

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
CLERMONT COUNTY

CHERYLE RICHARDS,	:	
	:	CASE NO. CA2014-08-061
Plaintiff-Appellant,	:	
	:	<u>OPINION</u>
	:	5/18/2015
- vs -	:	
	:	
BRETT NEWBERRY,	:	
	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM CLERMONT COUNTY MUNICIPAL COURT  
Case No. 13CVG03999

T. David Burgess Co., L.P.A., T. David Burgess, 110 North Third Street, Williamsburg, Ohio 45176-1322, for plaintiff-appellant

Brett Newberry, 1902 Pearl Street, New Richmond, Ohio 45157, defendant-appellee, pro se

**M. POWELL, J.**

{¶ 1} Plaintiff-appellant, Cheryle Richards, appeals a decision of the Clermont County Municipal Court granting a \$10,449 judgment in favor of a former tenant, defendant-appellee, Brett Newberry, in a forcible entry and detainer action.

{¶ 2} In 2012, Newberry was a month-to-month tenant in a house located in the village of Moscow, Ohio. Although the house was owned by Richards' mother, Genevieve Sponcil, Newberry mailed his rent payments to Richards, and not to Sponcil. At the time,

Richards and her husband lived in Arizona.

{¶ 3} On March 2, 2012, a tornado struck Moscow. The house sustained significant damages. Newberry testified he contacted Richards soon after the tornado struck and obtained her approval to make repairs to the house. Subsequently, Newberry replaced windows, repaired the roof of the house, and made other repairs. On March 2, 2013, Sponcil died and Richards inherited the house. A certificate of transfer was filed on November 15, 2013.

{¶ 4} In August 2013, Richards notified Newberry that she and her husband were moving back to Ohio and intended to live in the house. At the time, Newberry was in arrears in his rent payment. When Newberry refused to vacate the premises, Richards served him with a three-day-notice to vacate. Once again, Newberry refused to vacate the premises. Consequently, on November 26, 2013, Richards filed a complaint for eviction against Newberry, seeking \$3,200 in past due rent, and damages for conversion and property damage. Newberry filed a pro se counterclaim seeking \$14,892 in compensation for the repairs he made to the house following the tornado.

{¶ 5} The case proceeded to a hearing in front of a magistrate in December 2013. Richards was represented by counsel, Newberry was not. At the conclusion of the hearing, Richards was granted a writ of restitution and Newberry was ordered to vacate the premises. A hearing on Richards' claim for damages and Newberry's counterclaim was held on April 15, 2014. Once again, Richards was represented by counsel and Newberry appeared pro se.

{¶ 6} On April 17, 2014, the magistrate awarded Newberry \$10,449 in damages for the repairs he made to the house following the tornado.<sup>1</sup> The magistrate found that

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1. The magistrate awarded Richards \$2,568 in damages for the following items: an outstanding water bill, the replacement of three appliances converted by Newberry, and compensation for several personal items stolen or taken from the house during Newberry's tenancy. The magistrate awarded Newberry \$13,017 in damages for the repairs made to the house after the tornado. Offsetting the damages awarded to Richards by the damages awarded to Newberry, the magistrate awarded a total of \$10,449 in damages to Newberry.

Newberry was entitled to compensation on two grounds: (1) a landlord's duty to make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition, and (2) the doctrine of unjust enrichment. The magistrate found that Richards' testimony "she did not give Newberry permission to make the repairs when she failed to undertake the repairs herself and had authorized him to perform other work [was] not credible." With regard to unjust enrichment, the magistrate found that "Richards does not dispute that the repairs were made or that they constitute a benefit to her as the property owner." Richards filed objections to the magistrate's decision. On July 23, 2014, the trial court overruled the objections and adopted the magistrate's decision.

{¶ 7} Richards appeals, raising the following two assignments of error.

{¶ 8} Assignment of Error No. 1:

{¶ 9} THE TRIAL COURT ERRED BY FAILING TO REVERSE THE MAGISTRATE'S DECISION.

{¶ 10} Assignment of Error No. 2:

{¶ 11} THE TRIAL COURT ABUSED ITS DISCRETION BY ADOPTING THE MAGISTRATE'S DECISION.

{¶ 12} At the heart of both assignments of error is Richards' argument that the trial court committed plain error and abused its discretion in granting judgment in favor of Newberry on the basis of unjust enrichment because Newberry (1) should have filed his counterclaim against the estate of Sponcil and not against Richards, and (2) failed to plead unjust enrichment in his counterclaim or during the hearings.

{¶ 13} The doctrine of unjust enrichment states that a person should not be allowed to profit or enrich himself inequitably at another's expense, and should be required to make restitution to the party suffering the loss. *Henkle v. Henkle*, 75 Ohio App.3d 732, 738 (12th Dist.1991). The party asserting a claim of unjust enrichment must demonstrate that (1) he

conferred a benefit upon a defendant, (2) the defendant had knowledge of the benefit, and (3) the defendant retained the benefit under circumstances where it would be unjust to do so without payment. *Estate of Everhart v. Everhart*, 12th Dist. Fayette Nos. CA2013-07-019 and CA2013-09-026, 2014-Ohio-2476, ¶ 46.

