[Cite as *May v. Petrick*, 2010-Ohio-1642.]

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MARTHA MAY dba ORCHARD MOBILE HOME PARK	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellant	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2009CA00031
TANJA PETRICK	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Mount Vernon Municipal Court, Case No. 08 CVH 01038
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	April 8, 2010

APPEARANCES:

For Plaintiff-Appellant:	For Defendant-Appellee:
MARK A. ZANGHI One Public Square Mount Vernon, OH 43050	SCOTT E. TORGUSON 12 W. Locust Street Newark, OH 43055-5520

Delaney, J.

{¶1} Plaintiff-Appellant, Martha B. May, d.b.a. Orchard Mobile Home Park, appeals the July 10, 2009 and July 27, 2009 judgment entries of the Mount Vernon Municipal Court.

STATEMENT OF THE CASE AND THE FACTS

{¶2} On September 12, 2008, Appellant filed a complaint for damages against Appellee, Tanja K. Petrick in the Mount Vernon Municipal Court. Appellant requested damages for unpaid rent, maintenance fees, and attorney's fees based on Appellee's lease of a manufactured home lot at Orchard Mobile Home Park. The matter came on for a bench trial on May 27, 2009. The following facts were adduced at trial.

{¶3} Appellant, Martha B. May is the owner and sole proprietor of Orchard Mobile Home Park located in Mount Vernon, Knox County, Ohio.

{¶4} On or about October 18, 2006, Connie Monahan and Defendant-Appellee, Tanja K. Petrick entered into a contract for Appellee to purchase Monahan's 2000 Commander Manufactured Home. At the time of the contract, the 2000 Commander Manufactured Home was located at the Orchard Mobile Home Park, Lot #57. Monahan had a written lease agreement with Orchard Mobile Home Park for the lease of Lot #57.

{¶5} Monahan signed over and tendered the title to the 2000 Commander Manufactured Home to Appellee, but Appellee did not register the title with the Knox County Clerk of Courts.

{¶6} After Appellee purchased the manufactured home, Appellant testified that she presented Appellee with a written lease agreement for the lease of Lot #57. Appellant testified to the terms of the lease agreement. Monthly rent was $260.00 per

month, payable on the first of the month. If rent was not paid by the fifth day of the month, there was a $25.00 late charge. If rent was not paid by the fifteenth day of the month, there was an additional $25.00 late charge. Tenants were responsible for the maintenance of their rental lot, such as mowing. If Appellant was required to mow the lot, Appellant charged the tenant a fee.

{¶7} Appellee did not sign a written lease agreement. Appellant testified that she offered Appellee the written lease agreement and Appellee refused to sign it. Appellee testified that Appellant never offered her a written lease agreement. However, Appellee did pay Appellant $260.00 for rent due on November 1, 2006. Appellee failed to make any further rental payments to Appellant for Lot #57.

{¶8} Appellee testified that she did not pay the rent for Lot #57 because she did not receive the deed to the manufactured home until September 2008. She testified she believed that since she did not receive the deed from Monahan, the manufactured home was not hers and she could not move in.

{¶9} After Appellee's purchase of the manufactured home from Monahan, Appellee brought a civil action in the Knox County Court of Common Pleas naming Monahan as defendant. Appellee alleged breach of contract and fraud as to the contract of sale for the manufactured home. Appellee wanted to rescind the contract of sale or receive the deed to the manufactured home. A bench trial was held on the matter and on July 17, 2008, the Knox County Court of Common Pleas found in favor of Monahan on Appellee's causes of action. Appellee testified that she received the deed from Monahan after the resolution of the case.

{¶10} While Appellee continuously failed to make monthly rent payments for Lot #57 and failed to maintain the lot, Appellant never initiated eviction proceedings against Appellee.

{¶11} At the time Appellant filed her cause of action against Appellee for damages, the alleged rent due from December 2006 to May 2009 was $7,800.00. The late fees accrued for that period were $1,500.00. The maintenance fees for lawn care were $655.00. At the hearing date, Appellant testified the final amount due and owing was $9,955.00.

