[Cite as *January Invests., L.L.C. v. Ingram*, 2010-Ohio-1937.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

JANUARY INVESTMENTS, LLC,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-09-127
	:	O P I N I O N
- vs -	:	5/3/2010
BRIAN INGRAM, et al.,	:	
Defendants-Appellants.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 08CV72735

Lisa Conn, 10655 Springfield Pike, Cincinnati, Ohio 45215, for plaintiff-appellee

Brian and Sabrina Ingram, 6524 Thistle Grove, Morrow, Ohio 45152, defendants-appellants, pro se

YOUNG, P.J.

{¶1} Defendants-appellants, Brian and Sabrina Ingram (tenants), appeal the judgment from the Warren County Court of Common Pleas granting summary judgment to plaintiff-appellee, January Investments, L.L.C. (landlord). For the reasons set forth below, we affirm.

{¶2} On July 21, 2004, the parties entered a lease agreement wherein tenants agreed to lease from landlord a home located at 188 Hildebrant Drive in Maineville, Ohio from August 6, 2004 to June 31, 2005. The parties also entered a separate

contract for the option to purchase the property, providing that the tenants were to pay a "[n]on-[r]efundable payment" of $5,000.00 in exchange for the option beginning on August 6, 2004 and ending on August 31, 2005.

{¶3} After the lease expired in June 2005, tenants continued to lease the residence on a month-to-month basis. In November 2006, despite the fact that the option period had expired, landlord indicated a willingness to sell the house to tenants, but it appears that tenants chose not to purchase at that time. In November 2007, however, tenants expressed a desire to purchase the home, but the parties failed to enter into any binding agreements on the matter. Landlord made it clear, however, that a potential prerequisite to purchasing the home was timely payment of rent, and that some payments had not been received. In response, tenants sent landlord a $320 check labeled "late fees paid in full," which landlord subsequently cashed.

{¶4} On or about August 1, 2008, tenants served notice on landlord that they would vacate the premises on August 23, 2008. Later that year, landlord filed a complaint alleging breach of the lease agreement, seeking unpaid rent and late fees, together with interest and costs. Tenants filed an "answer," containing a general denial of all allegations, claiming that tenants were entitled to a "set-off," and requesting dismissal of landlord's complaint.

{¶5} Landlord moved for summary judgment on May 7, 2009. Landlord argued that tenants failed to answer interrogatories, requests for production, and requests for admissions landlord sent in March. Thus, landlord argued, the civil rules mandated that all unanswered requests for admission be deemed "admitted." With the support of an itemized affidavit, landlord requested judgment of $4,379 in unpaid rent and late fees, plus attorney fees. In response, tenants filed a "motion requesting dismissal of request for summary judgment, additional time for interrogatories and motion to compel

discovery from [landlord] and request sanctions." [sic] In their motion, tenants argued that they had never received landlord's discovery requests.

{¶6} In a hearing on May 28, 2009, the magistrate noted that tenants' motion was not notarized, thus did "not constitute admissible evidence upon a motion for summary judgment" under Civ.R. 56(C). In an order filed that same date, the magistrate ordered tenants to answer landlord's interrogatories, requests for production and requests for admissions "within *twenty-eight* days of the entry of this order." (Emphasis sic.) The magistrate ordered that "[s]uch responses shall be signed by *both* parties, properly notarized, served upon counsel for [landlord], and copies thereof filed with the Court[.]" The magistrate further ordered tenants to file a "proper response to the pending motion for summary judgment no later than July 3, 2009."

{¶7} On June 30, 2009, 33 days after the entry of the magistrate's order, tenants filed their responses to landlord's interrogatories and requests for admissions.

