[Cite as *Englefield v. Meeder*, 2015-Ohio-1905.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

F. W. ENGLEFIELD, IV, ET AL.	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiffs-Appellees	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
JERRY MEEDER, ET AL.	:	Case No. 14-CA-84
	:	
Defendants-Appellants	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Case No. 2014CV0734

JUDGMENT: Affirmed

DATE OF JUDGMENT: May 18, 2015

APPEARANCES:

For Plaintiffs-Appellees

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Farmer, J.

{¶1} On May 15, 2013, appellees, F. W. Englefield, IV and Benjamin Englefield, leased commercial property to appellants, Jerry and Ginger Meeder, for the operation of a restaurant. On August 12, 2014, appellees filed an eviction complaint against appellants for non-payment of rent and utilities.

{¶2} An eviction hearing was held on September 29, 2014. By journal entry filed same date, the trial court issued an order of eviction.

{¶3} Appellants filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶4} "THE COURT OF COMMON APPEALS ERRED IN GRANTING JUDGMENT FOR PLAINTIFF."

I

{¶5} Appellants claim the trial court erred in granting judgment to appellees because appellees accepted rent payments after the service of the three-day notice under R.C. 1923.04. We disagree.

{¶6} In Count One of their eviction complaint filed August 12, 2014, appellees alleged appellants breached the following two requirements of the lease agreement:

> 5. Defendants agreed to pay monthly installments of rent in the amount of $2,000.00 from December 1, 2013 through May 31, 2015, which rent is due, in advance, on or before the first day of each month.

6. Defendants agreed to reimburse Landlord for utilities used or consumed at the Premises in connection with Defendants' restaurant business.

{¶7} Count Two of the complaint alleged damages as a result of the breach. Paragraph 17 of the Lease, attached to the complaint as Exhibit A, covered "UTILITIES" and stated the following:

A. Tenant. Commencing as of June 1, 2013, Tenant shall be solely responsible for arranging and paying for the following services that may run to, or be used in, or charged against the Premises: garbage or refuse receptacle/dumpster, waste removal, cable, internet, telephone service and any other utilities not set for in (b) immediately below.

B. Landlord & Tenant Reimbursement. Commencing as of June 1, 2013, services for electricity, power, gas, heat, water and sewer shall continue to be billed to and paid by Landlord; provided however, that Tenant shall be obligated to reimburse Landlord for electricity, power, gas, heat, water and sewer services and charges to the extent that the monthly utility invoice coming due during the lease term exceeds the monthly average of that particular utility service for the entire 2012 calendar year. It is the intent of the parties that Tenant be obligated to reimburse Landlord for increased utility service usage resulting from Tenant's business during the initial and renewal term, if any, and that the monthly

average for that service during the 2012 calendar year serve as the base amount for calculating the increased utility cost. Tenant's reimbursement shall be due and payable to Landlord in accordance with section 20 below.

{¶8} Attached to the eviction complaint as Exhibit B was the three-day notice required under R.C. 1923.04. Said notice stated the following:

You have not paid rent for the months of April 2014 through August 2014 and therefore owe Landlord $10,000 in past due rent. You also have not reimbursed Landlord for utilities and, as of July 29, 2014, owe Landlord $9,398.10. **You are in default.** You must pay all past due amounts owing to Landlord by **Monday, august 11, 2014.**

Be advised that payments received by Landlord will be applied in order required by Section 24 of the Lease.

Be further advised that the amounts set forth above do not include the late payment penalty of 5%, nor do they include default interest accruing at a rate of 10% per annum. Landlord will not asses these amounts if the entire balance is paid, in full, before April 11, 2014. Landlord reserves the right to assess penalties and default interest at a later time should you fail to pay the above amounts, in full, before August 11, 2014.

{¶9} Following a hearing on September 29, 2014, the trial court found appellees had established the right to immediate possession of the premises, and issued a writ of restitution, ordering appellants to immediately "return all incidents of possession of the restaurant" to appellees. On October 1, 2014, the trial court set a hearing on the issue of damages alleged in the complaint for November 13, 2014.

{¶10} On October 3, 2014, appellants filed their notice of appeal. Because of the filing, the damages hearing was never held. Appellants have not requested a stay of the writ of restitution. To be final and appealable, an order must comply with R.C. 2505.02. Subsection (B) states the following in pertinent part:

> (B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:
>
> (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;
>
> (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;
>
> (3) An order that vacates or sets aside a judgment or grants a new trial;
>
> (4) An order that grants or denies a provisional remedy and to which both of the following apply:

> (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
>
> (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

{¶11} R.C. 1923.14 governs enforcement of writ of execution. Subsection (A) implies that a writ of restitution is a special proceeding and is a final appealable order:

> Except as otherwise provided in this section, within ten days after receiving a writ of execution described in division (A) or (B) of section 1923.13 of the Revised Code, the sheriff, police officer, constable, or bailiff shall execute it by restoring the plaintiff to the possession of the premises, and shall levy and collect the costs and make return, as upon other executions. If an appeal from the judgment of restitution is filed and if, following the filing of the appeal, a stay of execution is obtained and any required bond is filed with the court of common pleas, municipal court, or county court, the judge of that court immediately shall issue an order to the sheriff, police officer, constable, or bailiff commanding the delay of all further proceedings upon the execution. If the premises have been restored to the plaintiff, the sheriff, police officer, constable, or bailiff shall forthwith place the defendant in possession of them, and return the writ

> with the sheriff's, police officer's, constable's, or bailiff's proceedings and the costs taxed on it.

{¶12} When appellants filed their notice of appeal, they did not request a transcript with their docketing statement. The docketing statement clearly states the following:

> WARNING: If a transcript of proceedings is needed, a copy of the notice of appeal and an appropriate praecipe must be served by Appellant on the court reporter. A copy of the praecipe to the court reporter shall be filed with this Court showing service of the notice of appeal and praecipe upon the court reporter.

{¶13} Appellants attempted to supplement the record on February 3, 2015, after the respective briefs had been filed. This court denied the motion on February 27, 2015.

{¶14} In *Knapp v. Edwards Laboratories,* 61 Ohio St.2d 197, 199 (1980), the Supreme Court of Ohio held the following:

> The duty to provide a transcript for appellate review falls upon the appellant. This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record. See *State v. Skaggs,* 53 Ohio St.2d 162 (1978). This principle is recognized in App.R.

> 9(B), which provides, in part, that '***the appellant shall in writing order from the reporter a complete transcript or a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record.***.' When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm. (Footnote omitted.)

{¶15} Based upon the lack of a transcript and a reading of the eviction complaint with the attached exhibits, we presume the validity of the trial court's proceedings and affirm the judgment.

{¶16} The sole assignment of error is denied.

{¶17} The judgment of the Court of Common Pleas of Licking County, Ohio is hereby affirmed.

By Farmer, J.

Hoffman, P.J. and

Delaney, J. concur.

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