{¶12} On July 10, 2009, the trial court issued its Findings of Fact and Conclusions of Law. The trial court awarded judgment in favor of Appellant and awarded damages in the amount of $1,560.00 plus interest at the statutory rate. The trial court found that Appellant was entitled to a reasonable amount of damages due to Appellant's failure to mitigate her damages in the matter, resulting in an award of six months of rent.

{¶13} Appellant filed a Motion for New Trial, which the trial court denied on July 27, 2009.

{¶14} It is from these decisions Appellant now appeals.

ASSIGNMENTS OF ERROR

{¶15} Appellant raises two Assignments of Error:

{¶16} "I. THE TRIAL COURT ERRED BY FAILING TO AWARD LOT RENT IN THE AMOUNT OF $260.00 PER MONTH FROM DECEMBER 2006 THROUGH MAY 2009, PLUS LATE FEES AND MOWING CHARGES INCURRED FROM DECEMBER 2006 THROUGH MAY 2009.

{¶17} "II. THE TRIAL COURT ERRED WHEN IT DENIED THE PLAINTIFF'S MOTION FOR A NEW TRIAL.

I.

{¶18} Appellant argues in her first Assignment of Error that the trial court erred in its determination of damages. An appellate court will not reverse a trial court's judgment so long as it is supported by any competent, credible evidence going to all of the essential elements of the case. *C.E. Morris Co. Foley Construction* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578. "A reviewing court does not decide whether it would have come to the same conclusion as the trial court. Rather, we are required to uphold the judgment so long as the record, as a whole, contains some evidence from which the trier of fact could have reached its ultimate conclusions." *Hooten Equipment Co. v. Trimat, Inc.,* 4th Dist. No. 03CA16, 2004-Ohio-1128, ¶ 7. We are to defer to the findings of the trier of fact because in a bench trial 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 testimony. *Seasons Coal Company, Inc. v. City of Cleveland* (1984), 10 Ohio St.3d 77, 461 N.E.2d 1273.

{¶19} In this case, Appellant requested damages for unpaid rent, late fees, mowing fees, and attorney fees. The trial court found that the parties did not have an express agreement to rent Lot #57. Because the parties failed to execute a written lease agreement, the trial court found that Appellant was not entitled to late fees, mowing fees, and attorney fees because those fees were disclosed only in the written lease agreement.

{¶20} The trial court went on to find that the evidence demonstrated that Appellant failed to mitigate her damages. Appellee's rent allegedly became due and owing in December 2006 but Appellant did not file her complaint for damages based on the unpaid rent until September 2008. The trial court made a determination of damages upon the evidence presented in the amount of six months rent.

{¶21} The evidence in this case consists of only testimony from Appellant and Appellee as to what occurred in this matter. As discussed more detail below, we find upon the whole record presented that the judgment of the trial court is supported by competent and credible evidence upon which the trial court could have based its conclusions.

{¶22} There is a dispute as to whether Appellant offered Appellee a written lease agreement, as required by R.C. 3733.11(A)(1),[1] but it can be agreed that the parties did not execute a written lease agreement for Lot #57. We find the evidence supports the conclusion that an express agreement did not exist, but rather by Appellee's payment of rent on November 2006 and Appellant's acceptance of said rent, the parties entered into a month-to-month tenancy by implication or oral agreement, thereby creating a landlord-tenant relationship. See, *Amick v. Sickles*, 177 Ohio App.3d 337, 2008-Ohio-3913, ¶19.

[1] R.C. 3733.11 provides, in relevent part: (A)(1)"A park operator shall offer each home owner a written rental agreement for a manufactured home park lot * * *; (2) The park operator shall deliver the offer to the owner by certified mail, return receipt requested, or in person. If the park operator delivers the offer to the owner in person, the owner shall complete a return showing receipt of the offer. If the owner does not accept the offer, the park operator is discharged from any obligation to make any further such offers."

{¶23} We will first address Appellant's argument that the trial court erred when it failed to award Appellant unpaid late fees and mowing fees. Appellee states that because she was not offered a written lease agreement, she was not given a written disclosure of fees pursuant to R.C. 3733.11(B) and R.C. 3733.11(H)(4) and therefore Appellant was not entitled to collect those fees.