{¶8} On July 15, 2009, the magistrate granted landlord's motion for summary judgment for $4,379, together with interest and costs, but without attorney fees. In so holding, the magistrate found that tenants failed to timely comply with the magistrate's May 28, 2009 order when they failed to (1) answer landlord's requests for admissions, (2) serve landlord with their answers, and (3) file their answers with the court "no later than June 25, 2009." The magistrate noted, "[a]pparently, *pro se* [tenants] did not take this order seriously, because they did not file their answers with the Court until June 30, 2009." Thus, the magistrate deemed admitted all the issues in landlord's requests for admissions.

{¶9} Tenants subsequently filed a timely objection to the magistrate's decision. Tenants argued that (1) landlord had waived the right to seek additional late fees, (2) landlord did not keep accurate records regarding the late fees, (3) tenants answered

landlord's interrogatories and requests for admissions in a timely manner, (4) landlord breached R.C. 5321.04(A)(2) of the Ohio Landlord Tenant Act by failing to make $1,729.24 worth of "repairs and maintenance" to the home, and (5) landlord breached R.C. 5321.04(A)(8) by allegedly using its key to enter the residence on August 16, 2008 while tenants still lived there.

{¶10} After reviewing all evidence submitted in support and opposition to summary judgment, the trial court adopted the magistrate's entry in its entirety.

{¶11} Tenants timely appealed, raising one assignment of error:

{¶12} "THE TRIAL COURT ERRED BY DENYING DEFENDANTS' MOTION TO DISMISS/DENY SUMMARY JUDGMENT AND GRANTING A SUMMARY JUDGMENT FOR PLAINTIFF, LANDLORD INVESTMENTS, LLC."

{¶13} Summary judgment is a procedural device used to terminate litigation and avoid a formal trial when there are no issues in a case to try. See *Forste v. Oakview Constr., Inc.*, Warren App. No. CA2009-05-054, 2009-Ohio-5516, ¶7. This court reviews summary judgment decisions de novo. Id. Summary judgment is appropriate under Civ.R. 56 when (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. Id. at ¶8; *Zivich v. Mentor Soccer Club, Inc.,* 82 Ohio St.3d 367, 369-370, 1998-Ohio-389.

{¶14} The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. *State ex rel. Mongtomery v. Maginn*, 147 Ohio App.3d 420, 2002-Ohio-183, ¶24. Once the moving party satisfies its burden, the nonmoving party may not rest upon the mere allegations or denials of the moving party's pleadings. Id. at ¶25. The

nonmoving party's response, by affidavit or as otherwise provided in the rule, must set forth specific facts showing that there is a genuine issue for trial. Id.; Civ.R. 56(E). Doubts must be resolved in favor of the nonmoving party. *Maginn* at ¶25.

{¶15} On appeal, tenants argue that material issues have been left "unresolved" in the case at bar. Specifically, it appears tenants assert that: (1) they timely answered landlord's interrogatories and requests for admissions when the envelope containing tenants' responses was postmarked June 25, 2009; (2) landlord requested "late fees [for] made up dates," and landlord waived the right to seek additional late fees after accepting rent for four years without evicting tenants; (3) landlord committed negligence per se under the Ohio Landlord Tenant Act when she failed to make $1,729.24 worth of "repairs and maintenance" to the home, including installing blinds, lighting units, landscaping and cleaning the chimney; and (4) landlord made an unlawful entry into tenants' home in violation of R.C. 5321.04 and used physical force on tenant, Sabrena Ingram, on August 16, 2008.

{¶16} Tenants first argue that they complied with the magistrate's May 28, 2009 order to file their responses to landlord's interrogatories, requests for production and requests for admissions "within *twenty-eight* days of the entry of [the] order" because the envelope containing their responses was postmarked June 25, 2009 – 28 days after the magistrate's order. Landlord, however, argues that a different envelope, postmarked June 29, 2009, actually contained tenants' responses and that the June 25, 2009 envelope contained an unrelated matter.

