

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
BUTLER COUNTY

|                          |   |                        |
|--------------------------|---|------------------------|
| EARL WEBB, JR.,          | : |                        |
| Plaintiff-Appellant,     | : | CASE NO. CA2010-01-016 |
| - vs -                   | : | <u>OPINION</u>         |
|                          | : | 8/16/2010              |
| C and J PROPERTIES, LLC, | : |                        |
| Defendant-Appellee.      | : |                        |

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS  
Case No. CV07-08-3235

Repper, Pagan, Cook, Ltd., John H. Forg III, 1501 First Avenue, Middletown, Ohio 45044, for plaintiff-appellant

Bill W. Cummins, 8216 Princeton Glendale Road, Suite 162, West Chester, Ohio 45069, for defendant-appellee

**BRESSLER, J.**

{¶1} Plaintiff-appellant, Earl Webb, appeals the decision of the Butler County Court of Common Pleas granting a motion to dismiss in favor of defendant-appellee, C and J Properties, LLC (C&J). We affirm the decision of the trial court.

{¶2} Webb owned a mobile home and rented space in the Midwest Mobile Home Park, which was owned by C&J. The parties' month-to-month rental agreement lasted from August 2000 until November 2007.

{¶3} On June 30, 2007, Webb and a friend smelled strong odors emanating

from beneath his mobile home. Upon removing the plastic skirting from the underneath portion of the trailer, Webb encountered human feces seeping from the ground and a pile of raw sewage that stretched ten feet in each direction from the source of the seepage.

{¶4} Webb immediately contacted the property manager who informed Webb that due to the upcoming July 4 weekend, no repairs would be made. Webb tried to contact the Butler County Health Department (Health Department), but found the offices closed. Webb then tried calling 911, and was directed to contact the Health Department once it opened the following Monday. Unable to reach anyone else, Webb contacted People Working Cooperatively, an emergency service that aids low-income members of the community, who agreed to pay for a plumber to address the problem. The plumber investigated the situation under Webb's home, identified a main sewer line clog, and snaked out the portion of the sewer pipe running under Webb's mobile home.

{¶5} Webb and his son stayed at the homes of relatives and friends due to the odor that remained after the seepage stopped. Webb continued to contact the Health Department, and eventually filed a written complaint regarding the sewage under his mobile home. According to a report from the Health Department, another plumber came to Webb's trailer on July 6, 2007 at the behest of C&J, but Webb was not home. Without Webb's permission, the second plumber could not remove the skirting from the mobile home to investigate under the trailer. However, the Health Department report specifically noted the absence of sewage outside the trailer skirt. On July 27, 2007, a representative from the Health Department and Curt Powell, the owner and president of C&J, came to Webb's home and spread lime and sand under the trailer. The Health Department closed Webb's complaint soon thereafter.

{¶6} In a letter dated August 16, 2007, Powell, on behalf of C&J, terminated the

park's rental agreement with Webb, and instructed him to vacate the premises. In full, the letter states, "Pursuant to the Ohio Revised Code, you are hereby notified that our rental agreement will not be renewed for an additional term. Therefore, you **must vacate** the premises no later than the **30<sup>th</sup>** day of **September, 2007**. If you have not vacated the premises by that date, an eviction action will be initiated against you." (Emphasis in original.)

{¶7} Webb filed a pro se complaint in the Butler County Court of Common Pleas, claiming that C&J's eviction constituted a violation of R.C. 3733.09(A), a statute that forbids owners of mobile home parks from retaliating against renters. After a few months of paying his rent in escrow to the clerk of courts, Webb sold his trailer and moved out of the mobile home park.

{¶8} Regarding Webb's legal action, the trial court suggested that he seek counsel after he appeared pro se at multiple hearings and his motions failed to conform to local rules. Once Webb sought legal counsel, the trial court granted leave to file an amended complaint, and Webb filed the amended complaint on April 7, 2008. Webb alleged that C&J retaliated against him for making complaints to the Health Department, that he suffered damages as a result of the sewage seepage, and that C&J's conduct was an intentional infliction of emotional distress.

