

**IN THE COURT OF APPEALS OF OHIO  
THIRD APPELLATE DISTRICT  
LOGAN COUNTY**

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**TECUMSEH LANDING, LLC,**

**PLAINTIFF-APPELLEE,**

**CASE NO. 8-14-22**

**v.**

**PAULA L. BONETZKY,**

**OPINION**

**DEFENDANT-APPELLANT.**

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**Appeal from Logan County Common Pleas Court  
Trial Court No. CV 13 08 0270**

**Judgment Reversed in Part and Affirmed in Part**

**Date of Decision: July 6, 2015**

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**APPEARANCES:**

*Steven R. Fansler* for Appellant.

*Scott A. Kelly* for Appellee.

**WILLAMOWSKI, J.**

{¶1} Defendant-appellant, Paula L. Bonetzky (“Bonetzky”), brings this appeal from the judgment of the Common Pleas Court of Logan County, Ohio, finding her in breach of contract and ordering her to pay damages to Plaintiff-appellee, Tecumseh Landing, LLC (“Tecumseh Landing”). On appeal Bonetzky challenges the trial court’s finding with respect to whether a surrender occurred, so as to relieve her from the obligations of the lease. She further argues that the trial court erred in rejecting her defense of failure to mitigate damages by Tecumseh Landing and in calculating certain non-rent damages associated with the lease. Additionally, Bonetzky claims that the trial court erred in rejecting her counterclaim for damages due to its finding that the lease was of commercial, rather than residential nature. Of note, no challenges are made as to the trial court’s finding of breach or interpretation of the lease terms. For the reasons that follow, the trial court’s judgment is reversed in part and affirmed in part.

***Factual and Procedural Background***

{¶2} On May 14, 2012, Bonetzky and Tecumseh Landing’s managing member, Michael Kern (“Kern”), signed a lease agreement for the lease of “a portion of the real estate, internal and external fixtures, and commercial building at 10551 [County] Road 286, Huntsville, OH 43354.” (Pl.’s Ex. 1, Lease, Art. I.) The lease agreement stated that the rental period was “from APRIL 14, 2012 through MARCH 31, 2013.” (*Id.*, Art. III.) It required the rent to be paid in

twelve monthly installments, with a nonrefundable payment of \$5,000.00 for the first month's rent and for the security deposit at the inception of the lease. (*Id.*)

Some of the clauses of the lease are quoted below.

As a triple net lease, the LESSEE will pay all charges and bills including water, gas, sewer, and all other utilities, including electricity which may be assessed or charged against the occupant of said premises during said term or any extension thereof, or for the operation of the business such as BUSTER<sup>1</sup> insurance fee, gasoline tank fees, dock fees or license fees.

(*Id.*, Art. IV(2).)

Except as otherwise specifically provided in this lease LESSEE shall pay and discharge before any fine penalty interest or cost may be added thereto for the non-payment thereof all real estate taxes, assessments for the balance of the term of this lease and other governmental charges of any kind or nature whatsoever foreseen and unforeseen which at any time during the term of this lease may be assessed levied confirmed or imposed upon or become a lien on the Premises or part thereof or any appurtenances thereto and any use or occupation of the Premises.

(*Id.*, Art. V(1).) Additionally, article IX specified that

[a]ny notice to be given under this Lease shall be in writing and sent to the LESSOR Tecumseh Landing LLC whose mailing address is 16 Corn Hill Drive, Morristown, NJ 07960 by Certified Mail or such other places as the LESSOR may from time to time designate in writing.

(*Id.* Art. IX.) The agreement was notarized on May 14, 2012. A check for \$5,000.00 was attached to the record. (Pl.'s Ex. 3, Check Photocopies.)

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<sup>1</sup> We note the inconsistent spelling of this word throughout the record. Compare "BUSTER" in Pl.'s Ex. 1, Lease, with "Buster" in Pl.'s Ex. 4, and "BUSTR" in Tr. at 51. The abbreviation stands for the Bureau of Underground Storage Tank Regulations. *Shinkle v. Ashtabula Cty. Bd. of Revision*, 135 Ohio St.3d 227, 2013-Ohio-397, 985 N.E.2d 1243, ¶ 10.

{¶3} Shortly after receiving the key and possession of the premises, Bonetzky returned the key to the premises to Kern and indicated that she did not want to rent the property any more. Bonetzky did not make any further payments to Tecumseh Landing.

{¶4} Kern and Tecumseh Landing's sole equity member, Mark Mishler ("Mishler"), attempted to contact Bonetzky, but their calls remained unreturned.

On July 27, 2012, Mishler sent a certified letter to Bonetzky. The letter stated:

Tecumseh Landing, LLC has not received your \$2,500.00 monthly rent, late fees of \$20 per day, and triple-net-lease costs such as property taxes, sewer, Ohio Buster fees, etc. for May, June, and July.

