[Cite as *Bennington v. Austin Square, Inc.*, 2010-Ohio-5198.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CLARENCE BENNINGTON	:	JUDGES:
	:	
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellant	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2009CA00260
AUSTIN SQUARE, INC., et al.	:	
	:	
	:	
Defendants-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas Case No. 2004CV00281
JUDGMENT:	AFFIRMED IN PART; REMANDED IN PART
DATE OF JUDGMENT ENTRY:	October 12, 2010

APPEARANCES:

For Plaintiff-Appellant:

IVAN L. REDINGER, JR.
Courtyard Centre, Suite 418
116 Cleveland Ave. NW
Canton, OH 44702

For Defendants-Appellees:

MARK D. FRASURE
4518 Fulton Rd. NW
P.O. Box 35548
Canton, OH 44718

Delaney, J.

{¶1} Plaintiff-Appellant, Florence Stertzbach appeals the September 17, 2009 judgment entry of the Stark County Court of Common Pleas that overruled Appellant's objections and adopted the April 14, 2009 Magistrate's Decision awarding damages to Appellant.

STATEMENT OF THE FACTS AND THE CASE

{¶2} On January 15, 2009, Plaintiff-Appellant, Florence Stertzbach filed a Motion for Order to Show Cause or Be Held in Contempt against Defendants-Appellees, Austin Square, Inc., Ralph Bernard, and Adam Bernard. The facts giving rise to Appellant's motion to show cause are as follows.

{¶3} Clarence Bennington and his late wife, Bernice Bennington, purchased the manufactured home located at 200 E. Street, Navarre, for $30,000, in Appellees' manufactured home park. The park consists of 235 lots for rent, with an average monthly lot fee of $216. The Benningtons moved, into their new home, in December 1995. At the time the Benningtons moved into the park, they were not provided with a lease. Instead, park management treated them as month-to-month tenants.

{¶4} After the Benningtons moved into the park, Appellees revised their rules several times. Appellees made revisions in the spring of 2003. According to the rules, the park demanded both interior and exterior inspections, after a resident provided notice of his or her intent to sell the manufactured home, and keep it in the park. Following the inspections, the park would provide a list of repairs and/or upgrades that must be completed before the transfer of ownership would be approved.

{¶5} At the end of 2000, the Benningtons considered selling their home and relocating due to the decline in their health. In January 2001, Joe Drotovick, the part-time manager of the park for the past 15 years, gave the Benningtons a list of changes that were required if they wanted to sell the home and keep it in the park. The list included the following: (1) shingled roof on a 3/12 pitched roof; (2) thermo pane windows throughout; (3) new sinks in the kitchen and bathrooms; (4) paint the shed; (5) frost-free water faucets; (6) four-inch numbers at the front of the home; and (7) smoke and fire detectors.

{¶6} However, the Benningtons' plans to move were delayed due to the declining health of Mrs. Bennington. Mrs. Bennington subsequently died in July 2001. Following his wife's death, during 2001 and 2002, Mr. Bennington split his time between his home and his sister's residence. By the end of 2002, Mr. Bennington decided that he needed to sell his home because he could no longer care for himself due to his failing health.

{¶7} On January 3, 2003, Appellant, Mr. Bennington's sister, provided the park with written notice of Mr. Bennington's intent to sell the home. In response, on January 13, 2003, co-owner of the park, Ralph Bernard, Jr., sent a letter to Appellant explaining his policy on approving sales, including his list of repairs and/or upgrades and the restriction against any move into the home, by a new owner, until the repairs/upgrades have been completed.

