

[Cite as *Odita v. Phillips*, 2010-Ohio-4321.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Florence Odita,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 09AP-1172
v.	:	(M.C. No. 2008CVH-041906)
	:	
Patrick Phillips et al.,	:	(REGULAR CALENDAR)
	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on September 14, 2010

Joquetta S. Wells, for appellant.

Willis Law Firm LLC, and *Michael J. Cassone*, for appellees.

APPEAL from the Franklin County Municipal Court.

SADLER, J.

{¶1} Plaintiff-appellant, Florence Odita ("appellant"), filed this appeal seeking reversal of a judgment by the Franklin County Municipal Court granting judgment in favor of defendants-appellees, Patrick Phillips ("Patrick"), David Panzera ("David"),

Phillips Realty, LLC, and Property Management Concepts, Inc. (collectively "appellees").¹

{¶2} In May 2008, appellant entered into a contract with Phillips Realty, whereby Phillips Realty agreed to manage rental property owned by appellant. The contract, identified as a management agreement, called for Phillips Realty to be responsible for certain management responsibilities for the rental property, including renting apartments, collecting rent, and performing maintenance on the property. Entering into the management agreement was a requirement for appellant to obtain financing for the purchase of the property.

{¶3} The contract commenced some time around June 1, 2008, and stated that it would have a term of one year. The contract provided, in relevant part, that it would be "automatically renewed thereafter for successive periods of one year until terminated by either party upon not less than a 30 day written notice prior to the end of the initial term or at anytime during any concurrent renewal period."

{¶4} Under the terms of the agreement, after collection of rents, Phillips Realty would deduct a management fee of six percent of gross revenues, a rental fee for any apartments rented during the month, and any expenses incurred for maintenance or repairs, and would then forward the balance of the money collected to appellant. The contract also provided that prior written approval was to be obtained from appellant in the event that any single item of repair cost more than \$500.

¹ Property Management Concepts is a dba for Phillips Realty, LLC. For ease of discussion, we will refer only to Phillips Realty, even where the transcript refers only to Property Management Concepts.

{¶5} By letter dated July 23, 2008, appellant asked for documentation regarding work performed that appeared in the account statement prepared by Phillips Realty dated July 21, 2008. By a second letter also dated July 23, 2008, appellant informed Phillips Realty that it was terminating the management agreement, stating that the letter was the 30-day notice set forth in the agreement. Appellant sent Phillips Realty another letter dated July 30, 2008. That letter provided:

We will pick up August rents from your office on August 10, 2008. This is to avoid the difficulties we experienced with receiving July mailing rents. Also, please make available the following information for pick up at the same time (August 10). We want complete documentation of all deductions from the July rents including date, time, work actually performed and specific Unit number of all work completed and listed within the billing statement and operating statement dated July 21, 2008 for the property at 21-39 Burgess Avenue, Columbus, Ohio. We will pick up August rents and statements along with the above information on July proceeds from your Office on August 10, 2008.

We would also want all the original applications, original leases, property keys and other property specific information at that time.

{¶6} In a letter dated August 6, 2008, counsel for Phillips Realty acknowledged receipt of the letters from appellant. In the letter, counsel alleged that appellant's actions constituted an anticipatory repudiation of the contract, and asserted that Phillips Realty had the right to recover damages arising from the breach of the contract. Counsel further stated that the documents sought by appellant were being compiled and would be provided to appellant, and that appellant should refrain from contact with Phillips Realty in the meantime. Counsel stated an intention to resolve the dispute, but asserted that a civil action would be filed if no resolution could be reached.