This is a demand notice for payment of past due rent, late fees, and triple-net-lease costs.

Payment must be made as stipulated in the lease to:

Tecumseh Landing, LLC  
16 Corn Hill Drive  
Morristown, NJ 07960

Failure to pay past due amounts in 10 days may result in further collection action.

(Pl.'s Ex. 4.) This letter was returned to Mishler as "unclaimed" on August 30, 2012. (*Id.*)

{¶5} On January 18, 2013, Bonetzky received an email from Kern. The email stated:

Although your lease is still active on the Landing, We intend on sub-leasing the property to protect our interests in the investment. We will also be doing some upgrades and repairs. Unless we hear from you immediately, we will be doing the above in a timely fashion.

(Def.'s Ex. G.) Bonetzky responded, "I thought I made it clear to you that I was not involved in your operation when I returned your keys to you last May." (*Id.*)

{¶6} On August 9, 2013, Tecumseh Landing filed a Complaint for Breach of Contract and Money Damages in the Logan County Court of Common Pleas. Tecumseh Landing alleged that Bonetzky broke the lease by not making rent payments. Bonetzky answered, denying breaking the lease, and filed a counterclaim. In her defense, Bonetzky asserted that Tecumseh Landing had "failed to mitigate its damages." (R. at 22, Answer, ¶ 6-7.) As the cause of action in her counterclaim, Bonetzky alleged that Tecumseh Landing violated R.C. Chapter 5321 by retaining her security deposit and failing to give her "a written itemization of the application of the security deposit within thirty days of [her] vacation of the premises." (R. at 22, Countercl., ¶ 5.) She demanded an award of treble damages and payment of attorney fees. (*Id.* at ¶ 7, B.) Tecumseh Landing denied the allegations.

{¶7} After an unsuccessful mediation attempt, the matter proceeded to a bench trial on August 27, 2014. Three people testified at the trial. Mishler and Kern testified on behalf of Tecumseh Landing. Bonetzky testified on her own behalf. In summarizing the relevant testimony we divide it into subjects that relate to the issues raised on appeal.

*Trial Testimony*

Testimony about the Surrender of the Property

{¶8} Kern testified that a couple of days after Bonetzky had signed the lease, she visited him at his lake house to return the keys to the property. (Tr. at 30.) He understood it to mean that “she didn’t want to rent the property.” (*Id.*) Kern stated, however, that he was not clear on whether Bonetzky was abandoning the lease. (Tr. 31.) As he explained,

I gave the benefit of the doubt that I assumed that she just was either over her head on it or there were issues that she can’t understand she had an as is lease or whatever, so I said -- she dropped the keys off. I said I’m not taking these keys. They’re going to sit here. And they did. So I think -- I don’t know whether she was over her head or I don’t know whether she didn’t understand the magnitude of stocking the business or the operational side. I just thought she was over her head.

(*Id.*) Kern stated that Bonetzky did not clearly tell him that she was abandoning the premises and that he could access the property or re-rent it. (*Id.*) Kern thought that she indicated, “indirectly by handing the keys,” her intention and her understanding that “she could throw the keys back and call it a day.” (*Id.*) Kern testified that after Bonetzky had given him the keys, he did not feel that he could access the property without trespassing because she still had the lease. (Tr. at 32.)

{¶9} Kern testified that in June 2012, it became a concern that Bonetzky “didn’t do anything.” (*Id.* at 32.) At that time, both Kern and Mishler attempted to contact Bonetzky through phone calls and e-mails, but the phone calls and e-mails were not answered. (Tr. at 32, 68. ) “As far as [Kern] was concerned, she

had the lease” at that point and he was “not going to disturb her lease.” (Tr. at 33.) Kern was not aware that Mishler tried to send a certified letter to Bonetzky in July 2012, although he found out about it later. (*Id.*) Commenting on Bonetzky’s January 2013 email, in which she stated “I thought I made it clear to you that I was not involved in your operation when I returned your keys to you last May,” Kern testified “it wasn’t clear to me in May. At all.” (Tr. at 69.)

{¶10} Kern testified that he had never told Bonetzky that she was being released from her obligations under the lease agreement. (Tr. at 74-75.) To his knowledge, no one on behalf of Tecumseh Landing ever made such a statement to Bonetzky. (Tr. at 75.)

