[Cite as *Davis v. Wesolowski*, 2020-Ohio-677.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

GALEN DAVIS, ET AL., :

Plaintiffs-Appellants/
Cross-Appellees, :

No. 108606

v. :

SOBRINA WESOLOWSKI, ET AL., :

Defendants-Appellees/
Cross-Appellants. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: February 27, 2020

Civil Appeal from the Shaker Heights Municipal Court
Case No. 18CVG00853

Appearances:

Kasputis Law Firm, L.L.C., and Edward F. Kasputis, *for appellants/cross-appellees*.

Lieberman, Dvorin & Dowd, L.L.C., David M. Dvorin, Brad A. Straka, and Andrew K. Shibley, *for appellees/cross-appellants*.

MARY EILEEN KILBANE, J.:

{¶ 1} Plaintiffs-appellants/cross-appellees, Galen Davis, et al. (collectively, "Tenants"), appeal the decision of the trial court to not award attorney fees. Defendants-appellees/cross-appellants, Sobrina Wesolowski, et al. (collectively, "Landlords"), appeal the trial court's judgment in favor of the Tenants. For the reasons that follow, we affirm the trial court.

Facts

{¶ 2} The Landlords own the four-bedroom home located at 28175 Shaker Boulevard, Pepper Pike, Ohio 44124. On May 1, 2016, the Landlords and the Tenants entered into a lease for the Tenants to use and occupy the house, including monthly rent of $2,850. Pursuant to the lease, the Tenants tendered to the Landlords a security deposit in the amount of $3,350.

{¶ 3} In August 2017, the Tenants noticed some flooding in the basement. They notified the Landlords, and both parties retained mold inspectors, but none was reportedly found. Nevertheless, the Tenants felt that the water problem had not been addressed; on October 2, 2017, based on an alleged violation of R.C. 5321.07, the Tenants deposited their rent into escrow with the Clerk of Court for the Shaker Heights Municipal Court and continued to do so for the months of November 2017 through March 2018.

{¶ 4} On February 2, 2018, the Landlords notified the Tenants that their month-to-month tenancy was being terminated at the end of March 2018. On February 18, 2018, through counsel, the Tenants provided their forwarding address

to the Landlords for the return of their security deposit. The Tenants then returned their key and vacated the premises on March 19, 2018.

{¶ 5} On April 30, 2018, counsel for the Tenants received a letter from the Landlords' counsel containing an accounting of their security deposit. The letter stated that "our client has erroneously deposited the amount of $2,094.84 with the Court which is excess of the $1,655.16 that is due to your clients. I expect that $1,655.16 will be disbursed pending the resolution of the matter." Included in the letter was an itemized list of deductions detailing the $1,694.84 the Landlords had removed from the security deposit amount. However, the Landlords had not actually deposited anything with the clerk because the clerk did not accept the check. The Landlords did not attempt to remedy their error by immediately mailing the Tenants a security deposit check.

{¶ 6} On May 24, 2018, the Tenants filed an action pursuant to R.C. 5321.16 against the Landlords seeking the return of their security deposit in the amount of $3,350. Per the statute, the Tenants also demanded statutory damages equal to the amount wrongfully withheld by the Landlords as well as reasonable attorney fees.

{¶ 7} The underlying case is not the only litigation of note between the two parties, because the initial action of depositing rent into escrow had set off a flurry of legal activity. In October 2017, the Landlords filed suit to have the rent deposited directly to their accounts. The Tenants filed a complaint for rent reduction on October 24, 2017. The Landlords followed this up by filing an application to release rents on October 27, 2017. On June 28, 2018, the trial court issued a ruling resolving

the three cases holding that "[Tenants'] depositing of rents was not justified and therefore, [Landlords] are entitled to the deposited rental funds less one percent (1%) poundage." The court ordered the release of the six months of rent to the Landlords. The Tenants never appealed that decision and it is unclear from this record why the trial court felt that the deposit of rent was unjustified.

{¶ 8} A bench trial was conducted in the underlying matter on February 28, 2019. On April 25, 2019, the trial court held that:

> [The Tenants] are entitled to their security deposit of $3,350.00 less any reasonable deductions accounted for in the [Landlords'] list of itemized deductions of $1,694.84, within thirty days of the end of the tenancy as required by Ohio Revised Code § 5321.16(B). [Tenants] are also entitled to an award of damages equal to the returned amount of the security deposit pursuant to Ohio Revised Code § 5321.16(C). This court therefore awards [Tenants] $1,655.16 of their security deposit, plus an additional $1,655.16 in statutory damages for wrongfully withholding the security deposit, together totaling $3,310.32. The court denies [Tenants'] claim for attorney fees.

{¶ 9} The Tenants appealed the denial of attorney fees. The Landlords cross-appealed alleging that the trial court erred in finding the security deposit was wrongfully withheld.

{¶ 10} For clarity of discussion, we will address the Landlords' cross-assignment of error first. For the following reasons we affirm the ruling of the trial court.

Landlords' Cross-Assignment of Error

> The trial court erred in determining that appellants were owed any funds within thirty days after they vacated the premises.

{¶ 11} The Landlords are asking us to endorse a novel interpretation of R.C. 5321.16(B), the statute governing the return of security deposits. They argue that: (1) they were entitled to keep the security deposit because the Tenants never paid rent and (2) only once the trial court released the rent on June 28 did they have to comply with the timing rules of R.C. 5321.16(B) and return the security deposit. These are questions of law and are reviewed de novo. *See generally Dovi Interests, Ltd. v. Somerset Point, Ltd. Partnership*, 8th Dist. Cuyahoga No. 82788, 2004-Ohio-636.

{¶ 12} In their first argument, the Landlords posit that the rents deposited with the clerk of court in accordance with R.C. 5321.07 did not constitute rent. As a result, they argue, they should have been entitled to keep the security deposit to cover for the unpaid rent.

{¶ 13} R.C. 5321.16(B) states that:

> 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.

{¶ 14} It is clear from the statute that a landlord is entitled to use the security deposit as a payment of past due rent. *Lloyd v. Roosevelt Properties*, 8th Dist. Cuyahoga No. 105721, 2018-Ohio-3163. The question then is whether there was any

unpaid rent in this case. We find that there was not. The rent money deposited with the clerk of court pursuant to R.C. 5321.07 constituted rent.

{¶ 15} Ohio's landlord-tenant statute, R.C. 5321.01, et seq. imposes duties on landlords that did not exist at common law and provides tenants with leverage to redress breaches of those duties. *Miller v. Ritchie*, 45 Ohio St.3d 222, 224, 543 N.E.2d 1265 (1989). As it relates to this case, R.C. 5321.04(A)(1) requires that a landlord "[c]omply with the requirements of all applicable building, housing, health, and safety codes that materially affect health and safety." It also requires that a landlord "[m]ake all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition." R.C. 5321.04(A)(2). R.C. 5321.07(A) provides, in pertinent part:

> If a landlord fails to fulfill any obligation imposed upon him [or her] by section 5321.04 of the Revised Code, or any obligation imposed upon him [or her] by the rental agreement, if the conditions of the residential premises are such that the tenant reasonably believes that a landlord has failed to fulfill any such obligations, or if a governmental agency has found that the premises are not in compliance with building, housing, health, or safety codes that apply to any condition of the premises that could materially affect the health and safety of an occupant, the tenant may give notice in writing to the landlord, specifying the acts, omissions, or code violations that constitute noncompliance.

{¶ 16} If a landlord receives notice of a potential obligation and, after receipt of the notice, "fails to remedy the condition within a reasonable time considering the severity of the condition and the time necessary to remedy it, or within thirty days, whichever is sooner," and the tenant is "current in rent payments due under the rental agreement," the tenant may do one of the following:

> (1) Deposit all rent that is due and thereafter becomes due to the landlord with the clerk of the municipal or county court having jurisdiction in the territory in which the residential premises are located;
>
> (2) Apply to the court for an order directing the landlord to remedy the condition * * *[; or]
>
> (3) Terminate the rental agreement.

R.C. 5321.07(B).

{¶ 17} R.C. 5321.07(B)(1) makes clear that a tenant may deposit all current and future rent due to the landlord with the clerk of court. This court has previously referred to that option as "a right to deposit rent pursuant to R.C. 5321.07." *Smith v. Wright*, 65 Ohio App.2d 101, 107, 416 N.E.2d 655 (8th Dist.1979). The rent deposited with the clerk pursuant to R.C. 5321.07 constitutes a payment of rent sufficient to satisfy the obligations of a tenant to their landlord. Otherwise, any meaningful and equitable resolution would be unlikely.

{¶ 18} The Landlords cite a single case, *Timbercreek Village Apts. v. Myles*, 2d Dist. Montgomery No. 17422, 1999 Ohio App. LEXIS 2385 (May 28, 1999), to advance their argument that the Tenants' deposits did not constitute rent. That case does not stand for the proposition that rent properly deposited pursuant to R.C. 5321.07 is considered unpaid rent. In fact, it suggests the opposite.

{¶ 19} In *Timbercreek*, the tenant deposited his July rent with the trial court, alleging a breach of habitability under R.C. 5321.07. The tenant had been served a three-day eviction notice on July 1, a day after informing his landlord of alleged uninhabitable conditions and making his rent deposit with the clerk of courts. The

Second District found that the tenant had not satisfied the notice requirement of R.C. 5321.07(A), that the tenant had therefore not paid his rent, and that his landlord was justified in serving the tenant with an eviction notice.

{¶ 20} Here, the Tenants met the requirements of R.C. 5321.07: they notified the Landlords of the potential breach of R.C. 5321.07 in August 2017 and waited until October 2, 2017, to deposit their rent — well after the required 30-day period. We do not find the Landlords' first argument persuasive as a result.

{¶ 21} The Landlords' second argument also lacks merit. They argue that the proper time to return the security deposit was after the trial court ruled on the three companion cases regarding rent disbursement. The Landlords contend that once the trial court released the rent to them on June 28, finding that the deposit was unjustified, the Landlords then received the unpaid rent and had 30 days to comply with the statute. They do not cite any cases that support this proposition, and their theory cuts against the language of R.C. 5321.16(B).

{¶ 22} As we stated previously, a landlord may apply the security deposit to unpaid rent. If that occurs, then "[a]ny 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." R.C. 5321.16(B). However, a landlord is not obligated to apply the security deposit to unpaid rent owed by a tenant, and in fact may retain the security deposit while suing to recover the amount of rent past due under the lease agreement. *Skerl v. The Sheet Metal Prods. Co.*, 8th Dist. Cuyahoga

No. 43743, 1982 Ohio App. LEXIS 11386 (July 1, 1982). Even so, a landlord's obligation to either return the security deposit or provide notice and an itemization of deductions from the security deposit is not relieved merely because he or she has a damages action. *Sherwin v. Cabana Club Apts.*, 70 Ohio App.2d 11, 18, 433 N.E.2d 932 (8th Dist.1980). This requirement to abide by R.C. 5321.16(B) is "separate and distinct from a landlord's claim for any unpaid rent or premises damaged." *Id*.

{¶ 23} Even if a claim for unpaid rent stayed the requirement to return the security deposit, the Landlords' actions undermine their argument. They did not behave as if they were entitled to wait until the rent was disbursed. In fact, they clearly intended to return a portion of the security deposit.

{¶ 24} Per R.C. 5321.16(B), they had until April 30, 2018, to either return the security deposit or provide an itemized deduction together *with any amount due*. On April 30, 2018, the Landlords did provide the Tenants' attorney with itemized deductions totaling $1,694.84, but did not return the amount due, instead trying — and failing — to deposit the security deposit with the court. R.C. 5321.16(B) is clear that the written notice, and any remaining funds, are to be delivered to the tenant, not the court. As a result, the court properly rejected tender for the funds. The Landlords had the chance to try and remedy the situation but chose not to.

{¶ 25} For the foregoing reasons, Landlords' assignment of error is without merit and the judgment of the trial court is affirmed.

{¶ 26} We turn now to the Tenants' assignment of error and for the forgoing reasons, we affirm the trial court.

Tenants' Assignment of Error

> The trial court erred by denying Appellants' claim for attorney's fees pursuant to R.C. 5321.16(C) after holding that Appellees had improperly failed to return a portion of Appellants' security deposit within thirty (30) days pursuant to R.C. 5321.16(B).

{¶ 27} We review a trial court's award of attorney fees for abuse of discretion. *Blisswood Village Home Owners Assn. v. Cleveland Community Reinvestment, L.L.C.*, 8th Dist. Cuyahoga No. 105450, 2018-Ohio-2299. An abuse of discretion constitutes more than an error in law or judgment; it implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 28} A trial court must determine whether attorney fees are reasonable based upon the actual value of the necessary services performed by the attorney, and evidence must exist in support of the court's determination. *Bolek v. Miller-McNeal*, 8th Dist. Cuyahoga No. 103320, 2016-Ohio-1383. In determining whether the trial court abused its discretion in regards to attorney fees, we look to the record; in this case, we were not provided with one.

{¶ 29} On June 18, 2019, the Tenants filed an App.R. 9(A) praecipe indicating they did not intend to file a transcript on appeal or an App.R. 9(C) statement of the evidence of the trial. The appellant bears the burden of demonstrating error on appeal by reference to the record of the proceedings below. *See Stancik v. Hersch*, 8th Dist. Cuyahoga No. 97501, 2012-Ohio-1955. Without a record, we must assume the regularity of the proceedings in the trial court and the

sufficiency of the evidence for the trial court's conclusion. *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 400 N.E.2d 384 (1980).

{¶ 30} It is well settled that attorney fees are mandatory when a security deposit is wrongfully withheld. *Smith v. Padgett*, 32 Ohio St.3d 344, 513 N.E.2d 737 (1987), paragraph three of the syllabus; *see also Jensen v. Blvd. Invest. Ltd.*, 8th Dist. Cuyahoga No. 103658, 2016-Ohio-5325. Of course, if the appellant incurred no expenses then no attorney fees are required. *Prescott v. Makowski*, 9 Ohio App.3d 155, 458 N.E.2d 1281 (8th Dist.1983). Without a record to review or any other evidence regarding the amount of attorney fees in this case we cannot say whether the trial court erred in declining to award attorney fees. We must affirm the trial court as a result.

{¶ 31} Both the Tenants' and Landlords' assignments of error are without merit; the judgment of the trial court is affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, JUDGE

LARRY A. JONES, SR., P.J., and
RAYMOND C. HEADEN, J., CONCUR