excusable neglect.’” *Davis* at 14. “In determining whether neglect is excusable or inexcusable, all the surrounding facts and circumstances must be taken into consideration.” *Id.* “Neglect under Civ.R. 6(B)(2) has been described as conduct that falls substantially below what is reasonable under the circumstances.” *Id.*

{¶ 18} Here, the original answer was due on September 22, 2017. On the next business day, September 25, 2017, appellee’s counsel filed a notice of entry of



appearance and a motion for an extension of time to file an answer. Appellant simultaneously filed a motion for default judgment. The trial court never ruled on appellee's motion for an extension. Instead, the trial court set the matter for an assessment of damages hearing on appellant's motion for default judgment. At the assessment of damages hearing, the matter was referred to mediation. Mediation occurred on December 14, 2017, but no agreement was reached. Two business days later, on December 18, 2017, appellee filed her motion for leave to file a delayed answer and counterclaim. The trial court granted appellee's motion on December 26, 2017, and denied appellant's motion for reconsideration on January 22, 2018.

{¶ 19} Upon review, we agree with the trial court that appellee's conduct did not fall substantially below what is reasonable under the circumstances. Appellee filed her first request for an extension to file an answer one business day after the answer was originally due. Without a ruling on her motion, appellee then participated in mediation in an attempt to resolve the dispute between the parties. Two business days after the mediation was unsuccessful, appellee again filed a motion for leave to file a delayed answer and counterclaim. Therefore, we hold that the trial court did not abuse its discretion when it determined that appellee's failure to timely file the answer and counterclaim was a result of excusable neglect.

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

## B. Motion to Compel Production of Documents

{¶ 21} In his second assignment of error, appellant argues that the trial court abused its discretion in denying his motion to compel production of documents and in allowing the introduction of documents at trial that were not provided in discovery. We agree.

{¶ 22} We review a trial court's decision in a discovery matter for an abuse of discretion. *Mauzy v. Kelly Servs., Inc.*, 75 Ohio St.3d 578, 592, 664 N.E.2d 1272 (1996). Although a trial court has discretionary power in discovery practices, rather than a ministerial duty, the court's discretion is not without limits. *Id.* “[A]ppellate courts will reverse a discovery order when the trial court has erroneously denied or limited discovery.” (Quotations omitted). *Id.* “Thus, an appellate court will reverse the decision of a trial court that extinguishes a party's right to discovery if the trial court's decision is improvident and affects the discovering party's substantial rights.” (Quotations omitted). *Id.*

{¶ 23} Relevant here, Civ.R. 26(B)(1) provides,

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things and

the identity and location of persons having knowledge of any discoverable matter.

{¶ 24} In this case, consistent with Civ.R. 26(B)(1), appellant requested that appellee produce copies of any documents that she intended to introduce into evidence at trial. When appellee did not produce any documents in response to the discovery request, appellant then moved the trial court to compel appellee to produce those documents, which the trial court denied. Appellant now argues that the trial court's denial of his motion to compel prevented him from preparing for trial in any meaningful manner. In particular, appellant contends that appellee's counterclaim for unjust enrichment in the amount of \$2,654 was not specific as to the repairs allegedly made, and he needed the requested documents to investigate whether the repairs were properly completed, whether they added any value to the house, and whether they were included within the contract for repairs.

{¶ 25} Upon review, we find that the trial court's denial of appellant's motion to compel effectively denied appellant the opportunity to fully prepare his defense to appellee's counterclaim. "One of the purposes of the Rules of Civil Procedure is to eliminate surprise. This is accomplished by way of a discovery procedure which mandates a free flow of accessible information between the parties upon request." *Jones v. Murphy*, 12 Ohio St.3d 84, 86, 465 N.E.2d 444 (1984). Here, the purposes of the Rules of Civil Procedure were frustrated. Despite appellant's dutiful efforts, he was foreclosed from examining the documents on which appellee relied until the moment of trial,

thereby frustrating his ability to prepare a defense to appellee's counterclaim. Thus, we find that the trial court's decision to deny appellant's motion to compel was improvident and impacted appellant's substantial rights, and we therefore hold that the trial court abused its discretion.

{¶ 26} Accordingly, appellant's second assignment of error is well-taken.

### **C. Miscellaneous Damages Not Awarded by the Trial Court**

{¶ 27} In his third and final assignment of error, appellant argues that the trial court's award is against the manifest weight of the evidence. To the extent that appellant argues that the court's award of \$2,654 to appellee on her counterclaim is against the manifest weight of the evidence, we find appellant's argument moot in light of our resolution of his second assignment of error. Thus, we will address only his arguments as they pertain to the trial court's failure to award additional damages from appellee's breach of the residential rental agreement.

{¶ 28} Generally, we review a trial court's judgment following a bench trial under a manifest-weight standard of review. *Quest Workforce Solutions, LLC v. Job1USA, Inc.*, 2018-Ohio-3304, 119 N.E.3d 817, ¶ 14 (6th Dist.). In reviewing for manifest weight, "The [reviewing] court \* \* \* weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [finder of fact] clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered." *Eastley v. Volkman*, 132

Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 20, quoting *Tewarson v. Simon*, 141 Ohio App.3d 103, 115, 750 N.E.2d 176 (9th Dist.2001).

