[Cite as *Schultz v. Wurdlow*, 2012-Ohio-3163.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Kelly J. Schultz et al.,	:	
Plaintiffs-Appellees,	:	
		No. 11AP-62
v.	:	(M.C. No. 2008 CVI 31737)
Lawrence Earl Wurdlow,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on July 12, 2012

Moritz College of Law, and *Elizabeth I. Cooke*, for appellees.

Lawrence Earl Wurdlow, pro se.

APPEAL from the Franklin County Municipal Court.

BRYANT, J.

{¶ 1} Defendant-appellant, Lawrence Earl Wurdlow, appeals from a judgment of the Franklin County Municipal Court (1) concluding he violated R.C. 5321.16 when he failed to return to plaintiffs-appellees, Kelly J. Schultz and Daniel Duke, their security deposit on termination of their lease with defendant, (2) awarding them twice the amount of the security deposit, or $700, and (3) awarding them $14,782.50 in attorney fees. Because the trial court properly awarded plaintiffs twice their security deposit as a result of defendant's wrongfully withholding their security deposit, and did not abuse its discretion in awarding attorney fees in an amount that the evidence supports, we affirm.

I. Facts and Procedural History

{¶ 2} The procedural history of this case is pertinent to one or more of the issues in defendant's appeal, so we relate them in some detail.

{¶ 3} On July 11, 2008, plaintiffs filed a complaint seeking return of their $350 security deposited with defendant pursuant to their lease for the premises at 38 E. 17th Avenue, Apartment 42, near The Ohio State University campus. According to the complaint, plaintiffs vacated the apartment and returned the keys on April 30, 2008, leaving the apartment in good condition. Plaintiffs alleged defendant did not return the deposit, did not submit information about why he was withholding the deposit, did not respond to telephone or written messages, and did not appear for a third-party mediation on July 10, 2008. The complaint sought twice the amount of the security deposit plus fees and other court costs, as well as interest from the date of judgment.

{¶ 4} A trial was scheduled before a small claims magistrate on August 19, 2008. Defendant filed a motion to continue the trial date, specifically requesting trial on September 16, 2008; the court scheduled trial accordingly. At defendant's request, the court again rescheduled the matter, this time to October 8, 2008 at 1:30 p.m. Based on the October 8 proceedings, the magistrate issued a decision on October 10, 2008. The decision indicates the magistrate called the case at 1:45 p.m., but defendant failed to appear. The magistrate recommended judgment for plaintiffs in the amount $700, plus costs and interest at the rate of 8 percent from the date of judgment. On the same day, a judge of the municipal court entered judgment consistent with the magistrate's decision.

{¶ 5} Defendant filed a motion for reconsideration, contending he was present at the courtroom no later than 1:43 p.m. and thus was present if the magistrate called the case a second time at 1:45 p.m. When defendant's motion did not persuade the magistrate, defendant filed an objection to the magistrate's decision as well as a motion for a new trial. By entry filed November 13, 2008, the trial court ordered the matter to mediation scheduled for December 15, 2008. Mediation failed, and the court scheduled the matter for pretrial on February 5, 2009.

{¶ 6} Prior to pretrial, plaintiffs filed, on January 6, 2009, a motion for summary judgment regarding defendant's motion to reconsider and motion for a new trial; defendant did not respond. On February 24, 2009, the court granted plaintiffs' motion,

entering judgment for plaintiffs in the amount of $2,263.50, plus statutory interest at the rate of 5 percent from the date of judgment. Defendant appealed.