{¶ 14} Plain error in a civil case is an error that "seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson*, 79 Ohio St.3d 116 (1997), syllabus. The doctrine of plain error in civil cases is not favored and thus, its application must be limited to "those extremely rare cases where exceptional circumstances require its application to prevent a manifest miscarriage of justice, and where the error complained of, if left uncorrected, would have a material adverse effect on the character of, and public confidence in, judicial proceedings." *Id.* at 121; *Fender v. Miles*, 185 Ohio App.3d 136, 2009-Ohio-6043, ¶ 28 (12th Dist.).

{¶ 15} In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *Everhart* at ¶ 44.

{¶ 16} Richards first argues the trial court erred in granting a judgment in favor of Newberry for the repairs made to the house because Newberry should have filed his counterclaim against the estate of Sponcil, and not against Richards, because the repairs were made after the March 2012 tornado and prior to Sponcil's death in March 2013, when Sponcil was the owner of the house.

{¶ 17} We find the trial court neither committed plain error nor abused its discretion in granting judgment in favor of Newberry notwithstanding his failure to file his counterclaim against the estate of Sponcil.

{¶ 18} First, Richards initiated the proceedings by filing a complaint for eviction against

Newberry in her own name. As the trial court aptly noted, "this action [was] not brought in the name of the decedent, Genevieve D. Sponcil, nor [was] there a substitution of parties pursuant to Civil Rule 25." A counterclaim may be asserted in an action for forcible entry and detainer under Civ.R. 13. See *Jemo Associates, Inc. v. Garman*, 70 Ohio St.2d 267 (1982). Likewise, R.C. 1923.061 allows a tenant to file a counterclaim against a landlord who seeks to evict him. See *Fry v. Fry*, 12th Dist. Butler No. CA83-02-015, 1984 WL 3314 (Apr. 30, 1984). As stated below, the record shows that Richards, and not Sponcil, acted as the landlord. We further note that Richards' conversion claim (regarding appliances that were provided when Newberry moved into the house) appears to be a claim of the estate of Sponcil.

{¶ 19} Second, the trial court found that it was Richards, and not Sponcil, who authorized Newberry to make repairs to the house. Specifically, the trial court found that

Newberry testified that he contacted Richards soon after the tornado struck and obtained her approval to make the repairs to the property. Richards denies that she approved the work. Based on a review of all of the evidence, including an observation of the parties while testifying, her denial is not credible. Richards concedes that she granted Newberry blanket permission to make repairs to the property – including for necessary repairs such as replacing a water heater. She does not dispute that the tornado damage occurred and there is no evidence that she undertook to make the repairs herself. Richards also does not dispute that the repairs were completed or that they were necessary to make the property habitable. Her testimony that she did not give Newberry permission to make the repairs when she failed to undertake the repairs herself and had authorized him to perform other work is not credible.

The record supports the trial court's findings.

{¶ 20} Third, as the party who inherited the property, Richards was the party that ultimately benefited from the repairs made to the house by Newberry. Finally, the record shows that during the tenancy, Newberry mailed the rent to Richards, and not to Sponcil. Indeed, Newberry testified that during the entire time he was a tenant, "all of my rent

payments \* \* \* I sent to her name, not her mother's name, so why is she collecting rent when it's suppose to go to her mom?" [sic]. Richards did not refute Newberry's testimony.

{¶ 21} Richards also argues the trial court erred in granting judgment in favor of Newberry on the basis of unjust enrichment because Newberry failed to plead unjust enrichment in his counterclaim or during the hearings.

{¶ 22} Civ.R 15(B) allows for the amendment of pleadings to conform to evidence presented at trial, and thus, "treats issues that were not raised in the pleadings as if they were so raised, as long as they were tried with the express or implied consent of the parties and substantial prejudice will not arise from the result." *Aztec Internatl. Foods, Inc. v. Duenas*, 12th Dist. Clermont No. CA2012-01-002, 2013-Ohio-450, ¶ 25; *State ex rel. Evans v. Bainbridge Twp. Trustees*, 5 Ohio St.3d 41 (1983), paragraph one of the syllabus.

{¶ 23} A trial court is permitted to sua sponte consider whether an unpleaded issue was tried by the consent of the parties, as long as the decision to do so complies with Civ.R. 15(B). *Nguyen v. Chen*, 12th Dist. Butler No. CA2013-10-191, 2014-Ohio-5188, ¶ 18; *Stafford v. Aces & Eights Harley-Davidson LLC*, 12th Dist. Warren No. CA2005-06-070, 2006-Ohio-1780, ¶ 22. Whether an unpleaded issue was tried with the implied consent of the parties under Civ.R. 15(B) is a decision left to the sound discretion of the trial court and thus, will not be reversed on appeal absent an abuse of discretion. *Evans* at paragraph three of the syllabus; *Textiles, Inc. v. Design Wise, Inc.*, 12th Dist. Madison Nos. CA2009-08-015 and CA2009-08-018, 2010-Ohio-1524, ¶ 17.