{¶7} By letter dated August 7, 2008, appellant directed Phillips Realty to turn over all keys, documents, and other items related to the property, and stated that Phillips Realty and its employees were no longer permitted to be on the property. On August 18, 2008, Phillips Realty turned over all keys and other documents, along with a check for \$3,337.13, representing the amount remaining in the operating account for the property. On September 9, 2008, appellant filed a complaint against appellees in the Small Claims Division of the Franklin County Municipal Court, naming as plaintiffs appellant, Eric C. Oditia ("Eric"), and RCO International Corporation. In the complaint, appellant asserted that:

The Defendants were scheduled to release a check to Plaintiff's [sic] on July 10, 2008 for rents collected up to that date. After several attempts to contact the Defendants through phone calls and personal visits a check was finally able to be picked up in their office on July 21, 2008. A billing statement was included with the check which showed questionable management charges and other fees * * *. Due to the lack of timely payment, non-consideration for basic business courtesy, lack of communication, and questionable business practices it was decided that the contract should be terminated * * *. The Plaintiffs demanded that the original items be returned along with our property keys and a check be released to us for all rents collected through August, 10, 2008 * * *. To date they have released a check for rents collected in the month of August on August 18, 2008 through their attorney * * *. However, they still hold rents totaling \$2,462.34 collected in the second half of July * * *.

* * * Wherefore, Plaintiffs respectfully demand judgment jointly and severally against the Defendants in the amount of \$2,462.34, attorney fees, interest from August 1, 2008, court costs herein, and any other legal or equitable relief that this Court deems just and proper.

{¶8} Appellees filed an answer generally denying the claims set forth in appellant's complaint and asserting a number of affirmative defenses. Appellees also

asserted counterclaims against appellant, alleging: (1) breach of contract; (2) breach of the duty good faith and fair dealing; (3) unjust enrichment; and (4) frivolous conduct in violation of R.C. 2323.51. Appellees sought damages to be determined, but not to exceed the \$15,000 jurisdictional limits of the court. Based on appellees' assertion regarding damages, the case was transferred from the Small Claims Division to the court's regular docket.

{¶9} Appellant subsequently filed an amended complaint. In the amended complaint, appellant asserted four claims. The first claim asserted that appellees breached the management agreement "through lack of communication and non-completion of contracted responsibilities." The second claim asserted that for the month of July, appellees had collected rents totaling \$5,790.78, and billed appellant \$3,145.54 for work performed. The claim asserted that appellees had failed to release the net amount of \$2,462.34, and that the \$3,154.54 billed was for work that was not actually performed. The third claim asserted that appellees engaged in embezzlement and fraud by billing for services that were not actually performed. The fourth claim asserted that appellees had provided a check in the amount of \$3,337.13 representing August rents, but that appellees had improperly withheld additional rents from three tenants totaling \$1,225.

{¶10} The case came before the court for trial on September 28, 2009. Before the trial started, the parties entered into stipulations regarding a number of documents to be considered as exhibits at trial. Appellees then made a motion seeking dismissal of Eric and RCO International Corporation as plaintiffs, as neither had any interest in the contract at issue. Appellant argued that the motion to dismiss should be denied,

particularly with respect to Eric, as appellant argued that he did have an interest in the agreement. The trial court granted the motion to dismiss as to both of those plaintiffs. Appellant filed a notice with this court making it clear that Eric and RCO International Corporation are not parties to this appeal.

{¶11} The first witness called by appellant at trial was David, property manager for Phillips Realty, called as on cross-examination. Appellant questioned David about the management agreement and about a number of invoices for work listed as part of the July statement. There was some confusion regarding whether some of the documents had been provided to appellant, and the trial court pointed out that the documents at issue had been the subject of the motion to compel that appellant had agreed had been resolved. There was extensive discussion regarding the invoices provided by appellees in discovery, with appellant arguing that the work shown on the invoices was not actually performed. During appellant's questioning of David, appellant repeatedly argued that the invoices for work performed in July did not add up to the amount listed in the statement as representing work performed, with David testifying that the work was performed.

