

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Dr. C.S. Chen, D.O., :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 14AP-535
 : (C.P.C. No. 12CV-14744)
 Dr. Shie-Ming Hwang, Ph.D., : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on December 9, 2014

Fry, Waller & McCann Co., LPA, and Barry A. Waller, for appellee.

Dr. Shie-Ming Hwang, Ph.D., pro se.

APPEAL from the Franklin County Court of Common Pleas

SADLER, P.J.

{¶ 1} Defendant-appellant, Dr. Shie-Ming Hwang, Ph.D., appeals from the trial court's decision granting summary judgment in favor of plaintiff-appellee, Dr. C.S. Chen, D.O. For the reasons that follow, the judgment of the trial court is affirmed.

I. BACKGROUND

{¶ 2} This matter involves a failed lease agreement executed on August 3, 2012 between appellee, the intended tenant, and appellant, the lessor. The agreement provided for a three-year lease with an option to renew for an additional term. According to the agreement, the lease was to commence on October 1, 2012. The complaint, filed on November 30, 2012, alleges the lease agreement was not witnessed in accordance with R.C. 5301.01, appellant did not deliver the premises on October 1, 2012 as required, and

appellant failed to secure the permits necessary to complete the remodeling work required by the agreement. Because appellant was unable to produce the premises within a reasonable amount of time, appellee was not able to utilize the premises to conduct his medical practice. Therefore, appellee advised appellant that he was rescinding and canceling the lease agreement.

{¶ 3} In the complaint, appellee sought a declaration that the lease had been rescinded and canceled due to appellant's breach of the agreement and inability to deliver the premises. In the alternative, appellee sought a declaration that the lease was invalid and ineffective as a result of its defective execution. Appellee also sought a judgment for the amounts he expended on "additional rent at his current location" and damages for disruption of his medical practice. (Complaint, 4.) In addition, appellee sought repayment of \$23,922.22, which was comprised of payment for the first month's rent, payment of the security deposit, and money loaned to appellant for purposes of remodeling the premises.

{¶ 4} In response to the complaint, appellant filed a lengthy answer wherein appellant asserted it was appellee's failure to participate in the remodeling, including securing of the necessary permits that caused the delay. Appellant's answer also asserted that the lease provided that the \$20,000 remodeling loan would be paid back in monthly installments. Additionally, appellant's answer asserted that appellee breached the lease by "using false allegations" asserted in the complaint. (Answer, 7.) Because appellee allegedly breached the lease agreement, appellant asserted there was no longer an option to renew such that the lease did not have to comply with the lease-execution requirements set forth in R.C. 5301.01. Though not specifying any sort of counterclaim, at the conclusion of his answer, appellant set forth a request for judgment against appellee in excess of \$49,000.

{¶ 5} Contending that appellant failed to state "in short and plain terms" his defense to each asserted claim as provided in Civ.R. 8(B), and because it was unclear as to whether or not appellant was asserting a counterclaim, appellee moved for a more definitive statement. Appellant timely filed a response and argued that his answer was in compliance with the civil rules. The trial court denied appellee's motion for a more definitive statement to the extent that an amended answer was not necessary. However,

finding that appellant failed to separately set forth any allegations that formed a basis for a counterclaim, the trial court granted appellee's motion as to the intended counterclaim and provided appellant 14 days to file a proper counterclaim in accordance with Civ.R. 8. Appellant did not file a counterclaim at any time during these proceedings.

{¶ 6} On March 25, 2013, appellee filed a motion for judgment on the pleadings. Appellee asserted that because the lease was neither witnessed nor acknowledged as required by R.C. 5301.01, it was defectively executed and, therefore, invalid. Appellant did not respond to the motion, and, on April 24, 2014, the trial court granted appellee's motion. Specifically, the trial court found that as a three-year lease with an option to renew, the lease was subject to the execution requirements of R.C. 5301.01(A). Because the lease failed to comply with R.C. 5301.01(A), the trial court concluded appellee was entitled to judgment on the pleadings as to this claim which was asserted in count two of his complaint. At this time, the alternative claim asserted in count one became moot.

