

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

H & H Properties dba Realty Solutions, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 10AP-117
 : (M.C. No. 2009 CVF 023422)
 Ned Hodkinson, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on November 9, 2010

Jack E. McCormick, for appellee.

Beggs Caudill, LLC, Robert J. Beggs and Danny L. Caudill,
for appellant.

APPEAL from the Franklin County Municipal Court.

McGRATH, J.

{¶1} Defendant-appellant, Ned Hodkinson ("appellant"), appeals from a judgment of the Franklin County Municipal Court, which rendered judgment against him in favor of plaintiff-appellee, H & H Properties ("appellee"). For the following reasons, we affirm.

{¶2} The following facts are germane to this appeal. On May 29, 2009, appellee filed a complaint against appellant seeking damages in the amount of \$3,407.35 for breach of the lease contract the parties entered into on January 15, 2006. Appellant, pro se, filed an answer to the complaint.

{¶3} On October 9, 2009, appellee moved for summary judgment. Attached to the motion was the affidavit of Wayne Hiles, the record keeper for appellee, who asserted that appellant owed appellee \$3,407.35. Attached to Hiles's affidavit was a statement of appellant's account. Appellant filed a response to appellee's motion, denying that he owed appellee the amount it was seeking. Appellant provided two bases for his argument: (1) he was not obligated to pay for trash removal services, which comprised a portion of the amount sought by appellee; and (2) the obligation and the amount of the utility charges, which also comprised a portion of the amount sought by appellee, was inaccurate.

{¶4} On December 16, 2009, the trial court held an oral argument on appellee's motion. Although the transcript of that proceeding is not before us, it appears that appellee stipulated that an error was made with respect to the issue of trash removal services and that appellant did not owe the amount sought in connection therewith. Deducting the amount for trash removal services, appellee revised the amount it was seeking from appellant to \$3,262.25. On January 4, 2010, the trial court granted appellee's motion and entered judgment in its favor in the amount of \$3,262.25. Appellant appealed, and asserts the following assignment of error for our review:

The lower court erred to Mr. Hodkinson's prejudice in granting H & H Properties' Motion for Summary Judgment because there exists a genuine issue of material fact as to the amount owed, and because H & H Properties did not establish that it is entitled to judgment as a matter of law.

{¶5} In his assignment of error, appellant asserts that a material issue of fact exists regarding the amount owed, and, as such, the trial court erred in granting summary judgment to appellee.

{¶6} An appellate court's review of summary judgment is conducted de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, citing *Brown v. Scioto Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. We apply the same standard as the trial court and conduct an independent review without deference to the trial court's determination. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107; *Brown* at 711. We must affirm the trial court's judgment if any of the grounds the movant raised in the trial court support the judgment. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶7} Summary judgment is appropriate only where (1) no genuine issue of material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. A party seeking summary judgment "bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record * * * which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 1996-Ohio-107.

{¶8} On appeal, appellant argues that:

Whether the \$3,262.25 is an accurate calculation of the amount owed by [appellant] is certainly a "material" fact. [Appellant] disputes this figure and has specifically challenged (1) the possible late fees assessed on the erroneous trash removal charges, (2) the late fees charged in March and June 2008, and (3) the utility charges accrued under the sublease with Pam's Dance Academy.

(Appellant's brief at 6-7.) Appellant further argues that appellee is not entitled to judgment as a matter of law because:

[I]t failed to make a showing sufficient to establish the existence of an element essential to its case, and on which it will bear the burden of proof at trial. (Citation omitted). In other words because [appellee's] Motion for Summary Judgment was based on a theory of breach of contract, it was required to make a showing sufficient to establish the existence of the elements that constitute breach of a contract in order to be entitled to judgment as a matter of law. [Appellee] made no such showing.

(Appellant's brief at 6-7.)

{¶9} Given that appellee revised the amount sought from appellant by deducting any charge related to trash removal services, that issue is no longer before us. The remaining issues, as raised in appellant's brief, concern late fees and utility charges.

Before the trial court, appellant's entire argument consisted of the following:

[T]he calculations of the utility charges do not reflect a fair and accurate representation of the utilities [appellant] was obligated to pay. Both the amount and obligation are inaccurate and misrepresented. The inclusion of these inaccurate utility charges affects both the underlying balance and calculation of late payment fees.

In sum, the principal balance outstanding is not properly calculated because of erroneous and inaccurate charges. This Court should not grant Plaintiff's Motion for Summary [Judgment] because a genuine dispute exists as to the amount owed to Plaintiff by Defendant.

(Appellant's memorandum contra at 3-4.)

{¶10} Upon review of the record, the arguments advanced on appeal by appellant are new and/or, at the very least, certainly more developed than that which he asserted before the trial court. Given that a party may not change the theory of the case by raising

arguments for the first time on direct appeal, we will focus on the argument advanced by appellant before the trial court. *Odita v. Phillips*, 10th Dist. No. 09AP-1172, 2010-Ohio-4321, ¶47, citing *Abshire v. Mauger*, 10th Dist. No. 09AP-83, 2010-Ohio-787; see also *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elections* (1992), 65 Ohio St.3d 175, 177.

{¶11} As set forth above, the argument advanced by appellant before the trial court was that the portion of the amount sought by appellee attributable to the utility charges was inaccurate, and, as such, the amount that appellee claimed appellant owed was not accurate. Appellant supported his argument with his affidavit, in which he stated that "[t]he utility charges contained in the account ledger (attached hereto as exhibit B) do not fairly and accurately calculate the utilities I owe under the agreement." (Appellant's affidavit at ¶6.) Appellant's assertion is, in essence, a general denial; it provides no explanation, nor does it include specific facts, to substantiate his assertion. Appellee properly supported its motion for summary judgment, and we find that appellant's affidavit, without more, is insufficient to overcome appellee's motion. *Captain v. United Ohio Ins. Co.*, 4th Dist. No. 09CA14, 2010-Ohio-2691, ¶44, quoting *White v. Turner*, 4th Dist. No. 01CA2802, 2002-Ohio-116 ("[c]onclusory allegations are insufficient to overcome a properly supported summary judgment motion.'"), citing *Youssef v. Parr, Inc.* (1990), 69 Ohio App.3d 679, 689 (recognizing that when a party opposing a summary judgment motion presents an affidavit, "it is essential that an affidavit set forth facts, not legal conclusions"); *Tolson v. Triangle Real Estate*, 10th Dist. No. 03AP-715, 2004-Ohio-2640, ¶12 ("Affidavits, which merely set forth legal conclusions or opinions without stating supporting facts, are insufficient to meet the requirements of Civ.R. 56(E)."); *Rice v.*

Johnson (Aug. 26, 1993), 8th Dist. No. 63648 ("A court may disregard conclusory allegations in an affidavit unsupported by factual material in the record.").

{¶12} Based on the foregoing, we find that appellant's affidavit submitted in opposition to appellee's motion for summary judgment is insufficient to show any disputed issues of fact that would be adequate to overcome it. Thus, contrary to appellant's argument, we do not find any evidence in the record that creates a genuine issue of material fact or precludes the entry of summary judgment in appellee's favor. Accordingly, we overrule appellant's sole assignment of error.

{¶13} For the foregoing reasons, we overrule appellant's assignment of error and affirm the judgment of the Franklin County Municipal Court.

Judgment affirmed.

KLATT and SADLER, JJ., concur.