{¶11} Mishler testified that he was aware that Bonetzky had returned the keys to the property to Kern shortly after signing the lease and that she had never returned to the property afterward. (Tr. at 97.) He tried to call Bonetzky three times and left messages in “late May, early June.” (Tr. at 81-82.) Bonetzky never returned the phone calls. (Tr. at 82.) Therefore, in July 2012, Mishler sent Bonetzky a certified letter, which “was a demand notice that the rent hadn’t been paid.” (Tr. at 82-84, 98.) After the certified letter had returned to Mishler as “unclaimed,” he sent it again by regular mail. (Tr. at 85, 98.) This time the letter was not returned as undeliverable. (*Id.*) Mishler testified that he had never indicated to Bonetzky that he was “releasing her from her obligations under this lease agreement.” (Tr. at 85.) He testified that he had indicated “[j]ust the

opposite. That she was not released under the obligations of the lease agreement.” (Tr. at 85-86.)

{¶12} Bonetzky testified that upon inspecting the property with a contractor, she learned of certain deficiencies in the property. (Tr. at 119-121.) Bonetzky talked to her attorney about the situation and several days after signing the lease, she called Kern to set up a meeting with him. (Tr. at 122.) She informed Kern that she “was going to pull out” and she was “very adamant that [she] was not going to be in that -- any part of Tecumseh Landing.” (Tr. at 123.) She returned the only key that she had to the property to Kern and “made it very clear that [she] was not coming back.” (Tr. at 123-124.) Bonetzky testified, “I told him he could take whatever course he needed to, but my course was to back out at that point. And I left the keys with him and left.” (Tr. at 124.) She never returned to the property after that. (Tr. at 124.)

{¶13} Bonetzky acknowledged the notice provision of the lease, which required that “any notice to be given under the lease shall be in writing and sent to the lessor, to Tecumseh Landing.” (Tr. at 135.) She admitted that she had never sent “anything in writing by certified mail to Tecumseh Landing asking to get out of the lease.” (Tr. at 135.) Her only communication regarding her intention to abandon the lease was her conversation with Kern in May 2012. (Tr. at 135.) She testified that she had specifically told Kern that she would no longer pay rent for the property. (Tr. at 136.) She also testified that she had specifically authorized

Tecumseh Landing to find another lessee for the property. (Tr. at 136.) She did not tell Kern, however, “that Tecumseh Landing or its agents were allowed to access the property again.” (Tr. at 136.)

{¶14} Bonetzky admitted that Kern tried to call her after that meeting in May 2012. (Tr. at 124.) She testified that she had moved between several places after May 14, 2012, and did not receive the certified mail that Mishler had sent to her. (Tr. at 124-125, 129-130.) She did not remember receiving the letter that Mishler had sent to her by ordinary mail or any other communication in writing from Kern or Mishler between late May 2012 and January 2013. (Tr. at 125-126.)

Testimony about the Mitigation of Damages

{¶15} Kern described the convenience store at issue as “a seasonal business” and testified that one of the prior tenants attempted to operate it throughout the entire year, but “with no success.” (Tr. at 14-15.) Kern explained the duration of the season for operating the business stating, “I would say should be open at the end of April, sometime in May, and carry on through probably the end of October; peak -- peak being June, July, August. Or from a late, late side, Memorial Day to Labor Day is the peak months.” (Tr. at 15.) Kern further testified that the time around March and April is “the prime time that the property needs to be leased in order for somebody to open it and have it make any sense.” (Tr. at 24.) In order to achieve that, “you market the property actively \* \* \*

starting January 1st if you want to lease it from March, April, May on.” (Tr. at 35.)

{¶16} After Bonetzky left the keys at Kern’s residence, Kern and Mishler attempted to reach out to her “often,” so that they could “make it work.” (Tr. at 38.) Then, “[w]hen it became very apparent that -- that Ms. Bonetzky was not going to try to rent the business, into June, into July or whatever,” Kern contacted two realtors and informed them of the situation. (Tr. at 34.) He talked to the realtors about the possibility of finding Bonetzky a partner or someone who could sublet the property from her. (*Id.*) He specified that his contact with the realtors occurred “end of June to end of July, right in that range.” (Tr. at 35.) Kern admitted that he had not actually listed the property with a realtor at that point because “[b]y the time you get it active and get print copy, the season would be over.” (*Id.*) Since the time for marketing this seasonal property was early in the year, “the best approach” to rent it “midstream” was to “throw some e-mail or throw some Internet advertising as well as -- as make sure that the right people that have contacts, find out if anybody’s asking them about it. So that’s what I did.” (*Id.*) His additional reason for not marketing the property through a realtor at that point was his uncertainty about the situation with respect to Bonetzky, as he “still thought, wait a minute, she probably is going to end up figuring out she probably needs to run it.” (Tr. at 36.) He was concerned that placing a “for sale” or for a “for lease” sign at the property would be trespassing. (*Id.*)

{¶17} Kern testified that there were other people who had been previously “possibly interested in renting the business.” (Tr. at 37.) At some point in July, Kern contacted three of them to see whether they would “take over” Bonetzky’s lease, but it was “too late to open it.” (Tr. at 36-38.) He also testified about other efforts made to re-rent the property, which included “[e]verything from Craig’s List to eBay to the website that’s always been up that said for lease. The realtors scenarios. Just the things that you normally do.” (Tr. at 38.) The property was eventually leased to someone else in March 2013. (Tr. at 39.)

