[Cite as *Kopp v. Associated Estates Realty Corp.*, 2010-Ohio-1690.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Kyle Kopp et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 09AP-719 (C.P.C. No. 03CVH-06-6736)
Associated Estates Realty Corp.,	:	(ACCELERATED CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on April 15, 2010

Stephen R. Felson; Michael B. Ganson, for appellants.

Baker & Hostetler LLP, Rodger L. Eckelberry, *Mark A. Johnson*, and *Catherine E. Woltering*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Plaintiffs-appellants, Kyle and Melanie Kopp ("appellants"), appeal from the judgment of the Franklin County Court of Common Pleas denying their motion for summary judgment and granting summary judgment in favor of defendant-appellee, Associated Estates Realty Corporation ("appellee").

{¶2} On December 15, 2000, appellants entered into a 12-month lease with appellee for a rental unit in Arrowhead Station located in Westerville, Ohio. The lease provided for a monthly rental fee of $840 due by the first of each month. The lease incorporated an addendum referred to as a checklist that provided for a $75

"Redecorating Fee" and a $300 "Pet Fee." The checklist indicated that those fees were nonrefundable and that $40 of the stated monthly rent was "Pet Rent." Appellee also required a security deposit that consisted of a refundable deposit equal to one month's rent. As an alternative to the conventional security deposit, however, appellants were given the option of purchasing a security deposit bond referred to as "SureDeposit" from Bankers Insurance Company ("BIC"). According to the SureDeposit Bond Acknowledgement ("Acknowledgement"), signed by appellants, in exchange for a nonrefundable purchase price of $437.50, appellants had security bond coverage in the amount of $2,500.00.

{¶3} In addition to incorporating the checklist, the lease also incorporated the Acknowledgement and noted: "Tenant has deposited with Landlord the sum of SureDeposit Dollars ($0.00) * * * for the purpose of insuring performance by Tenant of all obligations of Tenant as provided in this Lease." For administering the program, BIC paid appellee 20 percent of all bond premiums.

{¶4} Appellants terminated the lease on October 31, 2001, which was two months prior to the lease's expiration. On June 18, 2003, appellants filed the complaint herein seeking a return of the above-described fees. According to appellants, the fees were actually deposits that must be returned to them pursuant to R.C. 5321.16 of Ohio's Landlord Tenant Act. On February 9, 2004, appellee filed a motion for summary judgment contending none of the fees sought by appellants constituted a security deposit under Ohio's Landlord Tenant Act and, therefore, appellee was entitled to judgment as a matter of law. Contending otherwise, appellants filed a cross-motion for summary judgment on June 4, 2004. On August 18, 2008, the trial court rendered a decision

denying appellants' motion for summary judgment and granting summary judgment in favor of appellee. Specifically, the trial court found the $300 pet fee and $75 redecorating fee were not security deposits but, rather, were nonrefundable fees for the respective privilege of keeping a pet and preparing the apartment for possession. Regarding the SureDeposit, the trial court concluded appellants voluntarily chose to purchase a bond in lieu of making a security deposit, and therefore, the $437.50 premium paid for the bond was not a deposit as defined by R.C. 4321.01(E).

{¶5} This appeal followed, and appellants bring the following assignment of error for our review:

> The trial court erred when it granted Defendant's motion for summary judgment and denied Plaintiff's motion for summary judgment.

{¶6} This matter was decided in the trial court by summary judgment, which under Civ.R. 56(C) may be granted only when there remains no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, that conclusion being adverse to the party opposing the motion. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64. Additionally, a moving party cannot discharge its burden under Civ.R. 56 simply by making conclusory assertions that the nonmoving party has no evidence to prove its case. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. Rather, the moving party must point to some evidence that affirmatively demonstrates that the nonmoving party has no evidence to support his or her claims. Id.

{¶7} An appellate court's review of summary judgment is de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588; *Bard v. Soc. Natl. Bank, nka KeyBank* (Sept. 10, 1998), 10th Dist. No. 97APE11-1497. Thus, we conduct an independent review of the record and stand in the shoes of the trial court. *Jones v. Shelly Co.* (1995), 106 Ohio App.3d 440, 445. As such, we must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are found to support it, even if the trial court failed to consider those grounds. See *Dresher*, supra; *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶8} Each argument raised in their assigned error relates to the security deposit section of Ohio's Landlord Tenant Act. Pursuant to R.C. 5321.01(E), "security deposit" means any deposit of money or property to secure performance by the tenant under a rental agreement. As is relevant here, R.C. 5321.16(B) provides:

> 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. If the tenant fails to provide the landlord with the forwarding or new address as required, the tenant shall not be entitled to damages or attorneys fees under division (C) of this section.