{¶12} Appellant also questioned David regarding the amount paid to appellant based on the July rents with the deduction for work performed. David explained that some of the cash balance remaining after deduction of expenses was paid to Eric upon his request, some was placed in reserve as called for by the management agreement, and the remainder of \$2,462.34 was carried forward as a cash balance. When asked whether that balance was ever paid to appellant, David pointed to the final check for \$3,337.13 as including that amount. This was repeated with regard to the

statement of expenses in August, with David testifying that invoices included with the August statement represented work that was actually completed prior to the termination of the management agreement.

{¶13} Throughout the course of David's testimony, appellant repeatedly argued that the documented expenses for July and August did not add up to the amounts listed as deducted expenses in the July and August statements. David repeatedly testified that there were no discrepancies.

{¶14} Appellant also elicited testimony from David regarding invoices that were dated after August 8, with appellant questioning their validity given that a new management company had taken over the management of the property on August 7. David testified that those invoices represented work completed prior to August 8, but not invoiced until later.

{¶15} On direct examination, David testified regarding each of the invoices for July and August, and explained the system for receiving and paying invoices for work that had been performed on the property. David also testified that while Phillips Realty was acting as property manager, appellant or Eric had work crews out working on the property, which he testified was improper under the management agreement.

{¶16} Also on direct examination, David was asked about complaints filed by appellant and/or Eric with the Columbus Board of Realtors and the Real Estate Commission of Ohio regarding Phillips Realty's actions as the property manager. David testified that the complaint with the Columbus Board of Realtors had been dismissed. When David was questioned about the complaint to the Real Estate Commission of

Ohio, appellant objected, arguing that the complaint was still pending. After a discussion held off the record, the trial court initially sustained the objection, stating that the testimony went to appellees' counterclaim for frivolous conduct and would therefore need to be brought up in appellees' case-in-chief. The trial court then reversed itself, stating that it would allow testimony regarding that complaint specifically for the purpose of considering the frivolous conduct counterclaim so as to avoid having to bring David back for additional testimony. David then testified that the Real Estate Commission had ruled in Phillips Realty's favor, but that the case was still pending because the administrative process followed by the Commission included a request for reconsideration by appellant that had not yet been considered.

{¶17} David was questioned about the counts in the amended complaint that alleged that appellees had: (1) refused to discuss property management issues, (2) failed to complete responsibilities under the management agreement, and (3) fraudulently billed for work performed. David testified that none of these allegations were true.

{¶18} On re-cross-examination, appellant questioned David about invoices that exceeded \$500, pointing to language in the management agreement requiring appellant's approval for any single item over \$500. David explained that in some cases, an invoice could reflect multiple single projects that individually cost less than \$500, but when put in one invoice would total over that amount. David testified that in no instances were there work projects that individually cost more than \$500.

{¶19} Appellant next called Eric, appellant's son, as a witness. He explained that he works in real estate consulting, and had been involved in the purchase of the

Burgess Avenue property. Eric explained that he had been present at times on the property because he was involved in condominium conversion, which he stated involved legal work, survey or engineering work, and architectural work. Eric further testified that he had problems getting cooperation from Phillips Realty, and that he believed appellant had been billed for work that had not been performed, based on his assertion that in all of the times he was present on the property, he never saw any work crews. Eric then testified that he believed appellees had breached a number of provisions of the management agreement, including the failure to maintain complete records of operating expenses, failure to pay appellant amounts owed at the proper times, and filing eviction actions without appellant's approval.

{¶20} Appellant next called Jay Robert Zollars, a real estate broker for Commercial Realtors. He testified that his company had taken over management of the Burgess Avenue property on August 7.

{¶21} Appellant then testified on her own behalf. She stated that she believed it was necessary for her to terminate the management agreement due to appellees' failure to pay her money she was owed. Appellant also testified that she believed she had been billed for work that was either not performed, or was performed after the agreement had been terminated. On cross-examination, appellant testified that she had sued Patrick in his individual capacity because he owned Phillips Realty, and understood that he could only be held liable if the corporate veil were pierced. Appellant was also asked about Eric's activities on the property during the time the management agreement was in effect, testifying that his activities did not constitute maintenance, and therefore did not violate the agreement. Appellant also testified that

she considered the management agreement to have been terminated on August 7 when she informed Phillips Realty that its employees could no longer enter the property.