{¶18} Mishler described the property as “a very seasonal business,” and indicated that the “trial time to lease it is really February, March, April timeframe.” (Tr. at 87.) The latest he recalled being able to lease this property was in April, “[b]ecause the season started in May.” (Tr. at 87.) Mishler did not personally contact realtors to list the property after finding out that Bonetzky was not returning. (Tr. at 99.) He advertised in a newspaper and on the Internet. (Tr. at 100-101.) Mishler testified that the property was rented again on March 1, 2013. (Tr. at 88.)

Testimony about the Non-Rent Costs Associated with the Lease

{¶19} Kern discussed the terms of the written agreement and testified about the fees for which the lessee was to be responsible. He explained that the fees depend “on the nature how they were running the business,” “depending on what the lessee chose to do.” (Tr. at 21.) Kern did not know whether Bonetzky ever

applied “for things that would necessitate the BUSTR fees” and he did not know when the BUSTR fees were due. (Tr. at 51.) Because he was not involved in the payment of fees, he did not know whether Tecumseh Landing paid any BUSTR fees during the time when the lease was in Bonetzky’s name. (Tr. at 51, 63.) Kern did not personally pay any of the expenses that were sought as non-rent damages in this case. (Tr. at 54.)

{¶20} Mishler testified about the damages incurred due to Bonetzky’s breach. In addition to the unpaid rent, Mishler claimed damages for the Ohio BUSTR tank fee, which “is an annual fee that one pays because you have gas tanks. That’s 2,400.” (Tr. at 90, 92.) Mishler indicated that there is an additional “registration fee for having gas tanks, and that’s 150.” (*Id.*) He testified about a “dock fee that you pay to the Logan County Parks Department” of \$190.00 “for having docks into the lake.” (Tr. at 90, 94.) Mishler also talked about a property tax, which had been consistent throughout the years and amounted to \$3,558.36. (Tr. at 90, 92-94.) He testified that he reduced this number by one month due to the new tenant taking over in March 2013, and he thus held Bonetzky responsible for \$3,265.33 in taxes. (Tr. at 94.) Additionally, he requested that Bonetzky pay the sewer fee for eleven months at \$308.70, which he described as “a sewer tax” for “the fact that you have a drain.” (Tr. at 90, 94, Ex. 5.) Mishler also claimed damages for an annual payment for the liquor license and for an electric bill. (Tr. at 95.)

{¶21} Mishler and Bonetzky both testified that the electric and sewer bills had never been transferred into Bonetzky's name. (Tr. at 96-97, 118.)

Testimony about the Nature of the Property

{¶22} Kern testified that the property at issue was zoned "commercial," although there was a storage area in the back of the property that had been used as an apartment before. (Tr. at 13-14.) The property had never been rented as an apartment, however. (Tr. at 14.) Kern admitted that he "probably talked" to Bonetzky about a possibility of using the back portion of the property as an apartment but he "doubt[ed]" that Bonetzky ever asked whether she could sublet the apartment. (Tr. at 63.) Mishler confirmed that the agreement at issue was "a commercial lease." (Tr. at 77, 78.)

{¶23} Bonetzky testified that to her, this property was "half and half," meaning of a commercial and a residential nature. (Tr. at 138.) She was going to use it as a convenience store and a gas store. (Tr. at 139.) Bonetzky indicated that she discussed with Kern "the front part" that "could be used as an apartment." (Tr. at 119.) She testified that "there was a good possibility" that she would intend to use the property as a living unit, stating, "It was definitely a bonus for me to have that space." (Tr. at 120-121.) She denied observing that the residential part of the property was actually used for storage at the time. (Tr. at 138.) She indicated that there were "couches and things like that in there, so he [Kern] promoted it as a manager's apartment." (Tr. at 139.)

{¶24} Based upon the testimony at trial, the trial court rendered a judgment in the amount of \$24,043.75 in favor of Tecumseh Landing on its complaint for damages against Bonetzky. The trial court also found in favor of Tecumseh Landing on Bonetzky's counterclaim. Bonetzky now appeals raising four assignments of error as follows.

