[Cite as *Davis v. Sean M. Holley Agency, Inc.*, 2010-Ohio-5278.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

CHAZ DAVIS	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23891
vs.	:	T.C. CASE NO. 08CVF-8082
SEAN M. HOLLEY AGENCY, INC.	:	(Civil Appeal from Municipal Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 29th day of October, 2010.

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GRADY, J.:

{¶ 1} This is an appeal from an order of the municipal court in an action for garnishment of personal property of a judgment debtor in the possession of a third party.

{¶ 2} On October 5, 2006, Sean M. Holley leased a commercial premises from Nicoll, Inc. The written lease agreement was signed

on behalf of Nicoll, Inc.: "By William Nicoll, President." Holley does business as Sean M. Holley Agency, Inc., an insurance agency.

{¶ 3} On August 23, 2008, Chaz Davis filed an affidavit, order, and notice of garnishment pursuant to R.C. 2716.13. The notice represents that Davis has obtained a judgment for $138,600 against William L. Nicoll, and that the Sean M. Holley Agency ("Holley") may have property in the form of past and present unpaid rent in the probable amount of $14,432 that is due and owing to Nicoll under the terms of a lease agreement. Holley filed a response, by its attorney, dated September 3, 2008, denying that it had any property due and owing to Nicoll.

{¶ 4} On October 9, 2009, Davis commenced an action against Holley on a complaint in accounting, demanding an accounting of all charges and credits under the lease between Nicoll and Holley and demanding a judgment against Holley for any monies Holley owes Nicoll. Holley filed an answer on January 29, 2009, admitting the existence of its lease with Nicoll, the notice that Davis filed, and Holley's response to the notice. Holley otherwise denied Davis's allegation that it held any monies due and owing to Nicoll under the terms of their lease. Holley also pleaded eight affirmative defenses.

{¶ 5} The case was tried to the court on November 25, 2009.

Holley offered evidence showing that the premises he rented from Nicoll was damaged by water from a leaking roof beginning in June of 2007, and that Nicoll had failed to correct the problem. Therefore, from June of 2007 until it vacated the premises in February of 2008, Holley withheld payment of the monthly rent of $725 due Nicoll under the terms of their lease.

{¶ 6} The trial court found that Holley stopped paying rent to Nicoll beginning on June 1, 2007, due to the water damage to the premises that Nicoll failed to prevent, and that the total amount of rent that was unpaid until Holley vacated the premises in February of 2008 is $5,800. After deductions for a security deposit and other costs Holley incurred, the court awarded a judgment against Holley and in favor of Davis for $3,736, plus interest and costs. Holley appeals.

ASSIGNMENT OF ERROR

{¶ 7} "THE TRIAL COURT ERRED AS A MATTER OF FACT AND LAW BY AWARDING CHAZ DAVIS JUDGMENT AGAINST THE SEAN HOLLEY AGENCY."

{¶ 8} Holley relies on two provisions of its lease with Nicoll to contend that it owes no unpaid rent to Nicoll, and therefore cannot be required to pay the same to Davis to satisfy his judgment against Holley.

{¶ 9} Paragraph 10 of the lease provides that Nicoll shall maintain and repair the roof, and that any damage to the interior

of the premises caused by Nicoll's failure to maintain the exterior of the building shall be Nicoll's responsibility. Holley argues that Nicoll breached the lease in that respect, relieving Holley of its duty to pay rent to Nicoll.

{¶ 10} Paragraph 29 of the lease provides that Nicoll covenants and agrees that Holley, upon paying the rent due, "may peaceably and quietly enjoy the Premises . . . without hindrance of [Nicoll] or any person lawfully claiming under [Nicoll]." Holley argues that Nicoll's failure to repair the roof deprived Holley of its right to peaceable and quiet enjoyment of the premises, relieving Holley of its duty to pay any further rent to Nicoll. Further, pursuant to paragraph 29, Davis may not now claim a right to which Nicoll is not entitled.

{¶ 11} R.C. 2716.11 authorizes an action for garnishment of property, other than personal earnings, commenced by a judgment creditor and supported by an affidavit stating "[t]hat the affiant has a reasonable basis to believe that the person named in the affidavit as the garnishee may have property, other than personal earnings, of the judgment debtor that is not exempt under the law of this state or the United States." R.C. 2716.11(B). Attachment is complete when the order of garnishment is served on the garnishee. *Marinik v. Cascade Group* (1999), 103 Ohio Misc. 2d 18. The garnishor nevertheless has the burden to prove that the

property concerned is the property of the judgment debtor.

{¶ 12} "In Ohio, a covenant of quiet enjoyment is implied into every lease contract for realty." *Dworkin v. Paley* (1994), 93 Ohio App.3d 383, 386. Such covenant protects the tenant's right to a peaceful and undisturbed enjoyment of his leasehold. Id. The covenant is breached when the landlord obstructs, interferes with, or takes away from the tenant in a substantial degree the beneficial use of the leasehold. Id. The degree of the impairment required is a question for the finder of fact. Id. When the landlord breaches the covenant of quiet enjoyment, the tenant is relieved of its obligation to pay rent for the premises. *GMS Mgt. Co., Inc. v. Datillo* (June 15, 2000), Cuyahoga App. No. 75838; *Hamilton Brownfields Redevelopment LLC v. Duro Tire and Wheel*, 156 Ohio App.3d 525, 2004-Ohio-1365, at ¶23.