{¶22} The final witness called by appellant was Patrick, owner of Phillips Realty. Patrick stated that he does not review expense statements for any of the property his company manages, but instead only receives information about income generated.

{¶23} At one point during the trial, the trial court pointed out that appellees had included their claim for frivolous conduct as a counterclaim. The court pointed to language in R.C. 2323.51, the frivolous conduct statute, stating that a claim for frivolous conduct must be brought by motion up to 30 days after completion of trial. The trial court stated its intention to treat the counterclaim as a motion under R.C. 2323.51, rather than requiring appellees to file a new motion at the trial's conclusion, and its intention to consider all of the testimony presented in the trial to determine whether any of appellant's actions constituted frivolous conduct. Appellant did not object to the trial court's statement regarding its intentions on how to address appellees' claim for frivolous conduct.

{¶24} At the conclusion of appellant's case, appellees moved for a directed verdict in favor of Patrick individually, arguing that appellant had offered no evidence that would support imposition of personal liability. Appellant argued against the motion for directed verdict, arguing that Patrick benefited from the management agreement, and failed to adequately supervise David. The trial court granted the motion and dismissed the individual claims against Patrick.

{¶25} In their case-in-chief, appellees first called as a witness Nick Panzera ("Nick"), David's father. Nick testified that although not employed by Phillips Realty, he

had been helping David on a voluntary basis by assisting with various property management functions, including keeping an eye on maintenance crews as they worked on the property. Nick testified that on one occasion after commencement of the management agreement, but before its termination, he had a conversation with Eric in which Eric stated that the management agreement had been entered into at the insistence of the bank that provided financing for the purchase of the property, and that as soon as refinancing was obtained, the management agreement would be terminated so Eric could manage the property himself. Nick further testified that he had seen workers on the property installing carpet and using a paintbrush touching up the paint around some windows, and that those workers were not employed by Phillips Realty.

{¶26} Next, appellees called as a witness Randy Murphy ("Randy"), who works as a leasing consultant for Phillips Realty. Randy's role included taking calls from tenants regarding maintenance work needed, and directing maintenance workers on what work to perform. Randy testified that he was aware that workers had been in an empty unit on the property performing maintenance work some time before the management agreement was terminated, and that those workers were not performing work on behalf of Phillips Realty. Randy also testified that none of the operating expenses listed in the August statement reflected work performed after termination of the agreement.

{¶27} At the conclusion of appellees' case-in-chief, the court considered whether to admit the exhibits that had been offered. When asked about any objections to Exhibits 34, 35, and 36, which were exhibits regarding appellant's complaint to the Real Estate Commission of Ohio (Exhibits 34 and 35) and a conditional assignment of the

management agreement (Exhibit 36), appellant stated that she had no objection to their admission into evidence, and did not refer back to her earlier objections to the documents.

{¶28} On rebuttal, Eric was recalled as a witness to dispute the testimony of Nick and Randy. Eric denied having any workers engaging in maintenance work on the property while the management agreement was in effect, and denied ever having a conversation in which he expressed his intention to cancel the agreement.

{¶29} At the conclusion of the trial, the court rendered a decision from the bench finding that appellant breached the management agreement when she terminated the agreement. The trial court focused on the language regarding termination, and concluded that by the terms of the agreement, the contract was to last for a period of one year, and that appellant's termination of the agreement before the expiration of one year from its inception constituted a breach. The court further concluded that David should not have been included as a defendant, as there was no basis to impose personal liability on him. With respect to appellees' counterclaims, the court found in appellees' favor on the claims for breach of contract, breach of the duty of good faith and fair dealing, and the claim for frivolous conduct, and found in appellant's favor on appellees' counterclaim for unjust enrichment.