{¶ 29} Appellant presents a list of eight items for which he believes damages should have been awarded: disposable camera; cost for developing film; chandelier; replacement lock; re-keying the locks; contract for repairs; attorney fees; and deposition of defendant.

{¶ 30} Regarding the costs for the disposable camera, developing film, and the deposition of appellee, we find that these costs are expenses undertaken for the purpose of litigation, and are not related to the remediation of any damage allegedly caused by appellee. Therefore, we hold that these costs are not recoverable as damages for breach of the residential rental agreement.

{¶ 31} As to the category of damages for the chandelier, replacement lock, and the cost of re-keying the locks, we have previously stated,

Both the rental agreement and the common law require a tenant “to return the leased premises in substantially as good a condition as when received, reasonable wear and tear excepted.” (Citations omitted.) *Bibler v. Nash*, 3d Dist. Hancock No. 5-05-09, 2005-Ohio-5036, ¶ 18. A tenant may be held liable for extraordinary damages which are not the result of normal wear and tear, but the landlord must establish the link between the damage and the tenants. *Id.*; R.C. 5321.05; *Kelley v. Johnston*, 4th Dist. Gallia No. 01CA5, 2001 WL 1479243, \*2-3, 2001 Ohio App. LEXIS 5177,

\*8 (Nov. 14, 2001). “It is axiomatic that in order to determine the reasonable cost to restore property to the condition it was in prior to being damaged, a court must have evidence of the condition of the property before it was damaged.” *PAG Holdings v. Love*, 2d Dist. Greene No. 12CA0012, 2012-Ohio-3388, ¶ 11.

*Tillimon v. Myles*, 6th Dist. Lucas No. L-17-1032, 2018-Ohio-434, ¶ 30. Here, according to appellee, the missing chandelier did not work, and appellant did not provide any evidence that it was working at the beginning of appellee’s tenancy. Thus, appellant is not entitled to reimbursement for the missing chandelier. Turning to the request for damages for changing and re-keying the locks, we find that such expenditures are part of the normal cost of doing business, and do not constitute damage beyond ordinary wear and tear. Thus, appellant is not entitled to reimbursement for replacing or re-keying the locks.

{¶ 32} Appellant next asks for an award of \$3,494.27 for appellee’s failure to replace the carpeting and vinyl flooring as provided for in the contract for repairs. We find that appellant has suffered no damages as a result of appellee’s conduct. The contract for repairs does not expressly require appellee to replace the carpet and vinyl flooring, but rather states that she would be credited \$3,494.27 against the purchase price of the house for the repair. Because she did not repair the flooring, she was not entitled to the credit, and since she did not purchase the house, appellant was never in a position

to extend the credit. Therefore, we hold that appellant is not entitled to recover \$3,494.27 from appellee.

{¶ 33} Finally, appellant seeks to collect \$375 in attorney fees pursuant to R.C. 5321.05(C), which allows for a recovery of attorney fees where the tenant has failed to:

(1) Keep that part of the premises that he occupies and uses safe and sanitary;

(2) Dispose of all rubbish, garbage, and other waste in a clean, safe, and sanitary manner;

(3) Keep all plumbing fixtures in the dwelling unit or used by him as clean as their condition permits;

(4) Use and operate all electrical and plumbing fixtures properly;

(5) Comply with the requirements imposed on tenants by all applicable state and local housing, health, and safety codes;

(6) Personally refrain and forbid any other person who is on the premises with his permission from intentionally or negligently destroying, defacing, damaging, or removing any fixture, appliance, or other part of the premises;

(7) Maintain in good working order and condition any range, refrigerator [sic], washer, dryer, dishwasher, or other appliances supplied by the landlord and required to be maintained by the tenant under the terms and conditions of a written rental agreement;

(8) Conduct himself and require other persons on the premises with his consent to conduct themselves in a manner that will not disturb his neighbors' peaceful enjoyment of the premises.

R.C. 5321.05(A).

{¶ 34} In this case, appellant has not demonstrated that appellee has failed to comply with the aforementioned requirements. Rather, he testified that she was evicted for failure to pay rent, utilities, and property taxes, which is not one of the criteria set forth in R.C. 5321.05(A)(1)-(8). Therefore, appellant is not entitled to recover attorney fees under R.C. 5321.05(C).

{¶ 35} Accordingly, because we find that appellant is not entitled to any of the additional miscellaneous damages that he requested, we hold that the trial court's decision not to award those damages is not against the manifest weight of the evidence.

{¶ 36} Appellant's third assignment of error is not well-taken.

#### **IV. Conclusion**

{¶ 37} For the foregoing reasons, we find that substantial justice has not been done the party complaining, and the judgment of the Toledo Municipal Court, Housing Division, is affirmed, in part, and reversed, in part. The trial court's award of \$2,654 to appellee is reversed and vacated. The remainder of the trial court's judgment is affirmed. The matter is remanded to the trial court for a new trial on appellee's counterclaim of unjust enrichment, with appellant being entitled to receive in discovery any documents



that appellee intends to introduce at that trial. Appellee is ordered to pay the costs of this appeal 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.

Mark L. Pietrykowski, J.

\_\_\_\_\_  
JUDGE

Arlene Singer, J.

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JUDGE

Thomas J. Osowik, 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:  
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