{¶ 13} Davis argues that Holley waived its right to argue its defense of breach of the covenant of quiet enjoyment because it is an affirmative defense that, per Civ.R. 8(C), must be affirmatively pleaded, and Holley failed to do that. "An affirmative defense is any defensive matter in the nature of a confession and avoidance. It admits for pleading purposes only that the plaintiff has a claim (the 'confession') but asserts some legal reason why the plaintiff cannot have any recovery on that claim (the 'avoidance')." Baldwin's Ohio Civil Practice, §8:14.

{¶ 14} Holley admits that it failed to pay rent to Nicoll from June of 2008 through February of 2009. However, that is not a "confession" that Holley "has property . . . of the judgment debtor," which is the claim in law Davis makes pursuant to R.C. 2716.11(B). Holley contends that it has no property belonging to Nicoll because his breach of the covenant of quiet enjoyment in their lease deprived Nicoll of his right to rent for the period concerned. That contention is a defensive matter, but not an affirmative defense that Holley was required by Civ.R. 8(C) to plead affirmatively in its answer.

{¶ 15} The only witness who testified at trial was Sean Holley. He testified that he had leased the premises from Davis, before Davis sold the building to Nicoll, who was another tenant. When that lease terminated, Holey signed a lease with Nicoll. When problems with the premises developed, Nicoll did not respond and could not be located.

{¶ 16} Holley testified that the problems with the premises started in 2007, stating:

{¶ 17} "YEAH THE EARLY PART OF THE SUMMER THERE. WE STARTED HAVING LEAKS COMING IN THROUGH THE CEILING AND WELL YOU HAVE TO UNDERSTAND IS THERE'S A SUITE NEXT TO ME WITH ANOTHER BUSINESS. THERE'S MY SUITE AND THEN THERE'S A SUITE UP ABOVE THAT MR. NICOLL OCCUPIED DURING THAT TIME. WE STARTED HAVING WATER COMING IN

THROUGH THE CEILING. AT FIRST ON OUR SIDE IT WAS YOU KNOW KIND OF SMALL. IT WAS COMING IN THROUGH THE DOOR FRAMES AND MINOR ISSUES WITH THAT. THEN THE CEILING - THE DRYWALL CEILING ON THE OTHER TENANTS SIDE COLLAPSED IN ON HIM. THE WATER POURED IN ON HIS SIDE AND YOU KNOW WE ARE TRYING TO CONTACT MR. NICOLL DURING THIS TIME PERIOD AND SAY HEY WE'VE GOT SOME PROBLEMS WITH THE BUILDING HERE. WE NEED TO HAVE THESE REPAIRED. OBVIOUSLY WE ARE TRYING TO CONDUCT OUR BUSINESS HERE. WE COULDN'T DO THAT SO THE GENTLEMAN ON THE OTHER SIDE HAS THE ROOF REPAIRED OR THE CEILING REPAIRED ON HIS SIDE WITH THE DRYWALL AND AFTER THAT TAKES PLACE THEN THE WATER COMES THROUGH FASTER AND FASTER ON OUR SIDE.

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{¶ 18} "SO THE WATER IS COMING IN THROUGH THE FIXTURES EVERY TIME IT RAINS. WE'VE GOT BUCKETS IN ALL THE DIFFERENT OFFICES WITHIN OUR SPACE THERE. THERE'S A TERRIBLE MILDEW SMELL THAT STARTS TO BUILD AND YOU KNOW WE DO OUR BEST TO TRY AND MEET WITH OUR CLIENTS OUTSIDE OF THE OFFICE WHERE POSSIBLE BUT YOU KNOW WE DO HAVE PEOPLE COME IN TO PAY BILLS AND THINGS OF THAT NATURE. ALL THROUGH THIS TIME WE ARE TRYING TO CONTACT MR. NICOLLS STILL AND UNABLE TO DO SO. EVENTUALLY AT SOME POINT IN THERE - WELL BEFORE THAT EVEN I SHOULD SAY WE STARTED TO KNOW SOMETHING WAS SERIOUSLY WRONG WHEN WE GOT NOTICE THAT THE WATER WAS GOING TO BE SHUT OFF IN THE BUILDING. THERE WAS SOMETHING LIKE FIFTEEN

HUNDRED – FIFTEEN HUNDRED SOMETHING DOLLARS THAT WAS OUTSTANDING ON THE WATER AND THAT WASN'T PAID. WE LOOKED INTO THAT AND THEN WE CAME TO FIND OUT THAT APPARENTLY THE TAXES HADN'T BEEN BEING PAID ON THE BUILDING AND THIS WAS REALLY THE FIRST TIME THAT WE REALLY KNEW THAT MR. NICOLL WAS ACTUALLY PURCHASING THE BUILDING FROM MR. DAVIS. UP TO THIS POINT I THOUGHT THAT HE HAD JUST PURCHASED IT OUTRIGHT AND – THEN WE MADE CONTACT WITH MR. DAVIS. ACTUALLY HE MADE CONTACT WITH ME I THINK AROUND THAT TIME AND SAY HEY-" (T. 9-11).

{¶ 19} Holley said that Davis told him he was foreclosing against Nicoll's interest under a land contract between them. Nicoll told Holley to send the rent payments he owed Nicoll to Holley. Holley declined to do that. Nicoll told Holley to make the necessary repairs and "we will be able to make things right and settle up" (T. 12) when the foreclosure was completed. Nicoll also declined to do that because "I'm not in the business of being a contractor." (T. 11).

{¶ 20} Holley testified that he occupied the premises until February of 2008, when he moved out. In going to a new location Holley had to perform improvements there that cost approximately $4,200. (T. 15). He also had to install a new phone system there that cost $3,500. (Id.)

{¶ 21} Holley testified that "the biggest part of my business

is home and auto insurance" (T. 18). He stated that his agency had been in that same location for about two years, and that "the way we do business is we are an in your neighborhood insurance agent . . . We are a fixture in the neighborhood." (T. 24). Holley testified that he used his office to meet with clients, and that when the leak problems developed,

{¶ 22} "WE TRIED TO MEET THEM AWAY FROM THE OFFICE WHERE POSSIBLE. SOMETIMES IS ESPECIALLY IF THEY HAVE A HOME FOR EXAMPLE THAT WE ARE WRITING THEN SOMETIMES WE CAN MEET AT THE KITCHEN TABLE AND TRY TO DO THAT. THE REALITY IS ESPECIALLY FOR SOMEONE WHO IS BUYING AUTO INSURANCE IT'S PRETTY HARD TO JUSTIFY TO THEM WHY I NEED TO MEET AT THEIR HOUSE OR AT DENNYS TO WRITE INSURANCE FOR THEM. SO YOU KNOW IF IT WAS - ESPECIALLY IF IT WAS RAINING DURING THAT TIME PERIOD. IF IT WASN'T RAINING IT MAY NOT BE DRIPPING THROUGH WE JUST HAVE THE STAINS AND SMELL THAT WERE COMING YOU KNOW THE SIDING BLOWING ON THE SIDE OF THE BUILDING. IT WAS EMBARRASSING BUT YOU KNOW I TRIED TO EXPLAIN TO THEM AND KIND OF JOKE AROUND YOU KNOW THAT THIS IS NOT MY BUILDING. I DON'T OWN IT SO YOU KNOW I CAN'T REALLY DO ANYTHING ABOUT THAT BUT AGAIN IF IT WAS AND IF THIS WAS YOUR HOUSE YOU KNOW I WOULD COME THROUGH AND DO THAT JUST KIND OF JOKE IT OFF IF I COULD.

{¶ 23} "Q. BUT IT WAS EMBARRASSING TO YOU?

{¶ 24} "A. YEAH IT WAS EMBARRASSING

{¶ 25} "Q. YOU COULDN'T FIND MR. NICOLL, IS THAT RIGHT?

{¶ 26} "A. RIGHT" (T. 19).

{¶ 27} Holley acknowledged that no one could have paid him to stay in the space he rented after February of 2008, adding: "would I have chosen to conduct business in a location like that? Absolutely not." (T. 28).

{¶ 28} Holley's testimony, which was uncontradicted, is substantial evidence showing that the ceiling leaks and related damage to the premises deprived Holley of his right to the peaceable and quiet enjoyment of the premises he leased from Nicoll. Nicoll had agreed to both keep the premises, including the roof, in good repair and to protect Nicoll's right of peaceable and quiet enjoyment. Nicoll breached those promises. Nicoll's breach deprived Nicoll of the right to the rent Holley agreed to pay, to the extent that Holley's right of peaceable and quiet enjoyment was impaired.

{¶ 29} Davis's claim for relief against Holley is derivative of Nicoll's rights against Holley, and is likewise diminished by the degree of impairment to Holley's right of peaceable and quiet enjoyment that Holley suffered because of Nicoll's breach. On this record, the trial court was charged by law to determine the extent of that breach and to reduce the amount of any award to which Davis might be entitled accordingly. The court failed to

do that. We believe that the court abused its discretion in so doing.

{¶ 30} The assignment of error is sustained. The judgment of the trial court will be affirmed with respect to the award of $3,736 the court ordered in favor of Davis, but reversed, in part, and remanded for further proceedings to determine the extent to which that award should be reduced to account for the impairment of Holley's right of peaceable and quiet enjoyment of the premises arising from Nicoll's breach of his promises to Holley.

BROGAN, J. And FAIN, J., concur.

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