{¶30} With respect to the counterclaim for frivolous conduct, the court identified a number of actions that constituted frivolous conduct. First, the court focused on the lack of any evidentiary support for the claims seeking to impose personal liability on Patrick and David. Next, the court focused on the lack of pre-trial preparation by appellant, which increased the time for trial by requiring testimony about each individual

invoice, rather than only those invoices about which there was a dispute. Finally, the court focused on appellant's failure to bring in any tenants to testify regarding appellant's allegation that appellant was billed for work on the apartments that was not actually performed. The court took the issue of damages arising from the frivolous conduct under advisement, and set the case for additional hearing on that issue.

{¶31} On October 22, 2009, the court held a damages hearing. At that hearing, appellees called as an expert witness Jeremiah Heck, an attorney licensed to practice in Ohio. Mr. Heck testified that he had reviewed a detailed statement of legal expenses billed by appellees' counsel in preparation and conduct of the trial, and that he believed the amount billed was reasonable. Appellees also testified as to the damages arising from appellant's breach of the management agreement, which included the loss of monthly commissions for the remaining ten months of the contractual period, which were extrapolated from the commissions Phillips Realty received for the two months during which the contract was in effect. Appellant argued that calculating lost commissions by extrapolation from two months of commissions was inappropriate. Appellees argued that their damages included \$8,557.50 in attorney fees for appellant's frivolous conduct, and \$5,511.96 for damages arising from the breach of contract, for a total of \$14,069.46.

{¶32} After the damages hearing, the trial court issued a written judgment entry memorializing its decision. The court reiterated the bases for finding appellant had engaged in frivolous conduct that had been identified in its oral pronouncement of judgment, and additionally set forth its conclusion that appellant engaged in frivolous conduct by being unprepared for trial, and by threatening criminal charges against

appellees. The trial court awarded damages in the amount of \$1,554.60 on appellees' claim for breach of contract, \$3,957.36 on appellees' claim for breach of the duty of good faith and fair dealing, and \$8,857.50 on appellees' claim for frivolous conduct, for a total award of \$14,369.46, plus interest and costs.²

{¶33} Appellant filed this appeal, and asserts three assignments of error:

I. The trial court erred by ruling that Plaintiff-Appellant Florence Odita unjustifiably and materially repudiated the parties' contract and thus committed a total breach of the contract.

II. The trial court abused its discretion by issuing evidentiary rulings that unduly prejudiced to [sic] Plaintiff-Appellant's due process right to a fair hearing.

III. The trial court erred in awarding to the defendants-appellees attorney fees as damages under § 2323.51 Ohio Revised Code.

{¶34} Appellant presents two arguments in support of her first assignment of error. First, appellant argues that the trial court erred when it focused solely on the termination provision of the management agreement without considering other provisions of the agreement. Essentially, appellant argues that the trial court erred when it ruled against her on her claim that appellees breached the contract, and also erred when it rejected her argument that her repudiation of the agreement was justified based on breaches of the agreement by Phillips Realty.

{¶35} Ultimately, appellant's argument is that the trial court's judgment ruling against her on her claim for breach of contract was against the manifest weight of the

² The total damages awarded by the trial court in its judgment entry did not match the amount of damages argued by appellees at the hearing. However, the discrepancy between the two amounts was not raised on appeal.

evidence. In civil cases, a reviewing court will not reverse a judgment if that judgment is supported by some competent, credible evidence going to all elements of the claim. *Coffman v. Mansfield Correctional Inst.*, 10th Dist. No. 09AP-447, 2009-Ohio-5859.

{¶36} Appellant points to a number of provisions of the management agreement that she argues were breached by Phillips Realty, and argues that the trial court erred in concluding that the provisions were not breached. Throughout the course of the action, appellant's claim that appellees breached the management agreement, thus justifying her repudiation of the contract, centered on two general claims: that appellant had been billed for maintenance work that had not actually been performed, and that appellant failed to properly pay her money she was owed under the contract.

