[Cite as *Stewart v. Strader*, 2009-Ohio-6598.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

DALE E. STEWART	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2008 CA 116
v.	:	T.C. NO. 07 CV 0618
DALE E. STRADER, et al.	:	(Civil appeal from Common Pleas Court)
Defendants-Appellants	:	
	:	

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O P I N I O N

Rendered on the 11th day of December, 2009.

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FROELICH, J.

{¶ 1} Dale and Sharon Strader appeal from a judgment of the Clark County Court of Common Pleas, which granted summary judgment to Dale E. Stewart on his claim against the Straders for breach of a residential rental agreement. Stewart was granted judgment in

the amount of $21,751.64, plus interest from February 28, 2007, and court costs. For the following reasons, the trial court's judgment will be affirmed.

I

{¶ 2} Stewart's unrefuted evidence in support of his summary judgment motion establishes the following facts:

{¶ 3} On February 19, 1994, Stewart and the Straders entered into a written residential lease whereby the Straders would rent a farm house located at 6789 Old Route 70 in South Charleston, Ohio, for twelve months, commencing on March 1, 1994. The original rent was $575 per month, due before the first of each month. The lease agreement required the Straders to provide 30 days written notice prior to vacating the premises. The Straders provided a security deposit of one month's rent ($575). At the conclusion of the one-year lease, the Straders continued to rent the premises on a month-to-month basis.

{¶ 4} In this complaint, Stewart alleged that he provided written notice that the rent would increase to $600 per month beginning on January 1, 1997. Although Strader's affidavit does not state that the rent increased to $600 on January 1, 1997, the affidavit and rental ledger reflect that the rent was $600 between 2003 and 2007. The Straders allegedly failed to pay the full monthly rent on October 1, 2003, and each month thereafter. The Straders vacated the farm house on January 18, 2007. They did not provide notice of their intent to vacate the premises.

{¶ 5} On May 16, 2007, Stewart brought suit against the Straders, alleging that they owed $21,726.64 for rent through January 2007; Stewart did not attach of copy of the lease to his complaint. He further asserted that they caused "extraordinary" damage to the

property beyond ordinary wear and tear, including "holes cut in plaster, damages to the shower and tub requiring complete replacement, the destruction of the water softener, the destruction of counter tops, and substantial other items all of which damages reasonably exceed $2,575.00." Stewart sought total damages of $24,301.64, plus interest at 10% from October 6, 2007, reasonable attorney fees, and court costs.

{¶ 6} The Straders retained counsel and filed an answer. In their answer, they denied that they owed any rent, that there was ever an increase in the rental fees for the property, and that they had caused any damage to the property beyond ordinary wear and tear.

{¶ 7} On July 23, 2008, the trial court scheduled a bench trial for October 28, 2008. The order further stated: "LEAVE IS GRANTED TO FILE SUMMARY JUDGMENT MOTIONS AT LEAST FORTY-FIVE DAYS PRIOR TO TRIAL DATE." Thus, motions for summary judgment were required to be filed on or before September 14, 2008.

{¶ 8} On October 6, 2008, Stewart moved for summary judgment against the Straders, seeking damages in the amount of $21,751.64, representing accrued rentals through January 31, 2007, and rent for February 2007. Stewart also sought interest from February 28, 2007, and court costs. At that time, he no longer requested damages for physical damage to the property. Stewart supported his motion with an affidavit, a copy of the rental agreement, and copies of rental ledgers and handwritten receipts.

{¶ 9} Four days later, Stewart filed a motion for leave to file his summary judgment instanter, as filed on October 6, 2008. Stewart included an agreed entry granting the motion for the court to sign. The trial court signed the agreed "Entry Granting Leave to File a

Motion for Summary Judgment Instanter" on October 14, 2008, stating that Stewart's motion for summary judgment will be deemed filed as of October 6, 2008. On appeal, the Straders claim that they were never served with a copy of that order.

{¶ 10} The Straders did not respond to Stewart's summary judgment motion. On November 6, 2007, the trial court granted Stewart's uncontested motion and entered judgment in the amount of $21,751.64, plus interest from February 28, 2007, and costs.

{¶ 11} The Straders appeal from the trial court's judgment, raising two assignments of error.

II

{¶ 12} The Straders' first assignment of error states:

{¶ 13} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANTS AND DENIED THEM THEIR DAY IN COURT BY GRANTING A MOTION FOR SUMMARY JUDGMENT OUTSIDE THE RULES OF CIVIL PROCEDURE AND NOT GIVING THE APPELLANTS AN OPPORTUNITY TO RESPOND TO THE MOTION FOR SUMMARY JUDGMENT."

{¶ 14} In their first assignment of error, the Straders set forth the standard for granting a motion for summary judgment and argue that the requirements of Civ.R. 56 must be strictly enforced. Although the Straders do not present any arguments in support of their assignment of error, the wording of their assignment and their presentation of the underlying facts suggest that they are challenging the trial court's granting summary judgment without proper notice that the court had granted leave to Stewart to file his untimely motion for summary judgment.

{¶ 15} In response, Stewart emphasizes that the Straders never responded to the motion for summary judgment and that his motion was properly supported with Civ.R. 56 evidence. Stewart further argues that the Straders "have pointed to no error in the record in the proceedings below. Accordingly, the presumption of regularity is fatal to [their] assignment of error."

{¶ 16} Civ.R. 5(A) requires that "every order required by its terms to be served" and "every written notice," among other papers filed after the original complaint, be served "upon each of the parties." When service is required under Civ.R. 5, service is generally made upon the attorney of record. Civ.R. 5(B).

{¶ 17} In *Ohio Valley Radiology Assocs., Inc. v. Ohio Valley Hosp. Ass'n* (1986), 28 Ohio St.3d 118, the Supreme Court of Ohio held that Civ.R. 5(A) did not require a trial court to serve the parties with notice of a scheduled trial date, provided that the parties received "some form" of reasonable notice. The court explained:

{¶ 18} "The service of pleadings, written motions, and other papers, then, is a task imposed by the Civil Rules on the attorneys. A court, on the other hand, generally acts and speaks only through its journal by means of orders. Civ.R. 5(A) does not require the service of orders unless the order is 'required by its terms to be served.' ***

{¶ 19} "*** Ohio courts have traditionally held that while some form of notice of a trial date is required to satisfy due process, an entry of the date of trial on the court's docket constitutes reasonable, constructive notice of that fact. ***" *Ohio Valley Radiology Assocs.*, 28 Ohio St.3d at 124.

{¶ 20} We have noted, citing *Ohio Valley Radiology Assocs.*, that "parties are

expected to keep themselves informed of the progress of a case once they are served with process." *Pearl v. J&W Roofing and General Contracting* (Feb. 28, 1997), Montgomery App. No. 16045.

{¶ 21} The record does not reflect whether the Straders were sent a copy of the court's entry granting leave to Stewart to file his motion for summary judgment. Indeed, none of the court's entries and notices indicate if or when those orders were sent to the parties. The Straders' brief acknowledges that they received notices from the court regarding scheduled pre-trial conferences on June 24, 2008, and July 16, 2008. They claim, however, that they did not receive the July 23, 2008, notice of the scheduled bench trial or the October 14, 2008, entry granting Stewart leave to file his motion for summary judgment instanter.

{¶ 22} Based on the record, we cannot determine whether the trial court sent its entry granting leave to Stewart to file his summary judgment motion out of time to the Straders. Contrast *First Natl. Bank of S.W. Ohio v. Doellman*, Butler App. No. CA2004-CA06-134, 2005-Ohio-679, at ¶29 (noting that the record suggested that the clerk of court had served the plaintiff's counsel, but not the defendant, who was pro se and not in default). Even if the record reflected that the court had sent its decision to grant leave to the Straders, we would be unable to determine whether the Straders received the entry. It is clear, however, that the Straders were aware that Stewart's motion for summary judgment had been filed and that they agreed to the late filing. The court filed its entry granting Stewart leave to file his motion for summary judgment on October 14, 2008, and the entry was journalized on the following day. Thus, the Straders had constructive notice that

leave had been granted. See *Ohio Valley*, supra; *Evans v. Mazda Motors of Am., Inc.*, Scioto App. No. 06CA3118, 2007-Ohio-4622, at ¶14 (court's entry granting Mazda an extension to file its response to plaintiff's summary judgment motion was constructive notice of the extended deadline). Based on the record, we cannot conclude that the trial court erred in ruling on Stewart's unopposed motion for summary judgment.

{¶ 23} On appeal, the Straders' counsel has submitted an affidavit stating that "no copy of that order [granting Stewart leave to file the summary judgment motion] was served upon counsel." He states that there is no certificate of service or any record of service by the clerk of court, and that he "had no notice that the Court granted the motion for leave *** until the motion [for summary judgment] was granted by the trial court." While such an affidavit and evidence may be appropriate for possible Civ.R. 60 relief, our review is limited to the record before the trial court, and we cannot consider the affidavit submitted with the Straders' appellate brief. *Chase Manhattan Mfg. Corp. v. Locker*, Montgomery App. No. 19904, 2003-Ohio-6665, at ¶10 ("An appellate court is limited to reviewing the record, and will disregard alleged facts that are not of record in the trial court.").

{¶ 24} In light of the record before us, the first assignment of error is overruled.

III

{¶ 25} The Straders' second assignment of error states:

{¶ 26} "EVEN IF THE TRIAL COURT DID NOT ERR IN ADDRESSING THE MOTION FOR SUMMARY JUDGMENT, WHICH APPELLANTS STILL ASSERT,

THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANTS BY GRANTING A MOTION FOR SUMMARY JUDGMENT THAT WAS SUBMITTED WITHOUT VALID SUPPORTING AFFIDAVITS AND EVIDENCE."

{¶ 27} In their second assignment of error, the Straders claim that the trial court should not have granted summary judgment to Stewart because he failed to support his motion with evidence as required by Civ.R. 56. They assert that Stewart attached "unverified exhibits that may or may not have been relevant to the issues before the trial court" and that Stewart failed to authenticate the documents attached to his motion and to demonstrate that those documents would be admissible at trial.

{¶ 28} Civ.R. 56(C) provides that summary judgment may be granted when the moving party demonstrates that (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183, 1997-Ohio-221; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64.

{¶ 29} Upon a motion for summary judgment, the moving party bears the initial burden of showing that no genuine issue of material fact exists for trial. *Harless*, supra. The moving party cannot discharge its initial burden simply by making a conclusory assertion that the non-moving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some

evidence of the type listed in Civ. R. 56(C) which affirmatively demonstrates that the non-moving party has no evidence to support the non-moving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The burden then shifts to the non-moving party to set forth specific facts which show that there is a genuine issue of material fact for trial. Id.; see, also, Civ.R. 56(E).

{¶ 30} Our review of the trial court's decision to grant summary judgment is de novo. See *Helton v. Scioto Cty. Bd. of Commrs.* (1997), 123 Ohio App.3d 158, 162.

{¶ 31} Stewart attached several documents to his motion for summary judgment, including (1) a rental agreement, dated February 19, 1994, between Stewart and Dale Strader; (2) an affidavit by Stewart; (3) Stewart Farms account records; (4) a handwritten note from Dale Strader regarding a check dated January 30, 2004; and (5) four receipts for payments from either Dale Strader or Sharon Strader.

{¶ 32} In his affidavit, Stewart stated under oath that he was the owner of a house that was used as a rental home, that he rented the home to the Straders, and that the rental agreement was attached as Exhibit A. Stewart further stated that he maintained records in the regular course of business, including the rental agreement (Exhibit A) and handwritten receipts and rental ledgers, which were attached. Stewart stated that the Straders "have failed to pay rent for a single-family dwelling (farm house) known as 6789 Old Rt 70, South Charleston, Ohio, and that the dwelling was vacated on or about January 18, 2007; that no advance notice was provided to Plaintiff by the Defendants; that past due rents of

$21,726.64 was due and owing for rents when Defendants vacated the farm house." The affidavit also provided that future rent of $600 was due for February 2007, minus $575 paid as a security deposit. Stewart indicated in his affidavit that he was not seeking damages for physical damage to the property, and that "the total due and owing to him" is $21,751.64.

{¶ 33} Stewart's affidavit and supporting documents satisfy the requirements of Civ.R. 56(C) and support his claim that the Straders owe $21,726.64 in past rent. Stewart authenticated the rental agreement between the parties, which he attached as Exhibit A. He identified the rental ledgers and receipts as business records related to the rental of the property to the Straders, which supported his statement that the rent during the relevant period was $600 and reflected the Straders' payment history. Stewart provided a sworn statement as to the amount of rent due and owing as of January 18, 2007, when the Straders vacated the property. Stewart thereby provided evidence to support his claim for unpaid rent, as required by Civ.R. 56; the trial court could conclude from that evidence that the Straders had failed to pay rent and that Stewart was entitled to judgment in the amount of $21,726.64. In short, the trial court did not err in granting summary judgment to Stewart based on his affidavit and supporting documentation.

{¶ 34} The second assignment of error is overruled.

IV

{¶ 35} The judgment of the trial court will be affirmed.

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BROGAN, J. and FAIN, J., concur.

Copies mailed to:

J. Douglas Stewart
James N. Griffin
Hon. Douglas M. Rastatter