

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Chase Home Finance, LLC,	:	
Plaintiff-Appellee,	:	
v.	:	
Sheri B. Mustafa,	:	No. 11AP-846
Defendant-Appellant,	:	(C.P.C. No. 09CVE02-1491)
	:	(REGULAR CALENDAR)
McNaughten Commons Condominium Association, Inc.,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on August 21, 2012

Law Offices of Marcus A. Ross, and Marcus A. Ross, for appellant.

Kaman & Cusimano, LLC, Robert E. Kniecik, and Kevin M. Fields, for appellee McNaughten Commons Condominium Association, Inc.

APPEAL from Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Defendant-appellant, Sheri B. Mustafa, appeals from a judgment of the Franklin County Court of Common Pleas entered in favor of defendant-appellee,

McNaughten Commons Condominium Association, Inc ("appellee"). For the following reasons, we affirm the judgment of the trial court.

I. BACKGROUND

{¶ 2} This action commenced with the filing of a complaint by Chase Home Finance, LLC ("Chase"), seeking foreclosure of appellant's property. The complaint alleged appellant had defaulted on her promissory note that was secured by a mortgage on appellant's condominium unit located in McNaughten Commons. Among the defendants named in the complaint were appellant and appellee. Appellee filed an answer to Chase's complaint and a cross-claim against appellant for unpaid monthly condominium assessments. Appellee's cross-claim sought foreclosure on its lien and judgment in its favor in the amount of \$2,593.50, plus 15 percent interest per annum, costs, attorney fees, and the amount of unpaid assessments and charges incurred subsequent to February 27, 2009.

{¶ 3} Though default judgment had been rendered against appellant, her motion for relief from judgment was ultimately granted by the trial court and the matter proceeded accordingly. With her answer to appellee's cross-claim, appellant asserted claims against appellee. During the pendency of the case, Chase and appellant engaged in loan modifications that resulted in a settlement of the claims asserted by Chase. Remaining at issue, however, were the claims of appellee and appellant that were asserted against one another.

{¶ 4} Appellee filed a motion for summary judgment seeking judgment as a matter of law on appellant's claims asserted against it and, also, its claims against appellant. After review, the trial court concluded appellee was entitled to summary judgment on the claims asserted against it by appellant, which included trespass, retaliatory eviction, breach of contract, and breach of covenant of quiet enjoyment. However, the trial court concluded genuine issues of material fact existed regarding appellant's account balance such that appellee's foreclosure-related claims could not be decided by summary judgment. Specifically, the trial court held appellant's deposition testimony, which indicated appellee failed to properly credit appellant's account with payments she had made, created genuine issues of material fact. Therefore, appellee's motion for summary judgment was granted in part and denied in part.

{¶ 5} The trial court conducted a bench trial on the remaining claims, and by decision filed August 31, 2011, found appellee established by a preponderance of the evidence that it had a valid lien for condominium fees in the amount of \$9,988.50. This number was comprised of the lien amount of \$1,982, plus interest at a rate of 15 percent per annum from January 27, 2009, and \$8,006.50 in condominium fees that had accumulated since the filing of the lien. The trial court also awarded appellant attorney fees for fees incurred between January 2009 and August 2011. A judgment entry reflecting the trial court's decision granting of judgment in favor of appellee was filed on September 29, 2011.

II. ASSIGNMENTS OF ERROR

{¶ 6} Appellant timely appealed, and brings the following two assignments of error for our review:

[1.] The trial court abused its discretion in ruling that plaintiff-appellee's lien filed February 11, 2009 was a good, valid, and subsisting lien upon defendant-appellant's condominium unit.

[2.] The trial court's decision was against the manifest weight of the evidence in that plaintiff-appellant's initial lien should have been wholly discharged along with all fees and cost of legal proceedings. Had the plaintiff-appellee's lien been properly discharged initially the defendant-appellant would not have fallen behind in her condominium payments and been subject to foreclosure by plaintiff-appellant. [Sic]

III. DISCUSSION

A. First Assignment of Error

{¶ 7} Appellant's first assignment of error challenges the trial court's finding that the February 11, 2009 lien filed by appellee constituted a good, valid, and subsisting lien upon her condominium unit. Though conceding that Ohio law and the governing declarations and bylaws provide that a lien could be placed on her property for all unpaid fees along with reasonable attorney fees and costs incident to collection, appellant contends the lien is invalid because she was not actually deficient in any monthly payments. According to appellant, appellee failed to properly credit her account with payments she had made, and that if her account had been properly credited, her account

would not have been deficient. Thus, appellant's arguments under her first assignment of error challenge the evidence presented at trial.

{¶ 8} "It is well-settled law that '[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.'" *Sharp v. Norfolk & W. Ry. Co.*, 72 Ohio St.3d 307, 313 (1995), quoting *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279 (1978), syllabus. In an appeal from a bench trial, a reviewing court must presume that the factual findings of the trial judge are correct because the trial judge had an opportunity "to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984). If the evidence is susceptible to more than one interpretation, we must construe it consistently with the trial court's judgment. *Cent. Motors Corp. v. Pepper Pike*, 73 Ohio St.3d 581, 584 (1995).

{¶ 9} As stated previously, the reason the trial court denied in part appellee's motion for summary judgment was to resolve an issue of fact created by appellant's deposition and affidavit testimony wherein appellant stated she had made payments for which appellee failed to properly account. At the bench trial, appellee offered evidence that it filed its lien against appellant's condominium unit in February 2009, after appellant ceased making monthly assessment payments in June 2008. In contrast, appellant offered testimony that she hand-delivered two separate checks to appellee's office late in the year of 2008, but appellee had "lost" them. After hearing the evidence, the trial court resolved this factual dispute in favor of appellee.

{¶ 10} Appellee presented competent, credible evidence to support the deficiencies in appellant's account. To the extent appellant's testimony was in conflict with the evidence presented by appellee, the trial court was in the best position to resolve the same. *See Seasons Coal Co.* at 80. Accordingly, appellant's first assignment of error is overruled.

B. Second Assignment of Error

{¶ 11} In her second assignment of error, appellant argues the trial court's judgment is against the manifest weight of the evidence. Under this assigned error,

appellant first argues (1) R.C. 5311.18(A) does not include debt acquired subsequent to the filing of the lien certificate, and (2) the lien is invalid because the late fees and annual interest rate on the lien is unreasonable. Neither of these arguments was raised during the trial court proceedings.

{¶ 12} It is well-settled that " 'issues not initially raised in the trial court may not be raised for the first time on appeal.' " *Amare v. Chellena Food Express, Inc.*, 10th Dist. No. 08AP-678, 2009-Ohio-147, ¶ 14, quoting *Ohio Civ. Rights Comm. v. Triangle Real Estate Serv., Inc.*, 10th Dist. No. 06AP-157, 2007-Ohio-1809, ¶ 11; *Stevens Skin Softener, Inc. v. Revco Drug Stores, Inc.*, 121 Ohio App.3d 212, 218 (8th Dist.1997); *Crist v. Precise Boring, Inc.*, 5th Dist. No. 11-CA-21, 2012-Ohio-2455, ¶ 41 (overruling assignment of error concerning implied contract theory because the issue was not raised at the trial court level).

{¶ 13} An appellant cannot change the theory of her case and present new arguments for the first time on appeal. *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elections*, 65 Ohio St.3d 175, 177 (1992); *see also State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 81 (1997) ("These rules are deeply embedded in a just regard for the fair administration of justice. They are designed to afford the opposing party a meaningful opportunity to respond to issues or errors that may affect or vitiate his or her cause [and] do not permit a party to sit idly by until he or she loses on one ground only to avail himself or herself of another on appeal."). Because appellant's first two arguments under her second assignment of error were not properly raised in the trial court, we decline to consider them for the first time on appeal.

{¶ 14} The third argument presented under her second assignment of error is that because appellee's negligence resulted in an invalid lien, it was "unfair and unreasonable" for the trial court to award appellee attorney's fees and costs. (Appellant's brief, 10.)

{¶ 15} R.C. 5311.19(A) and the governing declarations and bylaws authorize an award of reasonable attorney fees. R.C. 5311.19(A) provides in relevant part:

All unit owners * * * of a condominium property shall comply with all covenants, conditions, and restrictions set forth in a deed to which they are subject or in the declaration, the bylaws, or the rules of the unit owners association, as lawfully amended. Violations of those covenants, conditions, or

restrictions shall be grounds for the unit owners association
* * * to commence a civil action for damages, injunctive relief,
or both, and an award of court costs and reasonable attorney's
fees in both types of action.

{¶ 16} The Supreme Court of Ohio has held that " "where a court is empowered to award attorney fees by statute, the amount of such fees is within the sound discretion of the trial court. Unless the amount of fees determined is so high or so low as to shock the conscience, an appellate court will not interfere." " " *In re Estate of Born*, 10th Dist. No. 06AP-1119, 2007-Ohio-5006, ¶ 15, quoting *Bittner v. Tri-Cty. Toyota, Inc.*, 58 Ohio St.3d 143, 146 (1991), quoting *Brooks v. Hurst Buick-Pontiac-Olds-GMC, Inc.*, 23 Ohio App.3d 85, 91 (12th Dist.1985). Accordingly, we will affirm the trial court's judgment absent an abuse of discretion. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 17} The trial court's judgment entry indicates that it found the incurred attorney fees "to be fair, just and reasonable given the circumstances of the case as reflected upon the docket, and the evidence presented at trial." (Entry, 6.) The judgment also states that the amount awarded is the amount appellee was charged per its entries on the account. It is appellant's position that though attorney fees were permitted to be awarded, the trial court did not give "full consideration of all of the circumstances of the case" in awarding such fees. (Appellant's brief, 11.) According to appellant, the trial court did not give full consideration to the circumstances of this case because this dispute actually arose not from appellant's failure to pay, but, rather, from appellee's negligence in handling appellant's payments.

{¶ 18} As determined under appellant's first assignment of error, in ruling in favor of appellee, the trial court rejected appellant's assertion that she was not deficient in her monthly payments and that it was appellee that failed to properly credit her account with payments that had been made. Because we affirmed the trial court's rejection of this factual assertion, we do not find said assertion serves as a basis for finding the trial court abused its discretion in awarding attorney fees to appellee. Upon review of the record, we

reject appellant's contention that the trial court abused its discretion in awarding attorney fees to appellee.

{¶ 19} For all of the foregoing reasons, appellant's second assignment of error is overruled.

IV. CONCLUSION

{¶ 20} Having overruled both of appellant's asserted assignments of error, we hereby affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and CONNOR, JJ., concur.