{¶37} With respect to appellant's claim that she had been billed for work that was not actually performed, the testimony of both David and Nick was that all of the work for which invoices were produced at trial was actually performed. The only evidence to counter that testimony was Eric's testimony that he had been present on the property many times, and had not seen any of the work being performed. Appellant mentioned during trial that she intended to offer affidavits from some tenants on the property to the effect that some repairs had not been performed, but when told by the trial court that this evidence could not be offered in the form of affidavits, appellant failed to call any of the tenants to testify at trial.

{¶38} As for appellant's claim that she was not paid money owed to her, appellant offered evidence at trial that the July statement of revenues and expenses showed revenues of \$5,790.78 and expenses of \$3,145.54, with a net of \$2,462.34. David testified that at the end of July, this net amount was kept in the account, or "rolled

over," into the following month, and that this amount was included in the check for \$3,337.13 that appellant received from Phillips Realty in August.

{¶39} Appellant did not dispute that the \$2,462.34 was included in the check she received in August, but instead argued that Phillips Realty had improperly held that money in the operating account at the end of July when the management agreement required that money be paid to her at that time. Article IV, paragraph g of the management agreement required Phillips Realty to "on the 1st business day of each month close out and render to [appellant] a statement of receipts and disbursements for the preceding month. [Phillips Realty] shall, after deducting its compensation and any other sums due it from [appellant], hold or expend such sums as [appellant] may have directed herein or otherwise and remit the balance to [appellant]."

{¶40} Contrary to appellant's argument, Article IV, paragraph g of the management agreement, while setting a specific time for production of the statement of revenues and expenses, did not specify a time for remittance of the balance to appellant. Furthermore, given that by the time Phillips Realty generated the July statement, appellant had already stated her intention to terminate the contract, we cannot say that Phillips Realty's decision to wait to cut the check that was ultimately given to appellant on August 18 constituted a breach of the contract by appellees.

{¶41} Appellant points to a number of other provisions of the contract in support of her argument that appellees breached the agreement, thus justifying her repudiation, specifically Article IV, paragraphs a, b, e, f, and k. Appellant appears to be arguing that since the trial court did not mention these specific contractual provisions when it announced its decision ruling against appellant on her claim for breach of contract, the

trial court failed to consider those provisions. In support of this argument, appellant points to a number of statements made by the trial court in its oral pronouncement of judgment, including statements that the contract had been repudiated when it should not have been, and that appellant had failed to provide appellees with an opportunity to "cure" any problems under the agreement.

{¶42} We cannot say that the statements made by the trial court in its oral pronouncement of judgment show any failure by the trial court to completely consider the issues before it. The statements made by the trial court cited by appellant to support her argument came during the trial court's discussion of appellees' counterclaim asserting that appellant breached her duty of good faith and fair dealing under the agreement, not in its discussion of appellant's claim that appellees breached the contract. With respect to appellant's breach of contract claim, in its written decision and entry, the trial court simply concluded that appellant had failed to carry her burden of proof on any of the claims she asserted in her amended complaint, which included the breach of contract claim.

{¶43} Furthermore, there was evidence offered at trial that rebutted appellant's claims regarding each of the specific paragraphs appellant mentions on appeal. For example, appellant's argument at trial regarding Article IV, paragraph b of the management agreement was that Phillips Realty breached the provision requiring her approval before Phillips Realty completed any repairs costing more than \$500, pointing to an item in the August statement showing a single charge of approximately \$1,600. However, the testimony at trial was that this single charged item actually represented a

number of different individual repairs, and that no individual repair actually cost more than \$500.³

{¶44} The trial court's decision that appellant failed to establish her claim for breach of contract was supported by some competent, credible evidence, and therefore does not meet the standard for reversal on manifest weight grounds.

{¶45} Appellant's second argument in support of her first assignment of error asserts that the trial court erred in its interpretation regarding the letters exchanged between appellant and counsel for appellees. Appellant argues that the letters sent to Phillips Realty asserting appellant's intention to terminate the contract could not have been effective termination notices based on the duration of the agreement as set forth in Article II, which provided that the agreement would last for one year from its date of inception, and would be "automatically renewed thereafter for successive periods of one year until terminated by either party upon not less than a 30 day written notice prior to the end of the initial term or at anytime during any concurrent renewal period."

Appellant argues that:

[U]nder the contract duration clause * * *, no notices to terminate the contract were permitted until April 1, 2009 at the earliest. Thus, the July 23, 2008 letter could not take effect as a termination notice until the lapse of one year from the May 1, 2008 commencement date of the contract and the date of termination would be August 23, 2009.

(Appellant's brief, 22.)

³ We also note that this charge appeared in the statement prepared after appellant had terminated the management agreement, and therefore cannot support appellant's claim that she was justified in terminating the agreement based on appellees' prior breach.

{¶46} Under this interpretation of the contract, appellant argues that: (1) the July 23 and July 30, 2008 letters could not have effected a termination of the agreement until (at the earliest) the expiration of one year and 30 days from the date of the first letter; (2) since those letters could not have effected a valid termination of the agreement, the first act breaching the agreement would have been the August 6, 2008 letter sent by appellees' counsel directing appellant to refrain from contacting Phillips Realty; and (3) the August 7, 2008 letter in which appellant directed Phillips Realty to turn over all keys and documents related to the property, and stated that Phillips Realty employees were no longer allowed on the property, was nothing more than appellant's response to what she believed was appellees' breach of the agreement by the action of prohibiting her from direct contact with the property manager.

{¶47} We reject this argument for a number of reasons. First, appellant raised the argument for the first time on appeal, and a party may not change the theory of the case by raising arguments for the first time on direct appeal. *Abshire v. Mauger*, 10th Dist. No. 09AP-83, 2010-Ohio-787.

{¶48} Second, we disagree with appellant regarding her interpretation of the termination clause of the management agreement. Under the plain language of the termination clause, appellant had the right to terminate the agreement by giving notice at least 30 days prior to the expiration of one year from the date of the agreement's inception, as long as the termination did not actually take effect until the expiration of one year. Thus, appellant could have effected a termination of the agreement by her letters dated July 23 and July 30, 2008, if the effective date of the termination had been set one year after the agreement's inception date of (apparently) May 1, 2008.

{¶49} Finally, even if we were to agree with appellant's interpretation that the July 23 and July 30, 2008 letters could not have effected a termination of the agreement, accepting appellant's argument that this compels the conclusion that appellees breached the agreement by the August 6, 2008 letter from counsel would fly in the face of appellant's belief, expressed both in her July 30, 2008 letter and at trial, that she was terminating the agreement because appellees had breached the agreement prior to that date.

{¶50} Appellant's first assignment of error is overruled.

{¶51} In her second assignment of error, appellant argues that the trial court erred in its admission of some of the evidence offered at trial. Decisions regarding admissibility of evidence are within the broad discretion of the trial court, and will not be reversed on appeal absent an abuse of discretion that materially prejudices a party. *Pinchak v. Prudhomme*, 8th Dist. No. 94053, 2010-Ohio-3879. An abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217. Even if a trial court abuses its discretion in an evidentiary ruling, a trial court's judgment will not be reversed unless the ruling undermines a party's substantial rights. *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787.