*Assignments of Error*

- I. THE COURT ERRED IN FAILING TO FIND THAT APPELLANT SURRENDERED HER LEASED PREMISES BACK TO THE APPELLEE.**
- II. THE TRIAL COURT ERRED IN DETERMINING THAT THE APPELLANT OWED ANY MORE RENT TO THE APPELLEE BASED UPON THE APPELLEE'S FAILURE TO PROPERLY MITIGATE OR MINIMIZE ITS DAMAGES.**
- III. THE TRIAL COURT ERRED IN NOT ORDERING THE APPELLEE TO PAY DOUBLE DAMAGES TO APPELLANT FOR FAILING TO PROVIDE FOR THE SECURITY DEPOSIT RETENTION.**
- IV. THE COURT ERRED IN AWARDING PROSPECTIVE DAMAGES ON AN INCONSISTENT BASIS TO PLAINTIFF FOR SERVICES NEVER RECEIVED BY THE DEFENDANT.**

{¶25} Due to the fact that Bonetzky does not challenge the trial court's finding of breach, interpretation of the lease terms, or rejection of her other arguments asserted in the trial court,<sup>2</sup> and that Tecumseh Landing has not filed a

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<sup>2</sup> Although in her discussion of the surrender argument, Bonetzky refers to Tecumseh Landing's failure to fulfill certain contractual terms (App't Br. at 5-6), she does not raise an assignment of error regarding her justification to breach the contract's terms.

notice of appeal, our discussion below is limited to the specific issues raised in the assignments of error. A review of Bonetzky's arguments on appeal indicates that, in a large part, they challenge the trial court's findings as being against the manifest weight of the evidence. In reviewing the judgment of a trial court following a bench trial as being against the manifest weight of the evidence we are guided by a presumption that the trial court's findings are correct. *Brown v. Admr. of Bur. of Workers Comp.*, 3d Dist. Wyandot No. 16-02-03, 2002-Ohio-6274, ¶ 19, citing *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 79-80, 461 N.E.2d 1273 (1984).

The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that 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.

*Seasons Coal* at 80. Therefore, “ ‘[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.’ ” *Id.*, quoting *C.E. Morris Co. v. Foley Construction Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus. We keep this standard in mind as we proceed to review the assignments of error.

***First Assignment of Error—Surrender of the Premises***

{¶26} In her first assignment of error Bonetzky argues that she surrendered the leasehold when she returned the keys to Kern and that the trial court erred

when it rejected her allegation that the agreement was terminated after two days. She asserts that the surrender put an end to the lease and discharged her from “all further obligations under the term of the lease, including rent.” (App’t Br. at 7.) *See George Bieler Sons Co. v. Rist*, 18 Ohio N.P. 534, 26 Ohio Dec. 261 (1916) (“‘A surrender of the tenant has the effect of terminating all his interest under the lease, since the interest is thereby transferred to the landlord. And furthermore, it terminates all future liability under the covenants of the lease.’ ”), quoting 2 Tiffany, Landl. & Ten., 1348, Sec. 191a; *see also* 49 Am. Jur. 2d Landlord and Tenant § 211 (“surrender of the premises terminates any rights or obligations that the tenant and landlord have under the lease agreement”); *Renaissance Mgt., Inc. v. Jay-Lor Corp.*, 8th Dist. Cuyahoga No. 95585, 2011-Ohio-2792, ¶ 27 (“A new lease agreement is a surrender of the old lease, the effect of which is to terminate the former landlord-tenant relationship and to put an end to the old lease.”). “The burden of proving a surrender was upon the appellant, for it is a generally recognized principle that he who asserts the affirmative of an issue has the burden of proving it.” *Chapman v. Knickerbocker Amusement Co.*, 85 Ohio App. 215, 217, 84 N.E.2d 283 (2d Dist.1949).

{¶27} Ohio law recognizes two instances under which a surrender of a leasehold can occur. The first occurs by an agreement of the parties and must be in writing. *See Pietrykowski v. Hamblin*, 6th Dist. Wood No. WD-84-86, 1985 WL 7092, \*2 (Apr. 12, 1985); *Pettett v. Cooper*, 62 Ohio App. 377, 382-383, 24

N.E.2d 299 (1st Dist.1939); *City Natl. Bank & Trust Co. v. Swain*, 29 Ohio Law Abs. 16, 27-28, 1939 WL 8003 (2d Dist.1939). This kind of surrender “is a matter of contract.” *Moore v. Cincinnati Mining Co.*, 25 Ohio N.P. 197, 202, 1922 WL 2029 (1922). Bonetzky does not argue and the record does not disclose that there existed a written agreement in which Tecumseh Landing expressly accepted her surrender of the premises in May 2012. Her alleged notice of surrender given in May 2012 to Kern was oral and pursuant to Kern and Mishler’s testimony, it was not accepted. The email Bonetzky sent to Kern on January 21, 2013, in which Bonetzky for the first time expressed her intentions in writing, “was at best an unaccepted proposition to surrender the lease, and never ripened into an agreement between the parties, and could not do so unless the circumstances showed that the plaintiffs accepted the terms of the proposition.” *Id.*

{¶28} The second type of surrender occurs by operation of law. *Pietrykowski* at \*2; *Pettett* at 382-383; *City Natl. Bank & Trust* at 27-28. This kind of surrender “must be a surrender in fact,” evidenced by “the conduct of the parties to the lease[, which] implies a mutual agreement to the tenant’s surrender of the lease and landlord’s acquiescence thereto.” *Pietrykowski* at \*2. “The intent of the lessor to relieve lessee must be clearly shown.” *City Natl. Bank & Trust* at 27. The Second District Court of Appeals has recognized,

“A surrender of a lease by operation of law results from acts which imply mutual consent independent of the expressed intention of the parties that their acts shall have that effect; it is by way of estoppel. *However, the intention of the landlord to accept the tenant’s*

*surrender of the premises is important on the question of surrender by operation of law, and a surrender will not be implied against the intent of the parties, as manifested by their acts; when such intention cannot be presumed without doing violence to common sense, the presumption will not be supported. It has been said that a constructive surrender of demised premises by operation of law can be evolved from the acts of the parties only when the intent to accept a proffered surrender is made reasonably clear and unequivocal, or is the logical and necessary result of the landlord's conduct."*

(Emphasis added.) *Chapman* at 217, quoting 32 Am.Jur. 766, Section 905; *accord Pietrykowski* at \*2, citing *Chapman, supra*.

{¶29} The Sixth District Court of Appeals rejected an allegation that a surrender occurred in *Pietrykowski*, 6th Dist. Wood No. WD-84-86, 1985 WL 7092. There, a tenant notified the landlord's agent "of his intent to abandon the leased premises" and "removed substantially all of his personal property from the leased premises." *Id.* at \*2. Subsequently, the landlord "entered the leased premises and effected substantial repairs and renovations." *Id.* After that, the landlord demanded "continued rental payments upon the balance of the lease term." *Id.* Based on these facts, the court held that "[t]here is no basis in evidence to show conduct of the appellee which acquiesces in the alleged surrender of the leasehold" in spite of the landlord's "re-entry into the leased premises[, which] was contractually permitted and statutorily based." *Id.*

{¶30} Similarly, nothing in the evidence provided in the instant case shows a clear intent on the part of Tecumseh Landing to relieve Bonetzky from the lease. Even though Bonetzky returned the keys to the premises to Tecumseh Landing's

representative, the mere acceptance of the keys by a landlord does not result in an acceptance of the offer to surrender. *Burke v. Pfefferle*, 3d Dist. Hardin, No. 173, Ohio Law Abs. 545, 545, 1927 WL 3075 (Jan. 20, 1927), quoting *Bumiller v. Walker*, 95 Ohio St. 344, 116 N.E. 797 (1917), syllabus (holding that “[a]n acceptance by the landlord of the key to the premises, his advertising for a new tenant, and renting the premises to another upon its vacation by the old tenant, under the facts stated,” were not sufficient to constitute a surrender).

{¶31} Bonetzky has failed to prove facts that would show a clear intent on the part of Tecumseh Landing to accept her surrender in May 2012. Conversely, Tecumseh Landing provided overwhelming evidence showing a contrary intent. Kern testified that even though he understood that Bonetzky wanted to get out of the lease in May 2012, he refused to accept the keys from her. Believing that Bonetzky was still the tenant on the property, he did not enter the premises before January 2013, because he was concerned about disturbing her lease and committing trespass. The evidence in the record shows that Tecumseh Landing attempted to call Bonetzky and demanded payments for the lease pursuant to the agreement after Bonetzky had missed her June 2012 payment. When the certified letter demanding payment returned unclaimed, Tecumseh Landing sent another letter through regular mail, and eventually contacted her via email in January 2013, indicating that Bonetzky’s lease was “still active on the Landing.” (Def.’s

Ex. G.) Therefore, Tecumseh Landing's conduct did not evidence a surrender in fact, so as to result in a surrender by operation of law.

{¶32} Accordingly, we hold that Bonetzky has failed to satisfy her burden of proving that a surrender occurred in May 2013 and that she was no longer bound by the obligations of the lease. Therefore, the trial court's finding with respect to the surrender argument was not against the manifest weight of the evidence.

{¶33} The first assignment of error is overruled.

*Second Assignment of Error—Mitigation of Damages*

{¶34} Bonetzky argues that Tecumseh Landing failed to properly mitigate its damages because it did not make sufficient attempts to re-lease the premises after finding out about her abandonment of the property in May 2012. She thus asserts that the trial court erred in awarding rent damages for the entire lease term.