{¶9} During a bench trial, Webb presented evidence and the trial court heard testimony from Webb, his sister, and a Butler County Health Department supervisor. At the close of Webb's case, C&J moved for an involuntary dismissal pursuant to Civ.R. 41(B)(2). The trial court granted C&J's motion, finding that the statute was inapplicable, that Webb had not suffered damages, and that C&J's conduct did not cause emotional distress. Webb now appeals the trial court's decision, raising the following assignment of error.

{¶10} "THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION TO DISMISS PURSUANT TO CIVIL RULE 41(B)(2) AT THE CLOSE OF PLAINTIFF'S CASE-IN-CHIEF."

{¶11} In his assignment of error, Webb asserts that the trial court erred in granting C&J's motion to dismiss.<sup>1</sup> This argument lacks merit.

{¶12} According to Civ.R. 41(B)(2), "after the plaintiff, in an action tried by the court without a jury, has completed the presentation of the plaintiff's evidence, the defendant \*\*\* may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff \*\*\*."

{¶13} "Civ.R. 41(B)(2) specifically provides the trial court may consider both the law and the facts. Therefore, the trial judge, as the trier of fact, \*\*\* weighs the evidence and actually determines whether the plaintiff has proven the necessary facts by the appropriate evidentiary standard. Even if the plaintiff has presented a prima facie case, dismissal may still occur if the trial court determines that the necessary quantum of proof makes it clear that the plaintiff will not prevail. A trial court's ruling on a Civ. R. 41(B)(2) motion will be set aside on appeal 'only if erroneous as a matter of law or against the manifest weight of the evidence.'" *Tillman v. Watson*, Champaign App. No. 06-CA-10, 2007-Ohio-2429, ¶11-12, citing *Bank One, Dayton, N.A. v. Doughman* (1988), 59 Ohio App.3d 60, 63. (Internal citations omitted.) A judgment supported by competent, credible evidence will not be overturned as being against the weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 280.

{¶14} The trial court weighed the evidence and determined that R.C. 3733.09 did

not give Webb a cause of action for retaliation. According to R.C. 3733.09(A), "a park operator

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1. Webb does not challenge the trial court's decision regarding intentional infliction of emotional distress. Therefore, our analysis is specific to the application of R.C. 3733.09 and any possible damages that may have arisen.

shall not retaliate against a resident by increasing the resident's rent, decreasing services that are due to the resident, refusing to renew or threatening to refuse to renew the rental agreement with the resident, or bringing or threatening to bring an action for possession of the resident's premises because: (1) The resident has complained to an appropriate governmental agency of a violation of a building, housing, health, or safety code that is applicable to the premises, and the violation materially affects health and safety; (2) The resident has complained to the park operator of any violation of section 3733.10 of the Revised Code;<sup>2</sup> (3) The resident joined with other residents for the purpose of negotiating or dealing collectively with the park operator on any of the terms and conditions of a rental agreement."

{¶15} R.C. 3733.09(B) goes on to state, "if a park operator acts in violation of division (A) of this section, the resident may: (1) Use the retaliatory action of the park operator as a defense to an action by the park operator to recover possession of the premises; (2) Recover possession of the premises; (3) Terminate the rental agreement.

In addition, the resident may recover from the park operator any actual damages together with reasonable attorneys fees."

### **Retaliation**

{¶16} Regarding the first section of the statute, the language clearly states that an operator is prohibited from retaliating against a tenant should the tenant report issues to an appropriate governmental agency. While Webb argues that C&J retaliated against him because he complained to the Health Department, his assertion is not supported by the record.

{¶17} "The finder of fact must independently determine the reasons behind a

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2. R.C. 3733.10 enumerates the duties a mobile home park owner has regarding safety and maintenance of the premises.

landlord's action. A tenant must, therefore, show by a preponderance of the evidence, that the relationship between the complaint and action resulted from a retaliatory motive." *Weishaar v. Strimbu* (1991), 76 Ohio App.3d 276, 286.<sup>3</sup>

{¶18} Webb failed to provide evidence that C&J's actions were motivated by retaliation. Specifically, Webb failed to present any evidence that C&J terminated its rental agreement because of Webb's complaint to the Health Department. Although Curt Powell appeared at the bench trial, Webb never called him as a witness to establish why the lease was terminated or if Webb's complaint motivated C&J's decision to end the month-to-month rental agreement.

{¶19} The only evidence offered at the trial specific to the alleged retaliation was a letter proving that Webb made a written complaint to the Butler County Board of Health regarding the sewage in July 2007, and that C&J provided notice of termination in August 2007. While there is a temporal proximity between the complaint and termination, "such a circumstance does not create a presumption of a retaliatory motive under Ohio law." *Id.* at 286. Without any other evidence regarding C&J's termination of the rental agreement, Webb failed to show by a preponderance of the evidence that C&J retaliated against him.

### **Health and Safety**

{¶20} Webb also challenges the trial court's finding that the sewage leak did not represent a violation that, according to the statute, "materially affects health and safety."

{¶21} Based on the testimony and evidence, the trial court noted that had the sewage stayed on the property for an extended amount of time with no remedial action,

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3. *Weishaar v. Strimbu* was analyzed under R.C. 5321.02, a statute analogous to R.C. 3733.09, which

a violation would likely have occurred. Nevertheless, the trial court went on to state that  
because the



lines were snaked, no sewage was detected on the outside of the skirting, and because the Department of Health closed the case after spreading lime, the issue had been addressed and no violation occurred. After reviewing the record, we find that the trial court's decision was supported by competent and credible evidence.

{¶22} Webb testified regarding the assistance People Working Cooperatively provided by paying for a plumber to come out and snake the pipe directly under Webb's home. Webb also testified that the sewage stopped seeping after the plumber snaked the pipe. According to the Health Department's findings, another plumber was sent to Webb's home on July 6, 2007 and no sewage was detected on the outside of the trailer's skirting. Evidence was also admitted that the Health Department came to Webb's home on July 27, 2007 and spread lime and sand underneath Webb's trailer, but did not take any other action after that visit other than closing Webb's complaint.

{¶23} The trial court heard testimony from Brian Williamson, supervisor of health inspectors at the Butler County Health Department, who testified regarding the reports and inspections performed by his agency. Williamson testified that the remedial actions taken after the initial seepage by the two plumbers, C&J, and the Health Department were appropriate under the circumstances.

{¶24} Based on the testimony and evidence offered at trial, the trial court properly found that the seepage was appropriately remediated and did not otherwise constitute a violation that materially affected Webb's health and safety.

### **Eviction**

{¶25} Webb next challenges the trial court's interpretation of Section (B) of the statute and whether the provision provides a private cause of action.

{¶26} R.C. 3733.09 (B) clearly states that "if a park operator acts in violation of

division (A) of this section, the resident may: (1) Use the retaliatory action of the park operator as a defense to an action by the park operator to recover possession of the premises; (2) Recover possession of the premises; (3) Terminate the rental agreement."

**{¶127}** The trial court found that the statute was inapplicable to Webb's suit because C&J had not taken any action to evict Webb. We agree with the trial court's interpretation because Webb cannot use R.C. 3733.09 (B)(1) as a means of providing a cause of action when the section expressly provides only a defense to eviction.

**{¶128}** While the statute clearly provides "a defense to an action" by the owner, C&J never commenced an action to have Webb evicted from the premises. Instead, the trial court heard evidence that C&J merely terminated its rental agreement with Webb, and that the termination was not an eviction according to Ohio's code. Specifically, an owner cannot evict a tenant without first providing a notice of the impending action three days prior to eviction. R.C. 1923.04. According to R.C. 1923.05, the owner must then file a written complaint with the court that describes the premises to be entered upon and detained.

**{¶129}** C&J neither provided Webb a three-day notice, nor did it file an action in court seeking eviction. While the August 16, 2007 letter stated that the month-to-month rental agreement was terminated, C&J never complied with the statutory requirements in order to effectuate an eviction.

**{¶130}** The trial court also heard testimony that Webb showed intent to vacate the premises even before the sewage seepage and termination letter. Webb testified that prior to the sewage leak, he was trying to sell his home and had posted "for sale" signs on his trailer. Both Webb and his sister testified that he had entertained several offers on his home, but that the deals fell through before the sale was ever completed. However, Webb eventually sold his mobile home voluntarily and subsequently moved

from the mobile home park, but was never evicted by C&J prior to the sale. See *McCarthy v. Caplan*, Cuyahoga App. No. 79721, 2001-Ohio-4178 (finding in favor of landlord under R.C. 5321.02 where landlord had not evicted tenant and tenant expressed a desire to move from the premises before lease was not renewed). The trial court's finding that Webb was never evicted, is therefore supported by competent credible evidence.

**{¶31}** We also note that the other two options available through R.C. 3733.09(B) were inapplicable once Webb sold his trailer. Webb voluntarily sold his mobile home, thereby relinquishing possession of the premises. After Webb sold his mobile home, he could no longer seek to recover possession of the premises under (B)(2) when the new owner had already moved in and began renting Webb's former lot from C&J. Also, Webb could not have terminated the rental agreement under (B)(3) because C&J had already ended the month-to-month agreement it previously held with Webb.

**{¶32}** Had Webb been able to prove that C&J retaliated against him through eviction, he could have used the statute as a defense to any eviction process C&J may have initiated, or in an attempt to regain the premises or terminate the rental agreement. See *Voyager Village Ltd. v. Williams* (1982), 3 Ohio App.3d 288, 296 (recognizing that R.C. 3733.09 cannot be used as a defense unless a tenant "complained to an appropriate governmental agency of a violation of a building, housing, health or safety code that is applicable to his premises \*\*\* and that the landlord took his action to evict or terminate the lease because of these actions"). (Emphasis in original.) Because C&J never initiated an eviction action, Webb was unable to use the defense afforded under R.C. 3733.09. Webb, therefore, did not have a private cause of action against C&J under the authority of R.C. 3733.09, and the trial court properly dismissed Webb's complaint.

## **Damages**

{¶33} Webb's final argument challenges the trial court's finding that he did not suffer any damages as a result of C&J's wrongful termination of the rental agreement. Webb argues that the catch-all provision in the statute gives him a cause of action because the last sentence of R.C. 3733.09(B) states that, "the resident may recover from the park operator any actual damages together with reasonable attorneys fees."

{¶34} "Actual damages are defined as 'real, substantial, and just damages, or the amount awarded to a complainant in compensation for his actual and real loss or injury.'" *Whitaker v. M.T. Automotive*, 111 Ohio St.3d 177, 2006-Ohio-5481, ¶18, quoting Black's Law Dictionary (6th Ed.1990) 390.

{¶35} Even if the statute applied to Webb's claim, he was unable to prove that he suffered any actual damages. Webb's sister testified that while he and his son stayed with her immediately following the seepage, she did not charge Webb anything. Although Webb testified that when staying with friends, he gave them money to cover costs, he failed to produce any receipts or invoices for the costs he allegedly incurred. Additionally, People Working Cooperatively paid for the first plumber to come and snake the line and C&J paid for the second, so that Webb did not pay any out-of-pocket plumbing expenses.

{¶36} Webb also claims that he could have sold his trailer for \$6,000 before the sewage seepage, but was forced to accept \$3,000 when no potential buyers would offer more. However, Webb did not produce any evidence that the \$3,000 difference was due to C&J's actions. For example, Webb did not present evidence demonstrating that the fair market value of the mobile home was \$6,000 or that any contractual offers were made for \$6,000 before the sewage seepage.

{¶37} Regardless of the value, Webb retained the ultimate decision regarding

what he would and would not accept for his mobile home. Webb voluntarily chose to accept \$3,000 and cannot now claim that the sale price was a result of any action taken by C&J without first offering supporting evidence. Without any evidence regarding the value of the mobile home before the sewage seepage compared to after it, Webb has failed to demonstrate that he incurred any actual damages for any loss or injury caused by C&J. See *Nieman v. Bunnell Hill Dev. Co., Inc.*, Butler App. No. CA2009-04-109, 2010-Ohio-1519 (affirming trial court's directed verdict in favor of defendant where plaintiff failed to produce evidence of actual damages).

{¶38} Having found that Webb failed to prove that C&J retaliated against him for filing a complaint with the Health Department, that R.C. 3733.09 does not provide a cause of action, and that Webb was not able to prove actual damages, the trial court did not err in dismissing Webb's complaint in accordance with Civ.R. 41(B)(2). Webb's single assignment of error is overruled.

{¶39} Judgment affirmed.

YOUNG, P.J., and HENDRICKSON, J., concur.