{¶8} Thereafter, Mr. Bernard performed an interior and exterior inspection of Mr. Bennington's home. On January 22, 2003, Mr. Bernard provided Appellant, with a letter, indicating the following upgrades needed to be completed so the home could

remain in the park following the sale. The required upgrades are as follows: (1) replace the skirting with the simulated stone or brick skirting; (2) replace the windows with thermo pane windows; (3) install an electric outlet on the north side of the home; (4) replace the existing metal shed with a wood shed clad with vinyl siding that matches the home; (5) install a frost-free faucet on the south side; (6) move the existing gas line connection to conform with Dominion East Ohio Gas requirements; (7) replace the exterior steps with wood or concrete steps; and (8) install GFI outlets in the kitchen, bath and half-bath. Albert Yoder, Jr., the owner of Krest Construction, provided Mrs. Stertzbach with an estimate, for all the upgrades, totaling $12,680.

{¶9} Thereafter, on January 26, 2004, Clarence Bennington filed this lawsuit challenging Appellees' upgrade rules pursuant to R.C. 3733.11(C). In May 2004, a hail storm damaged the skirting and siding on Mr. Bennington's home. An adjuster, from Grange Insurance, performed an inspection of the residence, evaluated the damage and issued a check in the amount of $9,947.71. Appellant placed the money, in escrow, during the pendency of the litigation. In October 2004, Appellant was substituted as plaintiff, to represent Mr. Bennington's interests, due to his inability to proceed because of health problems. Following the commencement of the litigation, Appellant disclosed the existence of the litigation to all prospective buyers. Appellant received no purchase offers.

{¶10} The matter proceeded to a two-day trial, before a magistrate, on November 18, 2004. The magistrate issued her opinion on February 15, 2005, concluding the upgrade rules, as applied to Mr. Bennington's residence, were unenforceable and therefore, Appellees were restrained from enforcing them. The trial

court also awarded Appellant damages totaling $6,872.49 and attorney fees to be determined following a hearing by the trial court.

{¶11} Appellees and Appellant filed objections to the magistrate's decision. On March 18, 2005, the trial court overruled all the objections and affirmed the decision of the magistrate. Appellees timely filed a notice of appeal on April 11, 2005. Appellant filed a cross-appeal on April 21, 2005.

{¶12} Adam Bernard, Ralph Bernard, Jr.'s son, became the park's on-site manager in June 2005.

{¶13} In *Bennington v. Austin Square, Inc., et al.,* Stark App. No. 2005CA00095, 2006-Ohio-75 ("*Bennington I*"), this Court affirmed the decision of the trial court to find that Appellees' rules were unreasonable, arbitrary, and capricious and to award Appellant damages and attorney fees for the promulgation of said rules. Our decision was issued on January 9, 2006.

{¶14} Adam Bernard was aware of the lawsuit and appeal, but had not read a copy of the court orders. Ralph Bernard, Jr., discussed the lawsuit with his son but never gave him copies of the court orders.

{¶15} In 2007, Appellees issued new Rules, Procedures, and Standards for the manufactured home park to be effective on October 1, 2007. The new Standards contained provisions the trial court declared to be in violation of R.C. 3733.11. On August 28, 2008, Appellant received a letter from Appellees advising that Appellant had to make numerous upgrades to her home. The upgrades included the prohibited upgrades of the shed, GFI outlets, steps, and skirting.

{¶16} Appellant again attempted to sell the manufactured home. Appellant gave tours of the home and discussed the asking price with a number of prospective buyers who then went to Appellees' offices. The prospective buyers either walked away from the sale without explanation or specifically declined because of the costs of making the necessary changes.

{¶17} In June 2008, Stan Krawson, an independent tester on assignment from the Stark County Fair Housing Department, went to the property acting as a prospective buyer of Appellant's home. Krawson spoke with Adam Bernard about the property. Adam Bernard told Krawson that Appellees would require him to upgrade the skirting to brick or stone façade skirting, which would cost approximately $2,000. Adam Bernard also provided Krawson with a copy of the Standards written by Ralph Bernard, Jr., which included prohibited upgrades.

{¶18} On January 15, 2009, Appellant filed her motion to show cause as to why Appellees should not be found in contempt for violating the trial court's previous orders. In her motion, she further requested that Appellees be ordered to pay attorney fees and expenses.