{¶ 7} On April 25, the day following the trial court's decision granting the motion for judgment on the pleadings, appellant filed an "objection to plaintiff attorney's motion for a judgment on the pleadings." Appellant did not acknowledge the untimeliness of his objections and, instead, stated only that the motion for judgment on the pleadings "was filed by Plaintiff Attorney in the name of Plaintiff during Defendant's trip in the west coast and waiting for Plaintiff Attorney to provide copies of the Leases as promised." (Apr. 25, 2014 Objections, 1.) In his objections, appellant asserted appellee was making false allegations and that the lease was for a period of less than three years such that the requirements of R.C. 5301.01(A) were inapplicable. On May 6, 2013, the trial court overruled appellant's objections. The trial court found that the objections were untimely and that even construed as a motion for reconsideration, did not set forth a basis for overturning its previous decision. Specifically, the trial court noted that the objections "raise[d] facts and arguments that were not addressed by the ruling, which is limited to a finding that the lease agreement was not executed in compliance with R.C. 5301.01." (May 6, 2013 Decision, 2.)

{¶ 8} On June 19, 2013, appellee filed a motion for summary judgment seeking a judgment in the amount of \$23,922.22, which represented payment of the first month's rent, payment of the security deposit, and a loan for remodeling. Appellee also sought a

judgment in the amount of \$9,773.84, which represented additional rent that appellee alleged he was forced to pay because of appellant's breach of the lease agreement. The motion for summary judgment was supported by appellee's affidavit.

{¶ 9} On July 23, the trial court issued a decision granting in part and denying in part appellee's motion for summary judgment. Therein, the trial court noted that appellant had not filed any opposition to the motion for summary judgment. Based on its prior decision granting judgment on the pleadings and the undisputed evidence that (1) appellee paid appellant \$23,922, (2) appellant did not secure the necessary work permits, (3) appellant did not hire a licensed contractor, (4) the premises were not ready on October 1, and (5) the premises would not be ready for occupancy within a reasonable amount of time thereafter, the trial court concluded appellee was entitled to an award of \$23,922. With respect to appellee's request for judgment in the amount of \$9,773.84, the trial court found that appellee failed to present either evidence or authority to support this claim.

{¶ 10} Also filed on July 23 was appellant's "objection to plaintiff Dr. C.S. Chen, D.O.'s motion for summary judgment." However, the objection was filed at 2:46 p.m., which was three hours after the trial court filed its decision at 11:28 a.m. In his objection, appellant acknowledged that he "received on June 20, 2013 through e-mail Plaintiff Dr. C.S. Chen, D.O.'s Motion to the Court for Summary Judgment filed on June 19, 2013," but appellant gave no basis for the untimeliness of his objection. (July 23, 2013 Objection, 1.) Rather, appellant requested that the trial court issue an order declaring the lease effective and in full force, judgment against appellee in excess of \$49,000, and judgment against appellee's counsel in the amount of \$70,596 for damages allegedly caused by his representation of appellee. In his objection, appellant stated that appellee and his attorney have lied to the court and have engaged in trying to cover up their "false pretenses." Appellant also challenged the legitimacy of appellee's counsel's representation. Appellant, however, did not file any evidence with his objection.

{¶ 11} In response, appellee filed a reply noting appellant's objection was untimely, exceeded the trial court's page limitation, and failed to include any evidentiary items. On July 31, the trial court overruled appellant's objection. While noting that there is no procedure for filing an "objection" to a motion for summary judgment, the trial court first

construed the objection as a memorandum contra that was untimely. However, because final judgment had not yet been entered, the trial court further construed the filing as a motion for reconsideration and stated, "Defendant launches numerous allegations against Plaintiff and his counsel, but he has failed to refute Plaintiff's properly supported Motion for Summary Judgment with actual evidence in compliance with Civ.R. 56." (July 31, 2013 Decision, 1.) Therefore, the trial court overruled appellant's objection to the motion for summary judgment.