{¶9} As argued before the trial court, appellants contend the SureDeposit bond, the redecorating fee, and the pet fee constitute deposits under R.C. Chapter 5321. We

will first address appellants' arguments with respect to the SureDeposit bond wherein appellants contend the bond provided by SureDeposit violates R.C. 5321.16(B) because it permits both appellee and BIC from itemizing damages, which is required before a landlord can retain a tenant's security deposit. Appellant is correct that R.C. 5312.16 requires an itemization of damages prior to a landlord retaining all or a portion of a security deposit. The fallacy of appellants' argument is that here, the parties *chose* to contract for something other than a security deposit.

{¶10} Leases are contracts and are subject to traditional rules of contract interpretation. *Atelier Dist. v. Parking Co. of Am., Inc*., 10th Dist. No. 07AP-87, 2007-Ohio-7138, ¶16, citing *Mark-It Place Foods, Inc. v. New Plan Excel Realty Trust, Inc*., 156 Ohio App.3d 65, 2004-Ohio-411, ¶29. Courts thus interpret lease provisions according to traditional contract principles. Id., citing *Bucher v. Schmidt*, 3d Dist. No. 5-01-48, 2002-Ohio-3933, ¶13. " '[C]ontracts are to be interpreted so as to carry out the intent of the parties, as that intent is evidenced by the contractual language.' " Id., quoting *Skivolocki v. E. Ohio Gas Co.* (1974), 38 Ohio St.2d 244, paragraph one of the syllabus; *Shifrin v. Forest City Ent., Inc*. (1992), 64 Ohio St.3d 635. So long as a contract is clear and unambiguous, the rights and obligations of the parties are determined on the plain language of the agreement. *Bucher*, citing *Cleveland Trust Co. v. Snyder* (1978), 55 Ohio App.2d 168; *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108.

{¶11} The lease reflects the following:

> (4) **SECURITY DEPOSIT**. Tenant has deposited with Landlord the sum of SureDeposit Dollars ($0.00) ("Security Deposit") for the purpose of insuring performance by Tenant

> of all obligations of Tenant as provided in this Lease. Landlord may use the Security Deposit to cure any Tenant default by reason of tenant's noncompliance with the terms of this Lease, including without limitation, failure to pay rent, noncompliance with Ohio Revised Code § 5321.05, or the cost of cleaning, redecorating, or repairing damage to walls, floors, coverings, appliances and other appurtenances caused by Tenant or tenant's agents, guests, or other persons for whom Tenant is responsible. Within thirty (30) days after the later of (i) the expiration or earlier termination of this Lease, or (ii) the date Tenant vacates the Apartment, Landlord will refund the Security Deposit less any deductions authorized above. If the Apartment is rented by more than one person, Landlord may send the refunded Security deposit to any Tenant identified herein, and Landlord shall not be liable for the division of the refund between the Tenants. If Landlord's damages exceed the amount of the Security Deposit, Tenant shall be liable for the excess. Tenant's failure to provide Landlord in writing with a new or forwarding address will relieve Landlord of the obligation to return the Security Deposit (less deductions, if any) within that thirty (30)-day period. The Security Deposit may not be utilized by Tenant for payment of rent. Landlord may commingle the Security deposit with other funds of Landlord.

{¶12} The lease also incorporates the Acknowledgement which clearly reflects a nonrefundable purchase price in bold, all-capital letter font. Further, the Acknowledgement provides as follows:

> I AGREE TO PURCHASE A SECURITY DEPOSIT BOND FROM BANKERS INSURANCE COMPANY (BIC) THROUGH THE APARTMENT COMMUNITY NAMED ABOVE. THIS BOND IS FOR THE MAXIMUM AMOUNT LISTED ABOVE AND PROVIDES COVERAGE FOR THE AMOUNT OF MONETARY DAMAGES INCLUDING PAST DUE RENT, FEES, ANY OTHER CHARGES OR DAMAGES TO THE APARTMENT BEYOND NORMAL WEAR AND TEAR. I FURTHER AGREE AND UNDERSTAND THAT A CASH SECURITY DEPOSIT (IF ANY) HELD IN ESCROW, UPON TERMINATION OR EXPIRATION OF MY LEASE WILL BE APPLIED TO THESE MONETARY DAMAGES. IN THE EVENT THAT A CLAIM IS MADE ON MY ACCOUNT FOR DAMAGES, I UNDERSTAND THAT BIC IS

> OBLIGATED TO PAY ANY LOSS, DAMAGE, EXPENSES, COURT COSTS, AND ATTORNEY'S FEES BECAUSE OF MY ACTIONS. AS A RESULT I WILL BE OBLIGATED TO REIMBURSE BIC. I FURTHER UNDERSTAND THAT THE APARTMENT COMMUNITY NAMED ABOVE IS NOT A PARTY TO, NOR RESPONSIBLE FOR, THE COLLECTION ACTIVITY OR EFFORTS (RELATED TO THIS BOND) TAKEN BY THE EMPLOYEES OF BIC OR THEIR AGENTS. I FURTHER AUTHORIZE ANYONE TO FURNISH BIC ALL REQUESTED INFORMATION TO ASSIST IN THE COLLECTION OR MONIES PAID BY BIC AS PREVIOUSLY DESCRIBED. I FURTHER UNDERSTAND THAT MY FAILURE TO SATISFY MY OBLIGATION FOR ANY CLAIMS PAID OUT UNDER THIS BOND MAY ADVERSELY EFFECT MY CREDIT RATING AND MY ABILITY TO RENT FUTURE RESIDENCES, OR OBTAIN INSURANCE.

(Emphasis sic.)

{¶13} Thus, by virtue of the contract, there was no sum of money held by the landlord. Additionally, as acknowledged by appellants, they *chose* to purchase the bond at a lower out-of-pocket cost in lieu of placing a refundable security deposit at a higher cost. As found by the trial court, there is nothing in Ohio's Landlord Tenant Act prohibiting such a practice. Accordingly, we find that the $437.50 premium for a $2,500 bond was not a security deposit as defined by R.C. 5321.01, and thereby subject to R.C. 5321.16.

{¶14} Appellants next argue that at the very least they should have returned to them the "20% kickback" retained by appellee. It is not disputed that BIC pays appellee an administrative fee calculated as 20 percent of the total premiums of all bonds purchased by appellee's tenants nationwide. However, it is equally undisputed that appellee does not "retain" any portion of what tenants submit to BIC. Rather, the payment of the administration fee is a transaction separate and apart from the bond premium paid by appellants to BIC and in no way reflects a type of deposit.

{¶15} Thirdly, appellants contend the nonrefundable nature of the bond premium is unconscionable and, therefore, unenforceable under R.C. 5321.14, which provides that a court may refuse to enforce a rental agreement or any clause thereof if it is found to be unconscionable. In support of their position, appellants rely on an opinion from the Maryland Attorney General that prohibited SureDeposit from marketing its product in the state of Maryland. We find appellants' argument unpersuasive.

{¶16} Unconscionability is a legal question involving an absence of choice on the part of one of the parties to a contract and contract terms that are unreasonably favorable to the other party. *Swayne v. Beebles Invs., Inc*., 176 Ohio App.3d 293, 2008-Ohio-1839, ¶14, citing *Jeffrey Mining Prod., L.P. v. Left Fork Mining Co*. (2001), 143 Ohio App.3d 708, 718; *Orlett v. Suburban Propane* (1989), 54 Ohio App.3d 127, 129. Ohio courts analyze unconscionability under a two-prong test: (1) substantive unconscionability, which means whether the contract terms are unfair and unreasonable; and (2) procedural unconscionability which examines the relative bargaining power of the parties. Id., citing *Small v. HCF of Perrysburg, Inc.,* 159 Ohio App.3d 66, 71, 2004-Ohio-5757, ¶21.

{¶17} It is undisputed in the case sub judice that appellants had the *option* of paying a conventional refundable security deposit *or* purchasing the SureDeposit bond, and that appellants *chose* to purchase the bond in lieu of submitting a security deposit. Therefore, appellants' claim of unconscionability must fail as there is no question before us involving the absence of choice by either party.

{¶18} For the foregoing reasons, we find that the SureDeposit bond at issue before us is not a security deposit subject to Ohio's Landlord Tenant Act.

{¶19} Appellants next argue the $75 nonrefundable redecorating fee is a security deposit subject to the Landlord Tenant Act. In support of their position, appellants rely on this decision in *Riding Club Apartments v. Sargent* (1981), 2 Ohio App.3d 146. In that case, the parties entered into a one-year lease, which provided that in the event the tenant vacated the premises prior to the lease's expiration, a $150 charge would be deducted from the security deposit as an amount to prepare the premises and secure a new tenant. The issue before this court was whether such a liquidated damages clause in an apartment lease that allowed a landlord to retain a security deposit was inconsistent with R.C. Chapter 5321. We held in the affirmative, stating "[a] liquidated damages clause permitting the landlord to retain a security deposit without itemization of actual damages caused by reason of the tenant's noncompliance with R.C. 5321.05 or the rental agreement is inconsistent with R.C. 5321.16(B), which requires itemization of damages after breach by the tenant of the rental agreement." Id. at 147.

{¶20} However, the redecorating fee at issue here was not part of a liquidated damages clause, was not deducted from the security deposit, and was not dependent on any action or inaction of appellants. Rather, the redecorating fee was listed on the lease as an upfront, nonrefundable fee for preparing the apartment "prior" to appellants taking possession and was due at the time appellants moved into their rental unit. The redecorating fee did not apply to any potential damages and did not secure any performance by appellants. Therefore, we find the redecorating fee is not a security deposit as defined by Ohio's Landlord Tenant Act.

{¶21} Lastly, appellants contend the nonrefundable $300 pet fee is a liquidated damages provision prohibited by R.C. Chapter 5321. Like the redecorating fee, however,

the pet fee did not secure any performance of appellants under the lease, nor did it apply to damages caused by pets. The lease provided that the pet fee was an upfront, nonrefundable fee, and the undisputed deposition testimony provided the fee's purpose was for the contractual right to keep pets in the apartment. As stated by the court in *Ritter v. Fairway Park Prop., LLC*, 154 Ohio App.3d 444, 2003-Ohio-5048:

> Where a pet deposit is given to secure performance by the tenant under the lease, it may be considered a security deposit subject to the provisions of R.C. Chapter 5321 and applicable case law. *Pool v. Insignia Residential Group,* 136 Ohio App.3d 266, syllabus.
>
> The language of the addendum states that it is non-refundable and inapplicable to damages. Appellants present no argument or evidence to support the conclusory statement that the parties "clearly intended to secure the performance of their obligation not to allow their cat to damage Defendant's property." The plain language of the rental contract indicates that the pet deposit was not to be applied to damages, and so it cannot be intended to secure performance to keep the apartment free from damage.

Id. at ¶18-19.

{¶22} Likewise, in *Stauffer v. TGM Camelot, Inc.*, 12th Dist. No. CA2005-12-508, 2006-Ohio-3623, the court analyzed a nonrefundable pet fee that the tenants argued was a deposit to cover potential damages of their pet. The *Stauffer* court disagreed, noting that the evidence established that the one-time, nonrefundable pet fee was in exchange for the privilege of keeping a pet in the apartment. With respect to this issue, the court stated it found "no provision of law in Chapter 5321, or elsewhere, that prohibits, or is inconsistent with, a landlord and a tenant including a term in their lease agreement that requires the tenant to pay $150 as a one-time, nonrefundable fee in exchange for the right to keep a pet at the leased premises." Id. at ¶27.

{¶23} In fact, the lease before us differentiates between a "pet deposit" which appellants did not pay and a "pet fee" which appellants did pay. The lease clearly designates that the pet fee was nonrefundable and was due upon appellants moving into the rental unit. The pet fee did not set forth any obligations which appellants agreed to meet with regard to their pets, and the fee was not dependent on potential damages caused by appellants' pets. Accordingly, we find the $300 pet fee at issue here is not a security deposit under Ohio's Landlord Tenant Act.

{¶24} For the foregoing reasons, we find the trial court properly concluded the monies at issue here were not deposits that appellants were entitled to have returned to them under Ohio's Landlord Tenant Act as codified in R.C. Chapter 5321. Consequently, we overrule appellants' single assignment of error and hereby affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER and CONNOR, JJ., concur.

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