{¶24} R.C. 3733.11(B) states:

{¶25} "(B) A park operator shall fully disclose in writing all fees, charges, assessments, including rental fees, and rules prior to a tenant or owner executing a rental agreement and assuming occupancy in the manufactured home park. No fees, charges, assessments, or rental fees so disclosed may be increased nor rules changed by a park operator without specifying the date of implementation of the changed fees, charges, assessments, rental fees, or rules, which date shall be not less than thirty days after written notice of the change and its effective date to all tenants or owners in the manufactured home park, and no fee, charge, assessment, or rental fee shall be increased during the term of any tenant's or owner's rental agreement. Failure on the part of the park operator to fully disclose all fees, charges, or assessments shall prevent the park operator from collecting the undisclosed fees, charges, or assessments. If a tenant or owner refuses to pay any undisclosed fees, charges, or assessments, the refusal shall not be used by the park operator as a cause for eviction in any court."

{¶26} R.C. 3733.11(H)(4) provides that no park operator shall:

{¶27} "Charge any tenant or owner any fee, charge, or assessment, including a rental fee, that is not set forth in the rental agreement or, if the rental agreement is oral,

is not set forth in a written disclosure given to the tenant or owner prior to the tenant or owner entering into a rental agreement."

{¶28} As stated above, there is conflicting evidence as to whether Appellant offered Appellee a written lease agreement that disclosed any fees, charges, or assessments. Determination of credibility issues are within the purview of the trial court. At the appellate level, we must afford due deference to the trial court's factual determination. Based on the evidence presented, we find there was competent and credible evidence for the trial court to find that Appellant was not entitled to an award of damages for unpaid late fees or mowing fees.

{¶29} We will next address the trial court's determination of damages as to the unpaid rent. The parties in this case agree that there is rent due and owing. The trial court awarded Appellant six months of unpaid rent, finding that the amount was reasonable based on Appellant's failure to mitigate her damages. Appellant argues that she is entitled to 30 months of unpaid rent, from December 2006 to May 2009. Appellee counters that because Appellant made no effort to mitigate her damages by pursuing an eviction action against Appellee, Appellant is not entitled to 30 months of unpaid rent.

{¶30} The failure to mitigate damages is an affirmative defense. Appellee did not raise the issue of failure to mitigate damages in her answer to Appellant's complaint pursuant to Civ.R. 8(C); however, the matter was raised at trial without objection from Appellant. Appellant further addressed the issue in her post-hearing brief filed on June 5, 2009. We find the affirmative defense to be properly before the court under Civ.R. 15(B).

{¶31} It is well established that landlords, as all parties to contracts, have a duty to mitigate their damages caused by the breach of a lease agreement. *Dennis v. Morgan*, 89 Ohio St.3d 417, 2000-Ohio-211, 732 N.E.2d 391; *Frenchtown Square Partnership v. Lemstone, Inc.*, 99 Ohio St.3d 254, 2003-Ohio-3648, 791 N.E.2d 417. The landlord's efforts to mitigate must be reasonable, and the reasonableness should be determined by the trial court. Id.

{¶32} The duty to mitigate does not begin until the lessee is in default. *Car Wash Leasing, Inc. v. Ralph G. Consolo, Inc*. (Sept. 6, 1977), Franklin App. Nos. 76AP-818, 76AP-831. In this case, Appellee paid rent to Appellant in November 2006. She failed to make any further rent payments from December 2006 to May 2009. Accordingly, Appellant was a default in December 2006 and that is when Appellant's duty to mitigate her damages began.

{¶33} When considering the duty to mitigate as applied to tenant/landlord law, the concept is usually applied to instances where the tenant has abandoned the property and the landlord fails to make an effort to re-rent the property. However, it has been held that a landlord's duty to mitigate is not released because a defaulting tenant still occupies the property. *Car Wash Leasing, Inc. v. Ralph G. Consolo, Inc*., supra. The Tenth District Court of Appeals found that if a landlord knows of the continued occupancy of a property by a tenant and the tenant is not making rental payments, the landlord's failure to commence eviction proceedings could be considered a failure to mitigate damages. Id.