{¶35} The Ohio Supreme Court has established that “[a] lessor has a duty to mitigate damages caused by a lessee’s breach of a commercial lease if the lessee abandons the leasehold” and thus, “[f]ailure to mitigate damages caused by a breach of a commercial lease is an affirmative defense.” *Frenchtown Square Partnership v. Lemstone, Inc.*, 99 Ohio St.3d 254, 2003-Ohio-3648, 791 N.E.2d 417 (2003), ¶ 21. But the burden to show failure to mitigate is on the party asserting the defense, here Bonetzky. *Inverness Gardens, L.L.C. v. Fish*, 3d Dist. Hancock No. 5-06-41, 2007-Ohio-4230, ¶ 13.

{¶36} Bonetzky did not provide any affirmative evidence to prove failure to mitigate on the part of Tecumseh Landing. In turn, Tecumseh Landing showed that due to the seasonal nature of the business, it was very difficult to rent it for the 2012 season after May 2012. Nonetheless, Kern and Mishler attempted to contact Bonetzky and assist her in opening the business for the 2012 season by finding a partner or a sublessee. Kern contacted realtors and other investors who were previously interested in the business to see whether someone would “take over” her lease. (Tr. at 36-38.) Tecumseh Landing advertised the property in a newspaper, on Craigslist, eBay, and the company’s website. After all their efforts in 2012 failed, the property was eventually leased again in March 2013, in time to open it for the 2013 season.

{¶37} The Ohio Supreme Court held that “[t]he duty to mitigate requires only reasonable efforts.” *Frenchtown Square* at ¶ 19. Recognizing that Tecumseh Landing was on notice that Bonetzky had abandoned the lease in May 2012, the trial court determined that their efforts were not unreasonable “in this niche market.” (R. at 82, J. Entry at 3.) We presume that the trial court’s factual findings are correct as they are supported by competent, credible evidence in the case. *See Brown*, 3d Dist. Wyandot No. 16-02-03, 2002-Ohio-6274, at ¶ 19. Accordingly, we hold that the trial court did not err in finding that Bonetzky had failed to satisfy her burden of proving failure to mitigate by Tecumseh Landing.

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

***Fourth Assignment of Error—Calculation of Non-Rent Damages***

{¶39} Bonetzky alleges that the trial court erred in its calculations of “prospective” damages on an inconsistent basis. In particular, she points out that in its judgment entry the trial court noted that “the utilities would not be the responsibility of the Defendant,” because she occupied the premises for only two days. (R. at 82, J. Entry at 4.) At the same time, the trial court charged Bonetzky for tank fees, real estate property taxes, dock fees, and sewer fees for the entire duration of lease term. Bonetzky asserts that the calculation of damages for tank fees, real estate property taxes, dock fees, and sewer fees is inconsistent with its calculation of damages for other utilities. Bonetzky also presents an alternative argument, which focuses on the trial court’s determination that the lease was “[a]t best” “ten and one-half months.” (R. at 82, J. Entry at 3.) She asserts that based on this finding, the tank fees, real estate property taxes, and dock fees should be prorated at ten and one-half-months. Therefore, she demands reversal of the trial court’s calculation of these fees.

{¶40} We start by noting that there is no inconsistency due to the fact that the trial court held Bonetzky responsible for the tank fees, property tax, dock fees, and sewer fees, but it did not hold her responsible for the electric bill. The evidence at trial indicated that the fees for the former were fees assessed on a yearly basis, irrespective of the use. Conversely, there was no testimony that the

electric bill was a flat annual fee or that Bonetzky had used any electricity in the few days of May 2012.

{¶41} We do find certain inconsistencies with respect to the trial court's determination that the lease term was "ten and one-half months" and its award of the damages for tank fees and dock fees. (R. at 82, J. Entry at 3.) Mishler testified that the Ohio BUSTR tank fee is \$2,400.00 annually, and that an additional registration fee for having gas tanks is \$150.00 annually. It does not appear that these fees were reduced by the trial court based on its finding that the lease term was not a full year. The same seems to be true about the dock fee of \$190.00 annually. Therefore, the trial court's assessment of damages for the tank fees and dock fees is inconsistent with its finding that the lease term was "ten and one-half months." As such, this calculation must be reversed.

{¶42} With respect to the award of damages for unpaid taxes, the trial court accepted the number provided by Mishler, which was \$3265.33.<sup>3</sup> As Mishler testified, he arrived at the number by reducing an average annual tax estimation by one month. Such a calculation would result in a tax charge for eleven months and therefore, it would again be inconsistent with the trial court's finding that the lease term was "ten and one-half months." Thus, it must be reversed. Finally, as to the sewer bill, the trial court indicated that it prorated it "at ten and one-half months at

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<sup>3</sup> We note that on page 3 of the judgment entry the trial court inserted a different number in its finding as to the value of the property taxes, \$2,265.00. (R. at 82, J. Entry at 3.) Nevertheless, due to our disposition of this assignment of error and our holding that the trial court must perform a new calculation as to the tax amount owed by Bonetzky to Tecumseh Landing, this discrepancy becomes immaterial.

\$27.50<sup>4</sup> per month for a total of \$288.75.” (*Id.*) Therefore, this calculation appears to be correct.

{¶43} We thus reverse the trial court’s judgment and remand the case for a proper and consistent calculation of damages. The fourth assignment of error is sustained.

*Third Assignment of Error—Security Deposit Retention*

{¶44} Bonetzky’s argument in this assignment of error is based on her claim that the property at issue was a residential property and that she was a residential tenant subject to the protections of R.C. 5321.16. This section of the Revised Code requires that “[a]ny deduction from the security deposit shall be itemized and identified by the landlord in a written notice delivered to the tenant together with the amount due, within thirty days after termination of the rental agreement and delivery of possession.” R.C. 5321.16(B). The landlord’s failure to comply with this provision allows the tenant to recover “the property and money due him, together with damages in an amount equal to the amount wrongfully withheld, and reasonable attorneys fees.” R.C. 5321.16(C).

{¶45} On appeal Bonetzky focuses on the trial court’s finding that R.C. 5321.16 does not apply because the lease at issue was commercial rather than residential. We affirm the trial court’s factual finding regarding the commercial nature of the property, as it was supported by overwhelming evidence at trial.

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<sup>4</sup> Although the parties do not challenge this number, we note that Exhibit 6 shows a monthly fee of \$27.70 rather than \$27.50.

Kern testified that the property at issue is zoned commercial and that it had never been rented as an apartment. Mishler testified that the agreement at issue was a commercial lease. Furthermore, Article IV Section 22 of the lease agreement states,

A deed restriction will be permanently inserted indicating that real estate will remain a restaurant/store to serve the residents and visitors of Indian Lake, and will always be zoned business.

(Pl.'s Ex. 1, Lease, Art. IV(22).) In spite of the fact that Bonetzky indicated a possibility that she might use it as a living unit, she admitted that she was leasing the property to use it as a convenience store and the gas store. Therefore, the trial court's finding that the lease was commercial and not subject to the protections for residential tenants codified in R.C. 5321.16 was supported by competent credible evidence.

{¶46} We additionally note that Bonetzky would be precluded from recovery under this section, even if the premises were residential. Division (B) of R.C. 5321.16 states:

The tenant shall provide the landlord *in writing* with a forwarding address or new address to which the written notice and amount due from the landlord may be sent. If the tenant fails to provide the landlord with the forwarding or new address as required, the tenant shall not be entitled to damages or attorneys fees under division (C) of this section.

(Emphasis added.) Bonetzky testified that she had moved several times after May 2012, and as a result, the correspondence from Tecumseh Landing did not reach her. She admitted that she had not given any written notice to Tecumseh Landing.

At no point did she assert that she had provided Tecumseh Landing with a forwarding address or that Tecumseh Landing was aware of her whereabouts. Therefore, under the statute, she would not be entitled to damages or attorney fees even if the premises at issue were residential. *See Boice v. Emshoff*, 3d Dist. Seneca No. 13-98-23, 1998 WL 833686, \*6 (Dec. 3, 1998) (holding that the landlord was not responsible for failing to comply with R.C. 5321.16 “when the Appellant failed to provide the Appellees with a forwarding address” and that therefore, “the provisions of R.C. 5321.16(C) [did] not allow for double damages and attorney fees”); *Fowler v. Hellman*, 3d Dist. Allen No. 1-85-45, 1986 WL 15048, \*3 (Dec. 30, 1986) (holding that the tenant was not entitled to statutory damages and attorney fees where the tenant had failed to provide written notice of the forwarding address); *Carr v. Ed Stein Realtors*, 10 Ohio App.3d 242, 243, 461 N.E.2d 930 (9th Dist.1983) (“because Carr failed to give notice of her new address in writing as required by R.C. 5321.16(B), she cannot recover damages and attorney’s fees pursuant to R.C. 5321.16(C)”).

{¶47} For the forgoing reasons, we overrule the third assignment of error.

### ***Conclusion***

{¶48} Having reviewed the arguments, the briefs, and the record in this case, we find error prejudicial to Appellant in the particulars assigned and argued. Therefore, we reverse in part and affirm in part the judgment of the Common

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Pleas Court of Logan County, Ohio, and we remand this matter for further proceedings consistent with this opinion.

*Judgment Reversed in Part and Affirmed in Part*

**ROGERS, P.J. and SHAW, J., concur.**

**/hlo**