{¶19} The matter came on for hearing before the magistrate on February 25, 2009. Evidence was presented as to whether Appellees were in contempt of the court's orders and as to Appellant's damages. No testimony was taken on the issue of attorney fees and expenses. The magistrate took the matter under advisement and the parties filed closing briefs. In her brief, Appellant argued that she was entitled to damages in the amount of $28,417.88 for the rent and expenses she has paid on the property since

2005 to the present due to Appellees' prohibited acts. Appellant also requested that attorney fees and costs should be determined at a subsequent hearing.

{¶20} Pursuant to the evidence presented, the magistrate issued her decision on April 14, 2009, finding Appellees in contempt for failing to conform their behavior and their standards to comply with the court's orders. The magistrate found Appellant had paid rent in the amount of $9,680 from this Court's January 9, 2006 ruling to April 14, 2009. The magistrate awarded Appellant $9,680 for Appellees' contemptuous acts.

{¶21} There is no reference to attorney fees in the magistrate's decision.

{¶22} Appellant filed objections to the magistrate's decisions, arguing the magistrate awarded the incorrect amount of damages and failed to award attorney fees.

{¶23} On September 17, 2009, the trial court overruled Appellant's objections and adopted the magistrate's decision as a final entry.

{¶24} It is from this decision that Appellant now appeals.

ASSIGNMENTS OF ERROR

{¶25} Appellant raises two Assignments of Error:

{¶26} "I. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO COMPENSATE APPELLANT FOR ALL OF HER LOSSES CAUSED BY APPELLEES' CONTEMPTUOUS ACTS THAT VIOLATED R.C. §3733.11.

{¶27} "II. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO ORDER THE PAYMENT OF APPELLEES' ATTORNEY FEES INCURRED BECAUSE OF APPELLEES' CONTEMPTUOUS ACTS THAT VIOLATED R.C. §3733.11."

I.

{¶28} Appellant argues in her first Assignment of Error that the trial court erred in its determination of damages. We disagree.

{¶29} Appellant first argues that the trial court should have awarded Appellant her actual damages under R.C. 3733.11(I). R.C. 3733.11(I) states, "[i]f the park operator violates any provision of divisions (A) to (H) of this section, the tenant or owner may recover actual damages resulting from the violation, and, if the tenant or owner obtains a judgment, reasonable attorneys' fees, or terminate the rental agreement." Appellant argues that she demonstrated that Appellees' continued enforcement of the prohibited upgrades showed a violation of R.C. 3733.11(C): "A park operator shall promulgate rules governing the rental or occupancy of a lot in the manufactured home park. The rules shall not be unreasonable, arbitrary, or capricious."

{¶30} This matter was before the trial court upon a motion to show cause as to why Appellees should not be held in contempt for their failure to abide by the trial court's March 18, 2005 decision, and this Court's affirmation of the same, that the upgrades demanded by Appellees were unreasonable, arbitrary, or capricious. The trial court determined on March 18, 2005 that the upgrade rules were unenforceable and Appellees were restrained from enforcing those rules.

{¶31} Appellant argues that the contempt action brought on January 15, 2009 should be analyzed under R.C. 3733.11(C). We disagree. We find this to be an example of indirect contempt. Indirect contempt occurs when a party engages in conduct outside the presence of the court that demonstrates a lack of respect for the court or its lawful orders. *Bierce v. Howell*, Delaware App. No. 06CAF050032, 2007-

Ohio-3050, ¶ 16. When Appellees issued a revised set of Rules, Procedures and Standards in 2007 and sent Appellant the letter in August 2008 stating the prohibited upgrades were required, Appellant could have brought a new cause of action pursuant to R.C. 3733.11. Instead, Appellant filed a motion to show cause and this Court will analyze the trial court's decision as such.