{¶34} Appellant stated in her post-hearing brief that she could not commence eviction proceedings against Appellee because Appellee was not the record titleholder

of the manufactured home due to Appellee's failure to record the title with the Knox County Clerk of Courts. Appellee responded that Appellant could have filed an eviction proceeding against both Appellee and Monahan.

{¶35} Our review of Ohio's forcible entry and detainer statutes, in conjunction with Ohio law governing manufactured home parks, leads us to conclude that Appellant could have filed an eviction against Appellee as a resident of the manufactured home despite Appellee's failure to record the title. R.C. 1923.02(A) provides that forcible entry and detainer actions may be had (1) against tenants or manufactured home park residents holding over their terms; or (2) against tenants or manufactured home park residents in possession under an oral tenancy, who are default in the payment of rent as provided in division (B) of the same section. Division (B) states: "If a tenant or manufactured home resident holding under an oral tenancy is in default in the payment of rent, the tenant or resident forfeits the right of occupancy, and the landlord may, at the landlord's option, terminate the tenancy by notifying the tenant or resident, as provided in section 1923.04 of the Revised Code, to leave the premises, for the restitution of which an action may then be brought under this chapter."

{¶36} Once a resident of the manufactured home is evicted, and if the resident has abandoned or otherwise left the resident's manufactured or mobile home, then the park owner is permitted under R.C. 1923.12 to allow the titled owner to remove the home from the park and if the titled owner fails to do so after notice and opportunity, then the park may follow statutory procedures to remove the home.

{¶37} Thus, the trial court properly considered Appellant's failure to evict Appellee in determining the reasonableness of her efforts to mitigate damages. As

noted earlier, the determination of the reasonableness of the landlord's efforts to mitigate damages is a decision left for the trial court. *Frenchtown Square,* supra, at paragraph two of the syllabus.

{¶38} Upon review of the record in this case, we find the trial court's decision that Appellant's efforts to mitigate her damages were unreasonable, based upon her failure to institute eviction proceedings, was supported by competent, credible evidence. Likewise, the award of six months unpaid rent to Appellant to be supported by the record based upon the consideration of Appellant's duty to mitigate.

{¶39} Appellant's first Assignment of Error is overruled.

II.

{¶40} Appellant argues in her second Assignment of Error that the trial court erred in denying Appellant's motion for new trial pursuant to Civ.R. 59. Appellant argued in her motion that she was entitled to a new trial based on Civ.R. 59(A)(5), an error in the amount of recovery; (A)(6), the judgment was not sustained by the weight of the evidence; and (A)(7), the judgment was contrary to law.

{¶41} A trial court's decision to overrule a motion for a new trial is reviewed for abuse of discretion. *Mannion v. Sandel* (2001), 91 Ohio St.3d 318, 321, 744 N.E.2d 759. An abuse of discretion implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶42} The trial court's denial of Appellant's motion for new trial failed to address Appellant's specific arguments under the dictates of Civ.R. 59 and contained an editorialization of the trial court's perception of the evidence raised at trial; however, we

find Appellant's arguments raised in her Civ.R. 59 motion for new trial were addressed in our discussion of Appellant's first Assignment of Error. Based on our decision above, we find the trial court did not abuse its discretion in overruling Appellant's motion for new trial.

{¶43} Appellant's second Assignment of Error is overruled.

{¶44} The judgment of the Mount Vernon Municipal Court is affirmed.

By: Delaney, J.

Gwin, P.J. and

Hoffman, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

PAD:kgb

[Cite as *May v. Petrick*, 2010-Ohio-1642.]

IN THE COURT OF APPEALS FOR KNOX COUNTY, OHIO

FIFTH APPELLATE DISTRICT

MARTHA MAY dba ORCHARD MOBILE HOME PARK	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
TANJA PETRICK	:	
Defendant-Appellee	:	Case No. 2009CA00031

For the reasons stated in our accompanying Opinion on file, the judgment of the Mount Vernon Municipal Court is affirmed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN