

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Patrick M. McGreevy,	:	
	:	No. 09AP-381
Plaintiff-Appellant,	:	(M.C. No. 2006 CVG 034401)
v.	:	
	:	(REGULAR CALENDAR)
Rick Bassler,	:	
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on January 19, 2010

Patrick M. McGreevy, pro se.

Eric E. Willison, for appellee.

APPEAL from the Franklin County Municipal Court.

McGRATH, J.

{¶1} Plaintiff-appellant, Patrick M. McGreevy ("appellant"), appeals from the judgment of the Franklin Court Municipal Court entered in favor of defendant-appellee, Rick Bassler ("appellee"), in the amount of \$535.00, plus costs and interest at the rate of eight percent per annum from August 15, 2006, plus attorney fees in the amount of \$2,012.50 as additional costs, entered after a trial to the bench.

{¶2} As stated in *McGreevy v. Bassler*, 10th Dist. No. 07AP-283, 2008-Ohio-328 (*McGreevy I*):

On August 14, 2006, plaintiff filed a complaint in the Franklin County Municipal Court, alleging claims against defendant, his tenant, for forcible entry and detainer and for recovery of

unpaid rent, due August 1, 2006. The trial court dismissed plaintiff's forcible entry and detainer claim on August 29, 2006. On October 16, 2006, defendant answered plaintiff's complaint and filed counterclaims, which alleged: breaches of the parties' written lease, based primarily on plaintiff's failure to fix the refrigerator in the rented premises; violation of R.C. 5321.04, which sets forth statutory duties applicable to landlords; and a claim based on plaintiff's failure to return defendant's security deposit. Plaintiff filed a reply to defendant's counterclaims on November 22, 2006, denying all allegations asserted therein.

In his counterclaim, defendant alleges that he and plaintiff entered into a one-year apartment lease in May 2002 and that a month-to-month tenancy continued after the expiration of the lease term. Defendant alleges that, in June 2006, the refrigerator in the apartment stopped working and that he notified plaintiff of that fact in letters mailed with his rent payments for June 2006 and July 2006. Defendant also alleges that, on August 7, 2006, he notified plaintiff, in a voice mail message and by certified mail, that he was terminating the tenancy based on plaintiff's failure to fix the refrigerator. Defendant claims that he sent his August 2006 rent payment to plaintiff by certified mail on August 10, 2006, and vacated the apartment on August 28, 2006. Defendant also asserts that, although he notified plaintiff of his forwarding address on September 5, 2006, plaintiff did not refund defendant's security deposit.

Id. at ¶2-3.

{¶3} On February 2, 2007, appellee filed a motion to compel discovery and to deem admitted unanswered requests for admissions, and on February 15, 2007, appellee filed a motion for summary judgment. In the motion for summary judgment, appellee again argued that the matters upon which he requested admissions should be deemed admitted because of appellant's failure to deny such requests. The trial court agreed with appellee and held matters contained in the requests for admissions were conclusively admitted based on appellant's failure to deny such matters. Based on the admissions,

the trial court granted appellee's motion for summary judgment. A damages hearing was held, and the trial court entered judgment in favor of appellee on appellant's claims for unpaid rent and on appellee's counterclaims in the amount of \$3,325, plus costs, and post-judgment interest.

{¶4} Appellant appealed to this court arguing primarily that it was error for the trial court to deem appellee's unanswered requests for admissions as admitted and thereby grant summary judgment in appellee's favor. This court agreed holding that because appellee did not designate a period within which appellant was required to respond to the requests for admissions, appellee did not comply with the strictures of Civ.R. 36(A), and appellant was, therefore, entitled to respond to the requests for admissions any time prior to trial. Consequently, the matter was reversed and remanded to the trial court for further proceedings.

{¶5} On remand, a trial to the bench was held on July 18, 2008. The trial court found that appellant's failure to attend to the refrigerator in the apartment was a violation of duties imposed by R.C. 5321.04(A)(4). The trial court concluded that though this violation did justify appellee's election to terminate the lease, appellee was unable to establish that he suffered any damages as a result of said violation. The trial court also found the basis for appellant's eviction action, which was nonpayment of rent, was unjustified because appellant had established a pattern with appellee of accepting rent beyond the first of the month. Because there was no valid basis for the eviction action, the trial court found the eviction action constituted a retaliatory eviction prohibited by R.C. 5321.02(A)(2). Additionally, the trial court found appellant failed to establish the premises were damaged during tenancy beyond reasonable wear and that appellee was entitled to

his security deposit of \$535. However, because the trial court found appellee vacated the premises on August 15, 2006, appellant was only entitled to \$267.50 of past due rent for the month of August. Thus, the trial court rendered judgment for appellee in the amount of \$267.50 plus \$267.50, as authorized by R.C. 5321.06(C), plus costs and interest at the rate of eight percent per annum from August 15, 2006, plus attorney fees. Thereafter, the trial court awarded attorney fees in the amount of \$2,012.50.

{¶6} It is from this judgment that appellant appeals and assigns the following three assignments of error for our review:

1. The trial court's conclusion of law that the eviction was retaliatory was unsupported by the courts finding of facts or the record.
2. The judges finding of fact in paragraph 11 of the judgment entry of December 3rd 2008 is against the manifest weight of the evidence.
3. Attorney fees awarded by the lower court where [sic] not reasonable under R.C. 5321.16.

{¶7} The trial court's damages award is premised on R.C. 5321.16, which provides:

(A) Any security deposit in excess of fifty dollars or one month's periodic rent, whichever is greater, shall bear interest on the excess at the rate of five percent per annum if the tenant remains in possession of the premises for six months or more, and shall be computed and paid annually by the landlord to the tenant.

(B) Upon termination of the rental agreement any property or money held by the landlord as a security deposit may be applied to the payment of past due rent and to the payment of the amount of damages that the landlord has suffered by reason of the tenant's noncompliance with section 5321.05 of the Revised Code or the rental agreement. Any deduction from the security deposit shall be itemized and identified by

the landlord in a written notice delivered to the tenant together with the amount due, within thirty days after termination of the rental agreement and delivery of possession. The tenant shall provide the landlord in writing with a forwarding address or new address to which the written notice and amount due from the landlord may be sent. If the tenant fails to provide the landlord with the forwarding or new address as required, the tenant shall not be entitled to damages or attorneys fees under division (C) of this section.

(C) If the landlord fails to comply with division (B) of this section, the tenant may recover the property and money due him, together with damages in an amount equal to the amount wrongfully withheld, and reasonable attorneys fees.

{¶8} Because it is dispositive, we first address appellant's second assignment of error, in which he contends the trial court's finding that appellee vacated the premises on August 15, 2006 is against the manifest weight of the evidence. Civil "[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." *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. "[A]n appellate court should not substitute its judgment for that of the trial court when there exists * * * competent and credible evidence supporting the findings of fact and conclusions of law rendered by the trial judge." *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80; see also *Myers v. Garson*, 66 Ohio St.3d 610, 616, 1993-Ohio-9 (reaffirming the reasoning of *Seasons Coal*, and "hold[ing] that an appellate court must not substitute its judgment for that of the trial court where there exists some competent and credible evidence supporting the findings of fact and conclusions of law rendered by the trial court").

{¶9} When considering whether a civil judgment is against the manifest weight of the evidence, an appellate court is guided by a presumption that the findings of the trier of fact were correct. *Seasons Coal Co.*, at 79-80. "The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Id.* at 80.

{¶10} The trial court found appellee vacated the premises on August 15, 2006. This fact is pivotal because it is the basis for the trial court's conclusion that appellant erred in withholding \$267.50 of the security deposit. The derivation that appellant wrongfully withheld \$267.50 of the security deposit is as follows. The trial court found appellant had established a pattern with appellee of accepting rent after the first of the month; therefore, there was no basis for the eviction action premised on nonpayment of rent, and ergo the eviction was retaliatory in nature. Because the eviction was retaliatory, and the trial court found appellee vacated the premises on August 15, 2006, the trial court concluded appellee was responsible for paying only one-half, rather than the full rent for the month of August. Thus, in accordance with R.C. 5321.16, appellant was entitled to deduct the amount of past due rent, i.e., \$267.50, from the security deposit of \$535.00, leading to the trial court's conclusion that appellant wrongfully withheld \$267.50 of the security deposit. Also based on R.C. 5321.16, the trial court doubled the damages amount and awarded attorney fees to appellee.

{¶11} Appellee did indeed testify that he moved out of the apartment on August 15, 2006. However, upon review of the record, we find that even if appellee was

credible in his testimony that he moved his belongings out of the apartment on August 15, 2006, he was nonetheless required to pay rent for the full month of August. This is so because even if August 15, 2006 could be construed as the end of the lease term, appellee still retained possession of the premises as the record undisputedly establishes that appellee not only retained the keys to the premises until month's end, but also allowed a third party to access the premises at month's end. Therefore, the finding of the trial court that appellee relinquished possession of the premises on August 15, 2006, is against the manifest weight of the evidence.

{¶12} "A tenant is responsible to the landlord for rent beyond the lease term where he retained the keys to the premises." *Jones v. Simondis* (Mar. 27, 1998), 11th Dist. No. 97-T-0073, quoting *Griffin v. Currie* (Nov. 25, 1988), 11th Dist. No. 4065, citing *Peters v. Durroh* (1971), 28 Ohio App.2d 245. See also *Stile v. Rambler* (Sept. 28, 1983), 9th Dist. No. 11097 (tenants did not relinquish keys to the landlord until the fifth of June, thus, did not relinquish possession of the premises until that date).

{¶13} Here, the lease required, inter alia, that appellee, "return the keys personally to Lessor's office immediately upon vacating the premises." Despite this lease requirement, appellee testified he did not personally return the keys to appellant's office but, instead, left the keys in the mailbox of the apartment. Further, by his own testimony, appellee established that, at his request, a cleaning service entered the apartment days after he moved out by utilizing the keys appellee left in the mailbox. The invoice, however, states the cleaning service was at the apartment on August 26, 2006. Appellee testified he even instructed the person from the cleaning service that the keys would be found in the mailbox. Appellee then explained he was driving in the neighborhood in early

September 2006, and he decided to check to see if the keys were still in the mailbox. Upon finding the keys in the mailbox, appellee obtained possession of them and mailed them to appellant via certified mail on September 5, 2006. Moreover, appellee testified he attempted to instruct appellant that his last day of residence in the apartment would be August 31, 2006.¹

{¶14} Because the evidence undisputedly demonstrates appellee was responsible for a full month's rent of \$535, which is offset against the security deposit of \$535, none of the security deposit was wrongfully withheld. In *Vardeman v. Llewellyn* (1985), 17 Ohio St.3d 24, the Supreme Court of Ohio concluded an award of attorney fees in accordance with R.C. 5321.16(C) can be awarded only when a tenant prevails on his claim for damages based upon the trial court's finding that the landlord wrongfully withheld any amount due the tenant. Because appellant did not wrongfully withhold the security deposit, appellee may claim neither double damages nor attorney fees pursuant to R.C. 5321.06(C). Accordingly, we sustain appellant's second assignment of error.

{¶15} Given our disposition of appellant's second assignment of error, we need not consider whether the trial court's findings with respect to among others, retaliatory eviction and damages to the premises, were in error. Accordingly, appellant's remaining assignments of error are rendered moot. We take this opportunity to address the outstanding "Motion to Strike Uncorrected Brief and Motion to Dismiss" filed by appellee on October 8, 2009. On this same date, appellant filed a motion for leave to file a brief *instanter*. Appellant's motion was granted per this court's entry on October 13, 2009,

¹ We also note that in *McGreevy I*, this court stated, "[d]efendant claims that he sent his August 2006 rent payment to plaintiff by certified mail on August 10, 2006, and *vacated the apartment on August 28, 2006.*" *Id.* at ¶3. (Emphasis added.)

rendering moot appellee's motion to strike and motion to dismiss. Accordingly, said motions are denied as such.

{¶16} For the foregoing reasons, we sustain appellant's second assignment of error, overrule as moot appellant's first and third assignments of error, and reverse the judgment of the Franklin County Municipal Court. This matter is hereby remanded to that court for further proceedings consistent with law and this decision.

Motions denied; judgment reversed and cause remanded.

BROWN and CONNOR, JJ., concur.