{¶17} Civ.R. 36 governs requests for admissions. The rule provides that a party receiving such a request must serve a written answer or objection upon the requesting party within 28 days of being served with the request, or a different period of time if the court provides one. Civ.R. 36(A)(1). When a party fails to timely respond to a request

for admissions, the admissions become facts of record, which the court must recognize. See Civ.R. 36; *Jones v. Contemporary Image Labeling, Inc.*, Warren App. No. CA2009-02-017, 2009-Ohio-6178, ¶15; *Unifund CCR Partners Assignee of Palisades Collection, L.L.C. v. Childs*, Montgomery App. No. 23161, 2010-Ohio-746, ¶28. "[W]here a party files a written request for admission, a failure of the opposing party to timely answer the request constitutes a conclusive admission pursuant to Civ.R. 36 and also satisfies the written answer requirement of Civ.R. 56(C) in the case of summary judgment." *Childs* at ¶28; Civ.R. 36(A)(1).

{¶18} "Litigants who choose to proceed pro se are presumed to know the law and correct procedure, and are held to the same standards as other litigants." *Childs* at ¶29. Litigants proceeding pro se "cannot expect or demand special treatment from the judge, who is to sit as an impartial arbiter." Id.

{¶19} In the case at bar, tenants did not file their responses with the court until June 30, 2009, despite the magistrate's direct order to *file* "within *twenty-eight* days of the entry of this order." Thus, tenants failed to fully comply with the magistrate's order requiring tenants to (1) respond to landlord's discovery requests; (2) serve landlord with a copy of the responses; *and* (3) file them with the court on or before June 25, 2009. Thus, neither postmarked envelope presented as evidence complied with the magistrate's order.

{¶20} When tenants failed to properly respond to landlord's requests for admissions, they conclusively admitted the following facts: (1) the parties were under a lease agreement for the home at 188 Hildebrant Drive; (2) pursuant to the lease, $1,350 rent was due on the first day of each month; (3) rent payments not postmarked by the fifth day of each month were subject to a ten percent late fee, plus an additional $5 per day for each day the balance remained unpaid; (4) a $35 fee applied to all

bounced checks; (5) landlord had the right to recover attorney fees from tenants in this action; (6) the option to purchase the property had become void; (7) tenants did not fully exercise their option to purchase the property; (8) rent payments were "late" on each of the following months: August 2004, December 2004, January 2005, July-August 2005, November 2005, December 2005, March 2006, July 2006, September 2006, December 2006, March 2007, April 2007, September 2007, January 2008, April 2008, June-July 2008; and (9) tenants failed to pay rent for July and August 2008.[1]

{¶21} Because tenants were deemed to have admitted to failing to pay rent in a timely manner for 25 months during their tenancy, as well as failing to pay rent altogether for two months, tenants cannot now claim that landlord presented "made up dates" for the late fees. Thus, there is no genuine issue as to the amount of unpaid rent and late fees owed.

{¶22} Tenants next argue that landlord waived her right to pursue additional late fees when she (1) continued to accept rent without evicting tenants, and (2) cashed a check for $320.00 that was marked "late fees paid in full." Landlord and the magistrate characterized these arguments as an attempt to assert the affirmative defenses of waiver and accord and satisfaction. The magistrate held that because tenants' original answer did not set forth these affirmative defenses, they were waived. The issue before this court is whether tenants' failure to plead these defenses in their answer was fatal to their review on appeal.

{¶23} Failure to plead an affirmative defense typically results in the waiver of that defense. See Civ.R. 8(C). In the case at bar, the magistrate dismissed tenants' two

1. The court notes that tenants were deemed to have admitted inconsistent facts regarding July 2008. Namely, tenants admitted that they failed to timely pay rent and that they failed to pay rent altogether for that month. The court recognizes this discrepancy; however, we will not address it on appeal, since tenants must take responsibility for the consequences of their failure to timely respond to landlord's requests for admissions.

affirmative defenses on procedural grounds, based on their failure to plead them in their answer. After review of the record, we find that tenants committed several additional procedural errors that warranted the magistrate's findings. First, tenants never sought leave of court to amend their response to include these defenses. See Civ.R. 15(A). Secondly, tenants did not file a properly notarized response to the pending summary judgment motion until July 7, 2009. This was an untimely filing because it did not comply with the magistrate's order that "[tenants] shall file a proper response to the pending motion for summary judgment no later than July 3, 2009." In light of the foregoing, we find that the magistrate properly found that the affirmative defenses of waiver and accord and satisfaction were waived.

{¶24} Therefore, we decline to address tenants' arguments related to these defenses because they are not properly before this court.

{¶25} Tenants' next argument appears to be a claim of negligence per se under R.C. 5321.04(A)(2). Specifically, tenants claim they are entitled to a "set-off" because they paid $1,729.24 in "repairs and maintence [sic] to the home * * * that needed to be performed to keep the premises in a fit and habitable condition as well as keeping the common area of the premises in a safe and sanitary condition." Specifically, while residing in the home, tenants claimed to have performed the following "repairs:" landscaping, installation of new lighting units, vertical blinds, and "chimney sweeps[.]" Tenants claim that landlord's failure to perform these tasks constituted a violation of "her obligation as a landlord under the Ohio Revised Codes [sic] 5321.04 and the Ohio Landlord Tenant Act."

{¶26} R.C. 5321.04 imposes duties on a landlord to make repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition. See *Shroades v. Rental Homes, Inc.* (1981), 68 Ohio St.2d 20, 25. A violation of a

statute that sets forth specific duties constitutes negligence per se. Id. "Furthermore, the purpose of [R.C. 5321.04] is to protect persons using rented residential premises from injuries." Id. Thus, light fixtures, landscaping, blinds and "chimney sweeps etc." are not within the reach of the Ohio Landlord Tenant Act.[2] "[I]n order to maintain a claim under R.C. 5321.04(A)(2), a plaintiff must show that the premises are unfit and uninhabitable. To run afoul of R.C. 5321.04(A)(2), defects 'must be so substantial as to amount to a constructive eviction' and be more than nuisances or trifles." *Cipollone v. Hoffmeier*, Hamilton App. No. C-060482, 2007-Ohio-3788, ¶22. In the case at bar, the "repairs" tenants listed were not necessary for the home to be habitable.

{¶27} Tenants also appear to argue that landlord failed to keep the "common area of the premises in a safe and sanitary condition," as required by R.C. 5321.04(A)(3). However, this section is inapplicable to the case at bar because tenants set forth no evidence of a "common area" requiring landlord's attention. Because this case involved the lease of a single family home, the entire premises were "occupied and used" solely by tenants. See *Parks v. Menyhart Plumbing and Heating Supply Co., Inc.* (Dec. 9, 1999), Cuyahoga App. No. 75424.

{¶28} Thus, tenants' argument that landlord committed negligence per se when she failed to perform the aforementioned tasks is without merit.

{¶29} Lastly, tenants appear to argue that landlord violated R.C. 5321.04(A)(8) when she unexpectedly entered the residence on August 16, 2008 and used "physical force on Mrs. Ingram." However, tenants do not explain how these alleged facts relate to the issue at bar, to wit: whether summary judgment was appropriately granted on the issues of unpaid rent and late fees. Tenants state that although they "are not asking for

2. Tenants did not explain the reason for the chimney sweep, nor its effect on the habitability of the premises.

a monetary value from [landlord] due to these action[s], [tenants] wish to point out the false statements that continue to be heard in this trial from [landlord]." Thus, tenants' final argument is not related to any material issue in the case at bar.

{¶30} In summary, we find that landlord presented a meritorious motion for summary judgment, requiring tenants to produce competent evidence showing there were genuine issues of material fact for trial. However, tenants failed to meet that reciprocal burden. Therefore, the trial court properly granted summary judgment in favor of landlord. Accordingly, we overrule tenants' single assignment of error and affirm the judgment of the Warren County Court of Common Pleas.

{¶31} Judgment affirmed.

BRESSLER and POWELL, JJ., concur.