{¶ 7} In a decision issued March 23, 2010, this court reversed the judgment of the trial court, concluding "the trial court modified its prior judgment without ever rendering a decision on landlord's pending objections, which runs contrary to the requirements of Civ.R. 53(D)(4)(e)(i)." *Schultz v. Wurdlow*, 10th Dist. No. 09AP-301, 2010-Ohio-1140, ¶ 13. We thus concluded "the trial court erred by issuing a judgment that modified and superseded its prior judgment without following the process that is required to issue such a modified judgment." *Id.*

{¶ 8} On remand, plaintiffs responded to defendant's objection and motion for new trial on May 13, 2010; on July 26, 2010, defendant filed a motion to dismiss. The trial court, on August 6, 2010, sustained defendant's objection to the magistrate's October 10, 2008 decision, mooting all the pending motions. Rather than refer the matter to the magistrate for trial, the court set it for trial before the court on October 28, 2010. The court's entry states that, on agreement of the parties, the parties were to complete all discovery by the end of September; defendant, however, failed to produce the requested documents until two days before trial. Although plaintiffs' attorneys sought an award of attorney fees to compensate them for their appellate work, the trial court specifically denied it.

{¶ 9} Trial commenced on October 28, 2010, albeit late due to defendant's tardy appearance. After hearing the evidence, the court permitted the parties a brief oral closing and allowed them written post-trial briefs. They reconvened on December 2, 2010, where the court advised of its decision on the merits of plaintiffs' complaint and, finding in their favor, took evidence regarding attorney fees. The court ultimately granted judgment to plaintiffs in the amount of double their security deposit plus attorney fees, interest, and costs.

II. Assignments of Error

{¶ 10} On appeal, defendant assigns the following errors:

> [I.] The trial court erred in not following the guidelines of Chapter 5321 of the Ohio Revised Code as it prescribes rules for tenant and landlord relations. This chapter imposes duties and obligations upon both tenants and upon landlords. The

> trial court has ignored the obligations imposed upon the tenant. The trial court erred in not treating the written assertions of the tenant as binding statements of promise which could not later abandoned [sic] as inaccurate.
>
> [II.] The trial court erred in not addressing the duties imposed by the Columbus City Code upon the tenant.
>
> [III.] The trial court erred in not treating the contract in terms as valid requirements of both parties to this contract, both the tenant and the landlord.
>
> [IV.] The trial court has erred in attributing no costs whatsoever to the tenant for gas charges of the tenant, for long distance telephone expenses of the tenant, nor equipment repairs and replacement for these tenants, costs which are clearly documented by evidence and receipts as responsibilities of the tenant.
>
> [V.] The trial court erred in charging the appellant for attorney fees of the appellees which were incurred in maintaining a frivolous action of Summary Judgment which the Franklin County Appellate Court identified as an inappropriate legal action. These are charges for which the appellant should not be responsible.
>
> [VI.] The trial court erred in suggesting that there are no limits which can be placed upon attorney fees accumulated within a Small Claims Court action. The existing precedent does not support this view.

We address defendant's assignments of error in two categories: his liability under R.C. 5321.16 and the court's award of attorney fees.

III. Defendant's Liability Under R.C. 5321.16

{¶ 11} R.C. 5321.16(B) requires that, once a rental agreement is terminated, any property or money the landlord held as a security deposit may be applied to pay past due rent and to pay the amount of damages the landlord suffered by reason of the tenant's failure to comply with R.C. 5321.06 or the rental agreement. The statute, however, mandates that "[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).

{¶ 12} The tenant is not without responsibility, but "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." R.C. 5321.16(B). By contrast, "[i]f the landlord fails to comply" with the section's requirements, "the tenant may recover the property and money due him, together with damages in an amount equal to the amount wrongfully withheld, and reasonable attorneys fees." R.C. 5321.16(C).

{¶ 13} In response to plaintiffs' complaint, defendant, both in the trial court and on appeal, contends plaintiffs failed to notify him of problems with the rental premises that allegedly rendered the living conditions untenable. Defendant's argument, however, misses the gist of plaintiffs' complaint. R.C. 5321.04 outlines the obligations of a landlord under a rental agreement; R.C. 5321.05 delineates the obligations of a tenant. R.C. 5321.07, the section on which defendant apparently relies, provides that if a landlord fails to fulfill any obligation that the rental agreement or R.C. 5321.04 imposes on the landlord, other than those noted in R.C. 5321.04(A)(9), the tenant is to give notice in writing to the landlord, specifying the acts, omissions, or code violations that constitute non-compliance. Should the landlord fail to remedy the conditions in a reasonable time, the tenant may select one of several remedies set forth in R.C. 5321.07(B), including escrowing rent with the court.

{¶ 14} Plaintiffs did not attempt to escrow rent under R.C. 5321.07(B)(1). Nor does their complaint seek to terminate the rental agreement due to defendant's failure to remedy the conditions found in the rental premises. To the contrary, the parties agreed to terminate the rental agreement after a Columbus City Code officer inspected the property and cited defendant for violating Columbus Housing Code 4541.01, as pertinent zoning provisions permitted only one inhabitant in the living quarters. Instead, plaintiffs' complaint seeks return of plaintiffs' $350 security deposit and, in light of defendant's failure to return it according to the statutory provisions, double the security deposit and attorney fees. The issue, then, is whether the manifest weight of the evidence supports the

trial court's determination that defendant wrongfully withheld plaintiffs' security deposit, resulting in the award of damages against defendant.

{¶ 15} "Civil '[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.' " *Cunningham v. Ohio Dept. of Transp.*, 10th Dist. No. 08AP-330, 2008-Ohio-6911, ¶ 20, quoting *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279 (1978), syllabus. When considering whether a civil judgment is against the manifest weight of the evidence, an appellate court presumes the findings of a trier of fact are correct. *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 79-80 (1984). As a result, "[i]f the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment." *Id.* at fn. 3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 603, at 191-92 (1978).

{¶ 16} Here, Schultz testified plaintiffs paid a security deposit to defendant in the amount of $350. When plaintiffs moved out of the apartment, they returned the keys to defendant and provided a written notice of a forwarding address to the defendant. Defendant returned no portion of the security deposit; nor did he provide a reason for not returning the security deposit. Schultz further testified plaintiffs returned the apartment to defendant in better condition than when they moved into it. In particular, Schultz outlined the filthiness of the apartment on their move-in, the items in disrepair, and the unsafe condition of the stairwells into the apartment. Although defendant contested that testimony, the trial court specifically found "plaintiffs' testimony and evidence persuasive and defendant's unpersuasive." (Decision, at 3.)

{¶ 17} As the court explained, "the evidence" from the trial "shows an apartment in terrible disrepair. All of the appliances, fixtures and furniture in the apartment are old and barely usable. The photographs of the kitchen counter, peeling paint, and the exterior light and stairs illustrate[] the deplorable condition in which defendant maintained the property." (Decision, at 3.) In contrast to the condition of the property when plaintiffs moved into the premises, plaintiffs "produced pictures of the bathroom, kitchen sink, microwave, and stove * * * show[ing] that they returned the apartment to defendant in a clean condition." (Decision, at 3.)

{¶ 18} Defendant nonetheless contends the trial court's award is erroneous because it does not consider plaintiffs' failure to have the natural gas account transferred to their names after moving into the premises. Schultz, however, fully explained the circumstances. Four times she attempted to set up a meeting with the gas company to have someone come to change the account to plaintiffs' names. As Schultz explained: "The arrangements varied between having Columbia Gas call me and me call [defendant], or having Columbia Gas call him; and every time he wouldn't pick up his phone and he wouldn't show up." (Oct. 28, 2010 Tr. 89.) Because defendant's contract with the gas company precluded it from unilaterally putting the gas bill into plaintiffs' names for future assessments, the trial court arguably did not err in refusing to allow defendant to withhold the amount of the gas bills from the security deposit.

{¶ 19} Moreover, the record lacks evidence of the amount of the gas bills. Although defendant filed a motion to supplement the record with gas bills he suggests inadvertently were omitted from the record, the record does not indicate the trial court ever admitted the bills into evidence. It similarly does not indicate plaintiffs attempted to have them admitted into evidence. In the end, the record lacks evidence as to the amount of the gas bills. Accordingly, the trial court not err, since the record lacks evidence to suggest what deductions would have been appropriate.

{¶ 20} Because the evidence supports the court's conclusion that plaintiffs left the apartment in better condition than when they moved in, the court's decision is not against the manifest weight of the evidence. The trial court correctly concluded defendant is liable to plaintiffs under R.C. 5321.16.

IV. Damages

A. *Double Security Deposit*

{¶ 21} R.C. 5321.16 grants the trial court the authority to award not only the amount of the security deposit, but damages in an amount equal to the wrongfully withheld security deposit and reasonable attorney fees. On finding defendant violated R.C. 5321.16, the trial court properly awarded double plaintiffs' security deposit as damages. The court also had the statutory authority to award attorney fees. Defendant challenges the amount of the award. The more significant issue here is the award of attorney fees.

B. *Attorney Fees*

{¶ 22} "The determination that a tenant is entitled to attorney fees pursuant to R.C. 5321.16(B) and (C) and the amount of the award are within the sound discretion of the trial court." *Chaney v. Breton Builder Co., Ltd.*, 130 Ohio App.3d 602, 607 (6th Dist.1998), abrogated on other grounds by *Parker v. I&F Insulation Co.*, 89 Ohio St.3d 261 (2000). "A commonly accepted view of the purpose underlying this statute is that attorney fees are provided for in order to ensure the return of wrongfully withheld security deposits at no cost to tenants." *Christe v. GMS Mgt. Co., Inc.*, 88 Ohio St.3d 376, 378 (2000).

{¶ 23} "In calculating attorney fee awards, we require that a number of factors be considered, including, among other things, the time and labor involved in maintaining the litigation, the novelty and difficulty of the questions presented, the professional skill required to perform the necessary legal services, the reputation of the attorney, and the results obtained." *Id.*; *Lytle v. K & D Group, Inc.*, 8th Dist. No. 84889, 2005-Ohio-4310 (noting the statute's purpose is to compensate injured tenants for the time, inconvenience, and costs of having to sue, and to create incentive for landlords to comply with the law). "Both trial and appellate courts have authority to determine and tax costs under R.C. 5321.16(C) for attorney fees incurred at the appellate level" and at the trial court level. *Klein v. Moutz*, 118 Ohio St.3d 256, 2008-Ohio-2329, syllabus. Attorney fees under R.C. 5321.16 are not damages, but costs. *Christe.*

{¶ 24} Here, the evidence included the number of hours plaintiffs' attorneys worked on the case and their rates. Evidence further demonstrated the hours were both reasonable and necessary. Accordingly, the trial court awarded the full amount of plaintiffs' attorney fees. Defendant contests the award for three reasons: the amount is too great in relation to the award of damages, the amount includes fees incurred at the appellate level where defendant prevailed, and the award exceeds the jurisdiction of the municipal court.

{¶ 25} Although the award here is disproportionate to the damages, the trial court explained its reason for the amount of the award in the context of the factors in Prof.Cond. Rule 1.5. The noted case had stretched "out over lifetimes, practically," the court observed "the attorney and the intern" and could appreciate "the many hours in the

trial and preparation," and the court concluded, "based on the testimony * * * that the fees are appropriate." (Dec. 2, 2010 Tr. 23, 25.) As further support for its decision, the court stated, "I'm offended by my sense of right and wrong of what I see in these pictures and the testimony and the way Mr. Wurdlow behaved toward his--the people that he rented his properties to." (Dec. 2, 2010 Tr. 26.) The court stated it believed it had "witnessed that same attempt to frustrate the process here, which would go along with those cases in awarding attorney's fees. * * * It just shocks my conscience, the whole totality of the circumstances, of this--what I've seen throughout this trial." (Dec. 2, 2010 Tr. 26.) *See Whitestone Co. v. Stittsworth*, 10th Dist. No. 06AP-371, 2007-Ohio-233, ¶ 61, quoting *Parks v. Kanani*, 10th Dist. No. 01AP-905 (Mar. 21, 2002) (concluding that " 'where the amount recovered is small compared to the attorney fees assessed, the court must give adequate reasoning as to how it arrived at the specific amount of the award' ").

{¶ 26} Given the length of time the case extended before conclusion, defendant's actions in delaying the matter, including numerous continuances, and the testimony supporting the award of fees, the trial court did not abuse its discretion in awarding plaintiffs their attorney fees for the trial and their expert witnesses. The more difficult issue is the award of attorney fees for the appellate level, where defendant prevailed.

{¶ 27} Although attorney fees may be awarded for appellate work, plaintiffs did not prevail on appeal. Rather, plaintiffs prevailed before the trial court's magistrate who recommended judgment for plaintiffs in defendant's absence. Defendant filed a motion for reconsideration, contending he was present in the courtroom at 1:43 p.m., contrary to the magistrate's noting his absence at 1:45 p.m. He followed the motion for reconsideration with an objection and the motion for a new trial.

{¶ 28} Instead of responding to both motions, plaintiffs filed a motion for summary judgment, an arguably inappropriate response to defendant's pending motions. This court reversed the trial court's decision granting the summary judgment motion and remanded the matter. In other circumstances, we might conclude the award of attorney fees consistent with the amount of plaintiffs' appellate litigation fees was an abuse of discretion. Here, however, the trial court awarded the amount not to compensate plaintiffs for their appellate fees but as a result of defendant's conduct throughout the course of the pending litigation.

{¶ 29} After the trial court determined it would hear the case itself on remand rather than refer it to a magistrate, the court, on agreement of the parties, set "discovery due by September 30, 2010." (Aug. 6, 2010 Entry.) Plaintiffs filed a motion to compel discovery against defendant on October 5, 2010 due to defendant's failure to comply; defendant did not produce the material until two days before trial. Plaintiffs then were left in the unenviable position of either requesting further delay of the case in order to assess the information defendant produced, thus incurring additional attorney fees, or trying the case without the opportunity to adequately prepare for the belatedly-produced information. Given the length of time the case had been pending, plaintiffs reasonably chose to proceed despite defendant's disregard for the court's entry. The court's frustration with defendant's failure to comply was apparent.

{¶ 30} The trial court noted the case was already two years old and, despite defendant's failure to comply with the discovery order, the court was not inclined to continue the case. At the same time, the court was reluctant to grant plaintiffs' request that the information belatedly produced be excluded from evidence. As far as attorney fees regarding the discovery matter, the court stated it would deal with that issue at the end of the trial. In response, counsel for plaintiffs asked the court to consider the attorney fees on the motion to compel separately from attorney fees based on other aspects of the case, and the court again indicated it would deal with them separately at the end.

{¶ 31} In light of defendant's failure to comply with the discovery requests, and the court's inability to fashion a sanction so late in the proceedings, the court did not abuse its discretion in determining that plaintiffs be awarded an amount consistent with their appellate attorney fees, in effect as a sanction for defendant's abuse of the judicial process and failure to comply with the court's entry, pursuant to the parties agreement, that defendant provide all documents he intended to use at trial prior to September 30. *See* Civ.R. 37(B)(2)(e) (providing that in lieu of any fee otherwise ordered under Civ.R. 7(B)(2) or in addition to them, "the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court expressly finds that the failure was substantially justified or that other circumstances make an award of expenses unjust"). Particularly compelling are the court's comments not only on the condition of the

property at issue coupled with defendant's steadfast refusal to return their deposit, but defendant's "same attempt to frustrate the process here. * * * It just shocks my conscience." (Dec. 2, 2010 Tr. 26.)

{¶ 32} In an attempt to circumvent that result, defendant asserts the fees awarded exceed the trial court's jurisdiction. The Supreme Court of Ohio in *Klein, supra,* concluded attorney fees are not damages, but costs. Pursuant to R.C. 1925.02(A)(1), the damage limit in the small claims court is "exclusive of interest and costs." The damages award of $700 thus was within the jurisdictional limit of the small claims court, and the relevant statutes provide no limit to costs. Accordingly, the award of attorney fees does not exceed the jurisdiction of the small claims court.

V. Disposition

{¶ 33} For the reasons stated, we overrule defendant's motion to supplement the record as well as his six assignments of error. The judgment of the Franklin County Municipal Court is affirmed.

Motion denied;
judgment affirmed.

BROWN, P.J., and KLATT, J., concur.