{¶ 24} "Under Civ.R. 15(B), implied consent is not established merely because evidence bearing directly on an unpleaded issue was introduced without objection; it must appear that the parties understood the evidence was aimed at the unpleaded issues." *Evans* at paragraph two of the syllabus. Factors to be considered in determining whether the parties impliedly consented to litigate an issue include "whether they recognized that an

unpleaded issue entered the case; whether the opposing party had a fair opportunity to address the tendered issue or would offer additional evidence if the case were to be tried on a different theory; and, whether the witnesses were subjected to extensive cross-examination on the issue." *Id.* at paragraph one of the syllabus.

{¶ 25} Upon reviewing the record, we find that the claim of unjust enrichment was tried by the implied consent of the parties, and thus, pursuant to Civ.R. 15(B), the issue must be treated as if it had been raised in the pleadings.

{¶ 26} Richards initiated the proceedings by filing a complaint for eviction against Newberry. In his counterclaim, Newberry sought \$14,892 in damages for the repairs he made to the house as a result of the tornado. Newberry asserted that (1) Richards did not have homeowners insurance "during [the] tornado," (2) following the tornado, he "could not get assistance from Fema or any other organizations," and (3) he "had to borrow from friends and family to repair [the] house due to tornado damages."<sup>2</sup> The record shows that Richards never requested a more definite statement under Civ.R. 12(E) and never moved to dismiss Newberry's claim under Civ.R. 12(B)(6). Rather, Richards merely denied the allegations contained in Newberry's counterclaim when she filed her reply to the counterclaim.

{¶ 27} During the April 2014 hearing, Newberry testified about the numerous repairs he made to the house as a result of the tornado. Newberry testified that Richards did not have homeowners insurance and that he used his own money to repair the house as he believed he was buying the house. Newberry testified his belief was based on several statements from Richards and her husband that (1) they were going to sell the house to Newberry, (2) they were never going back to Ohio, and (3) Newberry could do whatever he wanted to the house. Hence, the record shows that Richards was given notice of Newberry's

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2. In his pro se counterclaim, Newberry uses the term "Fema." We assume he is referring to the Federal Emergency Management Agency, also known under the acronym FEMA.

unjust enrichment claim and should have recognized its presence.

{¶ 28} The record further demonstrates that Richards, who was represented by counsel, had the opportunity to argue or cross-examine on this issue during the hearing. The testimony during the hearing focused on the repairs made to the house by Newberry, whether Richards authorized him to make repairs to the house, the fact Newberry used his own money for the repairs, and his belief that Richards and her husband were going to sell him the house. Richards was entitled and did, in fact, cross-examine Newberry regarding his testimony.

{¶ 29} Consequently, we find that the trial court did not commit plain error or abuse its discretion when it amended the pleadings under Civ.R. 15(B) and granted judgment in favor of Newberry on the basis of unjust enrichment.

{¶ 30} Under her second assignment of error, Richards also argues the trial court abused its discretion in granting judgment in favor of Newberry on the ground a landlord has a duty to make all repairs and keep premises habitable because (1) there was no testimony the house was uninhabitable in the aftermath of the tornado, (2) Richards was not the owner of the house at the time of the tornado, (3) the receipts submitted by Newberry in support of the repairs were "suspect," and (4) his testimony as to whether he was renting the property or whether it was to be sold to him was conflicting.

{¶ 31} While Newberry, who was acting pro se, did not testify whether the house was habitable after the tornado, and Richards' counsel did not inquire, Newberry provided photographs depicting a house damaged by the tornado and the considerable amount of debris surrounding the house. Newberry's testimony and the receipts he submitted for the repairs show that several windows of the house had to be replaced, the roof of both the house and the garage suffered great damage and had to be repaired, new drywall was installed, and some siding had to be replaced.



{¶ 32} As stated earlier, the record indicates that while Richards was not the owner of the house at the time of the tornado, she acted as the landlord for purposes of Newberry's tenancy as he sent his rent payments to her, and not to Sponcil, and directly communicated with Richards and her husband after the tornado. Upon closely reviewing Newberry's testimony and the receipts he provided, we find that his testimony is not necessarily conflicting and that the receipts are not "suspect." Where the decision in a case turns upon the credibility of testimony and the record supports the findings and conclusions of the trial court, deference to such findings and conclusions must be given by the reviewing court. See *Home Helpers/Direct Link v. St. Pierre*, 196 Ohio App.3d 480, 2011-Ohio-4909 (12th Dist.). The trial court's findings are given deference because the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony. *First Fin. Bank, FSB v. Doellman*, 12th Dist. Butler No. CA2012-05-112, 2013-Ohio-1383, ¶ 12.

{¶ 33} In light of all of the foregoing, we find the trial court did not err in granting judgment in favor of Newberry. Richards' two assignments of error are overruled.

{¶ 34} Judgment affirmed.

PIPER, P.J., and HENDRICKSON, J., concur.