{¶52} The first evidentiary ruling with which appellant takes issue was the trial court's admission of Exhibit 36, which was entitled a "conditional assignment of management agreement." The document in question established that it was a condition for the financing of the purchase of the Burgess Avenue property that Phillips Realty, which had served as property manager for the previous owner, be retained as property

manager under appellant's ownership. This exhibit was used in appellees' examination of appellant at trial. Questioning by appellees regarding the conditional assignment involved whether appellant had hired a new property manager after termination of the management agreement, and whether the financial institution had given consent to the change in property management as called for in the conditional assignment. Subsequently, appellees questioned Nick about the conditional agreement when he was being questioned about some paperwork Eric had brought to Phillips Realty's office, but Nick denied that the conditional agreement had been part of that paperwork.

{¶53} Appellant argues that she was materially prejudiced by admission of the conditional assignment because the trial court was able to infer from that document that appellant had a motive or design to terminate the management agreement independent from her claims that appellees had breached the agreement. In its oral pronouncement of judgment, the trial court discussed the conditional assignment not as a basis for the decision on appellees' counterclaim for breach of contract, but rather used the document for the decision on appellees' counterclaim alleging that appellant breached the duty of good faith and fair dealing. We cannot say the trial court abused its discretion by admitting the document into evidence, as the document tends to show that appellant had not entered into the management agreement with Phillips Realty voluntarily, and could therefore have been acting in bad faith in seeking to avoid the agreement.

{¶54} Appellant's second argument regarding the trial court's evidentiary decisions asserts that the trial court erred by entering into evidence Exhibits 34 and 35, which were letters involving the complaint to the Real Estate Commission. Appellant

argues that the letters showing that the Real Estate Commission had found that there was no basis for the complaint should have been excluded under Evid.R. 403 because they were inflammatory, and could not be related to appellees' counterclaim for frivolous conduct.

{¶55} We cannot say that the trial court abused its discretion by admitting the documents relating to the complaint to the Real Estate Commission. The documents were relevant to appellees' cross-claim for frivolous conduct, since they tend to show that appellant was asserting in court claims that had already been rejected by an administrative body.

{¶56} We also note that, with respect to all three of the documents that appellant now alleges that it was error for the trial court to admit, appellant objected to their admission at the time testimony was being taken about them, but at the conclusion of appellees' case-in-chief, when documents were being entered into evidence, appellant stated that she had no objection to admission of any of the documents. Generally, when a party fails to renew an objection at the time exhibits are admitted into evidence, that party waives the ability to raise the admission as error on appeal, unless plain error is shown. *Nicula v. Nicula*, 8th Dist. No. 84049, 2009-Ohio-2114.

{¶57} Appellant's second assignment of error is overruled.

{¶58} In her third assignment of error, appellant argues that the trial court did not follow the proper procedure for considering a claim for frivolous conduct.⁴ Specifically,

⁴ Although appellant's third assignment of error is worded as a more general claim that the trial court erred by awarding damages for frivolous conduct, appellant's argument focuses on the procedure followed by the trial court, and does not challenge either the finding of frivolous conduct or the amount awarded in damages.

appellant points to R.C. 2323.51(B), which provides that, "at any time not more than thirty days after the entry of final judgment in a civil action or appeal, any party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal." Appellant argues that appellees raised the issue of frivolous conduct by way of a counterclaim, and never filed a motion as required under the statute.

{¶59} During trial, the trial court announced its intention to treat appellees' counterclaim for frivolous conduct as a motion, thus relieving appellees from the need to file a subsequent motion. Appellant did not raise any objection to the procedure set forth by the court, and therefore has arguably waived this issue on appeal. In addition, even if appellant did not waive the argument by failing to object when the trial court announced its intention to treat the counterclaim for frivolous conduct as a motion, Ohio courts have recognized that a claim for frivolous conduct under R.C. 2323.51 may be made by way of a counterclaim, rather than strictly by way of a motion. See *Texler v. Papesch* (Sept. 2, 1998), 9th Dist. No. 18977.

{¶60} Appellant's third assignment of error is overruled.

{¶61} Having overruled appellant's assignments of error, we affirm the judgment of the Franklin County Municipal Court.

Judgment affirmed.

KLATT and FRENCH, JJ., concur.