{¶ 12} On August 13, appellant filed a motion for reconsideration of the decision granting summary judgment against him "based on Plaintiff's and Plaintiff Attorney's false pretenses and lies filed to the Court." (Aug. 13, 2013 Motion, 1.) The motion reiterated the arguments appellant set forth in many of his prior pleadings. While attaching exhibits to the motion, appellant failed to provide any evidence permitted by Civ.R. 56.

{¶ 13} Months later, the trial court filed an entry on June 13, 2014 wherein the trial court denied appellant's motion to reconsider. The trial court's entry references its initial decision granting in part and denying in part appellee's motion for summary judgment and its entry overruling appellant's objection to the motion for summary judgment, which the trial court had previously construed as a motion to reconsider. After review, the trial court concluded appellant still had failed to refute appellee's properly supported motion for summary judgment with actual evidence in compliance with Civ.R. 56. Thereafter, the trial court filed a final judgment entry granting judgment in favor of appellee in the amount of \$23,922, plus statutory interest from October 1, 2012, and declaring that appellee rescinded the lease and had no obligations thereunder. This appeal followed.

II. ASSIGNMENTS OF ERROR

{¶ 14} On appeal, appellant brings the following assignments of error for our review:

1. The judge of the trial court, Judge Serrott of Common Pleas Court, failed to recognize the true facts Appellant filed to the Court which are clearly supported by the black-and-white written Provisions of the Lease in dispute. That the Lease of 08/03/12 has been effectively executed and is valid and in effect. That there is a latest Verbal Agreement of 10/13/12 between Appellant and Appellee made on 10/13/12 in

Appellee's former clinic on Northwest Blvd. And, that the Verbal Agreement of 10/13/12 should supersede over the Lease of 08/03/12.

2. The Judge of the trial court failed to notify Appellant as Pro Se on all Judge's decisions and entries on motions and objections, either in narrative or in writing, prior to 08/12/13. That has made Appellant in the dark and set an unfair ground between Appellant and Appellee's counsel during prosecution of the case.

3. Judge Serrott failed to serve as a court gatekeeper to prevent or discourage any party filing false pretenses and lies to the Court to uphold the justice. That would encourage party or parties filing false statements, false pretenses, and lies to the Court during prosecution of the case. That would lead to injustice judgment and fail to uphold the justice.

4. Judge Serrott failed to recognize the fact that Appellee now owes money to Appellant after deducting the first month rent of \$1,961 paid, the security deposit of \$1,961 paid, and the \$20,000 loan by Appellee to Appellant from the rent from 12/01/12 to 12/06/13. That Appellee now owes to Appellant in the sum of \$15,688.00 from the rent since 12/07/13. This is in accordance with the terms of the Lease of 08/03/12 and those of the Verbal Agreement of 10/13/12.

III. DISCUSSION

{¶ 15} Initially, we note that appellant has failed to separately argue and properly support each assignment of error as required by App.R. 16(A)(7), which states that each appellate brief shall include "[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies." As set forth in App.R. 12, appellate courts may decline to address assignments of error that are raised but not separately argued in briefing, as required by App.R. 16. However, even considering the allegations and arguments that are interspersed throughout appellant's brief, we find no merit to appellant's arguments.

A. First Assignment of Error

{¶ 16} In his first assignment of error, it appears appellant is arguing that the trial court erred in concluding that the lease herein was required to be acknowledged by two witnesses. Thus, we presume appellant is challenging the trial court's decision granting judgment on the pleadings.