{¶32} An appellate court's standard of review of a trial court's contempt finding is abuse of discretion. *State ex rel. Celebrezze v. Gibbs* (1991), 60 Ohio St.3d 69, 573 N.E.2d 62. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140. The burden of proof in a civil contempt action is proof by clear and convincing evidence. *Jarvis v. Bright,* Richland App. No. 07CA72, 2008-Ohio-2974 at ¶ 19, citing *Brown v. Executive 200, Inc.* (1980), 64 Ohio St.2d 250, 416 N.E.2d 610. The determination of "clear and convincing evidence" is within the discretion of the trier of fact. The trial court's decision should not be disturbed as against the manifest weight of the evidence if the decision is supported by some competent, credible evidence. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578.

{¶33} "The punishment for civil contempt is remedial or coercive in nature and for the benefit of the complainant, i.e., conditional fines and prison sentences." *Porter v. Porter,* 4th Dist. No. 07CA3178, 2008-Ohio-5566, at ¶ 30. Generally, in contempt proceedings, a trial court may compensate the complainant for losses where it can be proven that the damages were the direct result of the contempt. Id. citing *Cincinnati v. Cincinnati District Council 51 (1973),* 35 Ohio St.2d 197, 207, 299 N.E.2d 686, 694.

{¶34} Appellant argues that Appellees continued enforcement of the prohibited rules prevented Appellant from selling the home and she therefore requested damages from 2005 to the present. In this case, the trial court awarded Appellant $9,680 to compensate Appellant for her losses in paying rent from January 9, 2006, when our decision in *Bennington I* was filed, to the date of the April 14, 2009 magistrate's decision.

{¶35} Upon our review of the record, we cannot find the trial court abused its discretion in its determination of Appellant's losses. The record shows that in 2007, Appellees continued to enforce the prohibited upgrade rules. On August 28, 2008, Appellant received a letter from Appellees stating that Appellant was required to make the prohibited upgrades. Appellant filed her motion to show cause in January 2009. Appellant states that she lost potential sales for the home due to Appellees' actions, but could not specifically quantify as to when and to what amount.

{¶36} We find the trial court, in its discretion, correctly determined damages based on the competent and credible evidence before it as to the losses Appellant suffered as a direct result of Appellees' contempt.

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

II.

{¶38} Appellant argues in her second Assignment of Error that the trial court erred in failing to award Appellant attorney fees and expenses.

{¶39} Within Appellant's motion to show cause, Appellant moved the trial court to order Appellees to pay attorney fees and costs in relation to the contempt action. At the hearing on the motion to show cause, no evidence was presented about attorney

fees. In Appellant's post-hearing brief, Appellant requested attorney fees and expenses to be determined at a later hearing.

{¶40} There is nothing in the record to show that Appellant's request for attorney fees was bifurcated from the motion to show cause.

{¶41} In the magistrate's decision, the magistrate did not refer to attorney fees or expenses. Appellant raised the issue within her objections. The trial court overruled Appellant's objections and adopted the magistrate's decision.

{¶42} Appellees argue that the trial court's failure to award attorney fees was within its discretion. Based on the lack of information in the record before us, however, we find the trial court never addressed the issue of attorney fees – to deny attorney fees or otherwise; therefore the issue is not ripe for our review. We remand the matter to the trial court for the limited purpose of ruling on Appellant's request for attorney fees.

{¶43} Appellant's second Assignment of Error sustained in part.

{¶44} The judgment of the Stark County Court of Common Pleas is affirmed in part and remanded in part to rule on Appellant's request for attorney fees.

By: Delaney, J.

Hoffman, P.J. and

Farmer, J. concur.

HON. PATRICIA A. DELANEY

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER

PAD:kgb

[Cite as *Bennington v. Austin Square, Inc.*, 2010-Ohio-5198.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

CLARENCE BENNINGTON	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
AUSTIN SQUARE, INC., et al.	:	
	:	
	:	Case No. 2009CA00260
Defendants-Appellees	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed in part and remanded in part to rule on Appellant's request for attorney fees. Costs to be split between Appellant and Appellees.

HON. PATRICIA A. DELANEY

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER