

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

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| PINNACLE MANAGEMENT, | : | |
| Plaintiff-Appellant, | : | CASE NO. CA2011-08-145 |
| - vs - | : | <u>OPINION</u> |
| | : | 4/9/2012 |
| GARY BELL, et al., | : | |
| Defendants-Appellees. | : | |

CIVIL APPEAL FROM FAIRFIELD MUNICIPAL COURT
Case No. 2011 CVG 00476

Marilyn M. Eddy, 431 Ohio Pike, Suite 202, Cincinnati, Ohio 45255, for plaintiff-appellant
Gary Bell, 1104 Governor's Drive, Fairfield, Ohio 45014, defendant-appellee, pro se

PIPER, J.

{¶1} Plaintiff-appellant, Pinnacle Management (Pinnacle), appeals a decision of the Fairfield Municipal Court limiting judgment in its favor to damages of \$290.11 and excluding damages pertaining to future rents owed to Pinnacle.

{¶2} Defendants-appellees, Gary Bell, Ethel Bell, and Nicole Jordan (Tenants), rented an apartment from Pinnacle. According to the lease between Pinnacle and Tenants, Tenants were permitted to have a dog, but had to execute a Pet Rental Premium Lease

Addendum to register their dog with Pinnacle. Tenants executed such an agreement for their dog, Peanut. At some point, Peanut died, and Tenants acquired a new dog, Oscar. However, Tenants neglected to execute a new pet rental addendum for Oscar.

{¶3} On March 29, 2011, Pinnacle sent Tenants a letter notifying them that it had received a complaint about Oscar, and asking them to contact Pinnacle's office. Tenants contacted Pinnacle as directed, and on March 31, 2011, Tenants executed an addendum for Oscar. By April 6, 2011, Pinnacle had received three complaints about Oscar, including one from a Pinnacle employee who claimed that Oscar lunged at her while he was freely roaming the apartment complex. Pinnacle hand-delivered a notice to Tenants informing them that they had to remove Oscar from the premises, or they would be evicted. When Tenants refused to remove Oscar, Pinnacle gave them a notice to leave the premises within three days.

{¶4} Tenants did not leave within the three days, and Pinnacle filed an eviction action in the Fairfield Municipal Court on April 26, 2011. Before the case was heard, however, Tenants vacated the premises on May 11, 2011. Tenants notified Pinnacle and the court that as of the hearing for eviction, they had already vacated the premises. The court held a hearing to determine damages, at which both parties appeared. In addition to costs related to cleaning the apartment and making it presentable for re-letting, Pinnacle submitted evidence that Tenants owed outstanding utility bills, as well as unpaid rent once they vacated the property until the end of the lease term. The trial court granted judgment in favor of Pinnacle, but limited damages to \$290.11 of the \$4,600.50¹ requested. The trial court's judgment was limited to the unpaid utilities owed by Tenants, as well as replacement parts for

1. Pinnacle states in its brief that damages specific to unpaid rent have been reduced to \$2064.12 because it has since re-rented the property. However, this information was not before the trial court.

window treatments, doorknobs, towel bars, and keys. Pinnacle appeals the trial court's decision, raising the following assignment of error:

{¶5} THE TRIAL COURT ERRED BY FAILING TO AWARD APPELLANT RENT AS PART OF ITS DAMAGES.

{¶6} Pinnacle argues that the trial court erred by not awarding damages for unpaid rent as of the date Tenants vacated the property.

{¶7} The trial court indicated that there was not a breach of the lease because Tenants left with the dog prior to being evicted, and thus Tenants complied with Pinnacle's request by vacating the premises. We do not agree.

{¶8} Prior to 2000, Ohio appellate courts were split regarding whether the issuance of a three-day notice to vacate was an election of remedies by the landlord and thus a termination of a tenant's liability for any unpaid rents under the lease terms. The Ohio Supreme Court determined that when a landlord issues a notice to vacate because of a lease violation or pursues eviction, the tenant who violated the terms of the lease is liable for the unpaid rents until either the expiration of the lease, or until the premises are re-rented. *Dennis v. Morgan*, 89 Ohio St.3d 417, 418, 2000-Ohio-211.

{¶9} In so holding, the court first reviewed R.C. Chapter 1923, the statute on forcible entry and detainer proceedings, and determined that landlords may evict "tenants who have breached an obligation imposed upon them by a written rental agreement." R.C. 1923.02(A)(9). The court further stated, "the statute empowers landlords to regain possession of their property upon a tenant's breach of the rental agreement. R.C. 1923.04 requires notice to the tenant-the landlord must notify the adverse party to leave the premises at least three days before bringing the action." *Dennis* at 418.

{¶10} In *Dennis*, the landlord served the tenant with a three-day notice to vacate because the tenant breached the lease by disturbing other residents with excessive noise.

The landlord then sought rent for the remaining seven months of the lease term during which the apartment remained vacant. The tenant argued that the landlord had elected his remedy by filing the three-day notice, and therefore, had released tenant from any future liability for unpaid rent. The Ohio Supreme Court disagreed.

{¶11} In analyzing the issue, the court posed the following question, "should a person be able to escape her obligations under a lease by purposefully violating that lease and waiting for the lessor to present her with a three-day notice to vacate?" *Id.* at 420. The court then answered this question in the negative, and reasoned, "otherwise, whenever a lease became unpalatable, a lessee could commit some bad act and thereupon be relieved of the burden of her bargain." *Id.*

{¶12} The record is clear that Tenants violated the terms of their lease with Pinnacle by keeping Oscar after management required that Tenants remove Oscar from the premises or be evicted. According to the lease,

No pets shall be kept on the premises without written approval (signed pet agreement) from the Management and monthly pet premiums paid. Pet sitting is strictly forbidden. Any unauthorized pet is a lease violation. This violation constitutes not less than a \$150.00 fine and immediate removal of pet and payment of any damages incurred to the Premises and/or surrounding area by the unauthorized pet. After Pet Agreement signed by Management [sic], if in the event Resident's pet becomes a nuisance to Management or other Residents, Management may, at its sole discretion, require the pet to be removed from the premises. Failure to remove pet will constitute a default of this Lease by Resident.

{¶13} Furthermore, Oscar's executed pet addendum specifically states that "said pet shall never be allowed to freely roam outside the premises. Said pet must be leashed and in the company of a willing individual who is able to control it. SAID PET SHOULD NEVER BE LFT [SIC] ON A CHAIN. * * *." (Emphasis in original.) The addendum concludes with the following warning: "This permission is purely conditional and may, at any time, be cancelled

by Pinnacle Management by giving to Lessee written notice of such cancellation of permission. Lessee shall promptly and permanently, and without recourse, remove said pet from premises."

{¶14} During the hearing, the trial court heard evidence that Tenants chained Oscar up outside their apartment, and also permitted him to roam freely. A Pinnacle employee stated that she encountered Oscar as he roamed freely, and that the dog lunged at her. Additionally, residents complained that Oscar barked incessantly, and Pinnacle received several complaints regarding the dog. For these reasons, Pinnacle cited a breach of the lease agreement and pet addendum, and revoked Tenants' pet privileges. Pinnacle expressly directed Tenants to remove the dog from the premises due to the breach, and gave them notice that a failure to remove the dog would result in eviction proceedings being initiated against them. Tenants chose to keep the dog, and cannot be relieved of the burden of their bargain via the lease because they disagree with Pinnacle's revocation of their pet rights. The fact that Tenants moved before the eviction proceedings were completed does not change the fact that Pinnacle initiated the three-day notice and began eviction proceedings due to Tenants breach and violation of lease terms.

{¶15} Pinnacle did not elect a remedy by instituting eviction proceedings against Tenants. However, this conclusion does not automatically entitle Pinnacle to the relief they seek. Instead, the Ohio Supreme Court concluded its analysis in *Dennis v. Morgan* by reaffirming the common law principle that a landlord has a duty to mitigate its damages when a tenant vacates property. The court stated, "landlords have a duty, as all parties to contracts do, to mitigate their damages caused by a breach." *Dennis*, 89 Ohio St.3d at 419. The court further stated,

Landlords mitigate by attempting to rerent the property. Their efforts to do so must be reasonable, and the reasonableness should be determined at the trial level. If the lessor has acted

reasonably in attempting to secure a new tenant, the lessee is liable for the rent up to the point of the lessor's finding a new tenant, or the expiration of the lease, whichever is earlier.

Id.

{¶16} A review of the transcript and exhibits from the hearing reveals that the trial court did not address whether Pinnacle properly mitigated its damages. Furthermore, Pinnacle did not offer any evidence of its mitigation other than statements by counsel that it was advertising and showing the apartment. Perhaps Pinnacle neglected to submit evidence of its mitigation because the trial court summarily concluded that it was not awarding damages for unpaid rent because Tenants left before being evicted. Regardless of the reason, however, the trial court must determine on remand if Pinnacle mitigated its damages. See *Pinnacle Mgt. v. Smith*, 12th Dist. No. CA2003-12-327, 2004-Ohio-6928.

{¶17} To the extent that the trial court erred in finding that Tenants were not liable for rent, Pinnacle's assignment of error is sustained. However, Pinnacle is not entitled to damages for the unpaid rent until the trial court determines whether Pinnacle mitigated its damages.

{¶18} Judgment reversed and cause is remanded for further proceedings consistent with this opinion.

HENDRICKSON, P.J., and HUTZEL, J., concur.