{¶ 17} Civ.R. 12(C) provides that, "[a]fter the pleadings are closed but within such times as not to delay the trial, any party may move for judgment on the pleadings." "Civ.R. 12(C) motions are specifically for resolving questions of law." *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 570 (1996). Appellate review of motions for judgment on the pleadings is de novo, without deference to the trial court's determination. *Fontbank, Inc. v. CompuServe, Inc.*, 138 Ohio App.3d 801, 807 (10th Dist.2000). Thus, we are restricted, as was the trial court, to the allegations in the pleadings, as well as material incorporated by reference or attached as exhibits to those pleadings, in determining the motion for judgment on the pleadings. *Curtis v. Ohio Adult Parole Auth.*, 10th Dist. No. 04AP-1214, 2006-Ohio-15, ¶ 24. When addressing a Civ.R. 12(C) motion, the court "is required to construe as true all the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party." *Whaley v. Franklin Cty. Bd. of Commrs.*, 92 Ohio St.3d 574, 581 (2001). The court will grant judgment on the pleadings only when the material facts are undisputed, and the pleadings demonstrate that the movant is entitled to judgment as a matter of law. *Midwest Pride* at 570.

{¶ 18} In granting appellee's motion for judgment on the pleadings, the trial court concluded the lease was subject to, but failed to, comply with the execution requirements of R.C. 5301.01, and, therefore, the lease was defectively executed. As is relevant here, R.C. 5301.01(A) provides:

A deed, mortgage, land contract as referred to in division (A)(21)(b) of section 317.08 of the Revised Code, or lease of any interest in real property and a memorandum of trust as described in division (A) of section 5301.255 of the Revised Code shall be signed by the grantor, mortgagor, vendor, or lessor in the case of a deed, mortgage, land contract, or lease or shall be signed by the trustee in the case of a memorandum of trust. The signing shall be acknowledged by the grantor,

mortgagor, vendor, or lessor, or by the trustee, before a judge or clerk of a court of record in this state, or a county auditor, county engineer, notary public, or mayor, who shall certify the acknowledgement and subscribe the official's name to the certificate of the acknowledgement.

{¶ 19} Though appellant does not dispute that the lease did not comply with R.C. 5301.01, appellant argues that the formalities of R.C. 5301.01 do not apply here because R.C. 5301.08 exempts this lease from the formal execution requirements. R.C. 5301.08 states: "Sections 5301.01 to 5301.45 of the Revised Code do not affect the validity of any lease * * * of any other lands for any term not exceeding three years or require that lease to be acknowledged or recorded."

{¶ 20} Here, the lease was signed by the parties on August 3, 2012. The lease provided that the term was for three years with the option to renew. As stated by this court in *380 E. Town Assoc. v. Mangus*, 10th Dist. No. 91AP-92 (June 20, 1991), "[u]nder Ohio law, option periods are added to the initial term of the lease in order to determine the length of the lease for the purposes of complying with R.C. 5301.01 and 5301.08." *Id.*, citing *Gelman v. Holland Furnace*, 59 Ohio Law Abs. 539 (1948). Despite the lease not complying with the requirements of R.C. 5301.01 at the time of its execution on August 3, 2012, appellant suggests the renewal option terminated on September 27, 2012, the date appellee declared that he would not move into the premises, thus turning this into a three-year lease with no option to renew and, therefore, subject to R.C. 5301.08. Appellant has not provided, nor has this court's research revealed, any authority to support such a position.

{¶ 21} Given the undisputed evidence presented, we find appellee's motion for judgment on the pleadings was properly granted.

{¶ 22} Appellant also suggests it was appellee's responsibility to procure the government permits for remodeling such that the delay in the premises being ready for occupancy on October 1 was due to appellee. As we have previously set forth, the alleged delay in the readiness of the premises was not the basis for the trial court's decision to grant judgment on the pleadings. Rather, the alleged delay in occupancy was an alternative basis for lease rescission that was pled in the complaint and became moot

when the trial court granted judgment on the pleadings based on the defective execution of the lease. *West v. Stump*, 4th Dist. No. 07CA5, 2007-Ohio-6495.

{¶ 23} Appellant also appears to argue that appellee violated the terms of the lease by demanding immediate repayment of the \$20,000 loan for remodeling. According to appellant, the lease provided the remodeling loan would be paid back in monthly installments. We find no merit to appellant's position, given the lease was found to be defectively executed and, therefore, of no effect.

{¶ 24} After review and contrary to appellant's assertion that the trial court failed to recognize "true facts," we conclude the trial court correctly applied the law to the undisputed evidence before it. Accordingly, we overrule appellant's first assignment of error.

B. Second Assignment of Error

{¶ 25} We discern from reading appellant's statement of the facts that his second assignment of error asserts the trial court failed to designate him as "pro se" on the filings such that he was not notified of the same. From what we can discern, though he admittedly received service by e-mail of all filings, appellant is arguing that he was entitled to paper copies and service by mail as well.

{¶ 26} First, we note appellant did not raise such alleged error in the trial court. "It is well-settled that a litigant's failure to raise an issue before the trial court waives the litigant's right to raise that issue on appeal." *Gentile v. Ristas*, 160 Ohio App.3d 765, 2005-Ohio-2197, ¶ 74 (10th Dist.); *Realty Income Corp. v. Garb-Ko, Inc.*, 10th Dist. No. 13AP-35, 2013-Ohio-4932, ¶ 63.

{¶ 27} Second, it is not clear what filings, if any, appellant is alleging he failed to receive. A review of the docket demonstrates that appellant responded to *every* filing of appellee. While his responses to appellee's motion for judgment on the pleadings and the motion for summary judgment were untimely, it was not because appellant was not timely served with them. Indeed, appellant's responses indicate that he received the March 25 motion for judgment on the pleadings on April 2, and he received the June 19 motion for

summary judgment on June 20, yet his responses were not filed until April 25 and July 23 respectively, clearly beyond the time permitted by rule.¹

{¶ 28} Finally, even assuming appellant is correct in his assertion that he was entitled to paper copies of all filings, appellant has failed to demonstrate any prejudice. As noted in our recitation of this matter's procedural history, even though untimely, the trial court considered the merits of each of appellant's filings. Thus, appellant's arguments were rejected not because they were untimely, but because they did not provide a basis for the trial court to reconsider its previous decisions.

{¶ 29} For all the foregoing reasons, we overrule appellant's second assignment of error.

C. Third Assignment of Error

{¶ 30} In his third assignment of error, it appears appellant is alleging that appellee's affidavit submitted in support of his motion for summary judgment was filled with untruths. As best we can construe, appellant is asserting an argument that the trial court erred in granting summary judgment on appellee's request for an award of \$23,922, consisting of payment of the first month's rent, payment of the security deposit, and repayment of the \$20,000 remodeling loan. However, as noted previously in this decision, appellant did not submit any evidence in the trial court. Appellant's bare allegations without any evidentiary support in the record are not sufficient to withstand a properly supported motion for summary judgment. Civ.R. 56(E) (when a motion for summary judgment is made and supported as provided in Civ.R. 56, "an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party").

{¶ 31} Accordingly, we overrule appellant's third assignment of error.

¹ Loc.R. 21 of the Franklin County Court of Common Pleas, General Division, requires that answers to motions be filed "on or before the 14th day after the date of service as set forth on the certificate of service attached to the [motion]."

D. Fourth Assignment of Error

{¶ 32} In his fourth assignment of error, appellant asserts the trial court failed to recognize that appellee owes appellant \$15,688, which, according to appellant, represents past due monthly rent from December 7, 2013. As previously indicated, appellant did *not* file a counterclaim in this case. Thus, there is no basis on which the trial court could have granted a monetary judgment in his favor. Moreover, as discussed in the disposition of appellant's previous assignments of error, appellant did not present *any* evidence in the trial court on which a judgment in his favor could be based.

{¶ 33} Accordingly, we overrule appellant's fourth assignment of error.

IV. CONCLUSION

{¶ 34} Having overruled appellant's four assignments of error in their entirety, we hereby affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

CONNOR and DORRIAN, JJ., concur.
