[Cite as *Covey v. Natural Foods, Inc.*, 2004-Ohio-1336.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Opal Covey

Appellant

v.

Natural Foods, Inc.

Appellee

Court of Appeals No. L-03-1111

Trial Court No. CI-00-3700

DECISION AND JUDGMENT ENTRY

Decided: March 19, 2004

* * * * *

Opal Covey, pro se.

Kenneth W. Wenninger, for appellee.

* * * * *

HANDWORK, P.J.

{¶1} Opal Covey is a pro se appellant in a landlord-tenant dispute, appealing from the judgment of the Lucas County Court of Common Pleas. Also before this court is the adequacy of the App.R. 9(C) statement of evidence included in the record. For the reasons stated herein, this court affirms the judgment.

{¶2} On July 6, 1999, appellant entered into a six-month commercial lease with appellee, Natural Foods, Inc., through its president and agent, Frank Dietrich. The lease term was July 8, 1999 to January 8, 2000 for the property at 343 Morris Street, Toledo,

Ohio. Appellant opened a thrift store in this commercial space. On October 5, 1999, Dietrich verbally notified appellant that she was in default for failure to pay rent. On November 5, 1999, Dietrich sent a letter to appellant demanding that the rental payments be brought current within ten days. The rent was not paid and Dietrich locked the premises on November 27, 1999. At least three times, appellee provided appellant with the opportunity to pick up her property. Appellant declined, instead filing a complaint against appellee on August 11, 2000 for wrongful eviction, conversion, and fraud in the inducement. Appellee countered with claims of past due rent and breach of contract.

{¶3} Appellee filed a motion to dismiss the claim of fraud in the inducement. The trial court converted this to a summary judgment motion, giving notice to both parties. Subsequently, the trial court granted this motion for summary judgment in favor of appellee. The four other claims went to trial. The trial court found no wrongful eviction, no conversion and no breach of contract, but did find appellant liable for past due rent in the amount of $1,400. Appellant appeals assigning the following errors:

{¶4} "FIRST ASSIGNMENT OF ERROR

{¶5} THE COURT ERRED WHEN IT DISMISSED FRAUD IN THE INDUCEMENT ON SUMMARY JUDGMENT ENTRY DTD. OCT. 15, 2002 AGAINST MANIFEST WEIGHT OF THE EVIDENCE PRESENTED BY PLAINTIFF'S ATTORNEY.

{¶6} "SECOND ASSIGNMENT OF ERROR

{¶7} TRIAL COURT ERRED WHEN IT DID NOT DECLARE SELF EVICTIONS UNLAWFUL AND NOT FINDING DEFENDANT GUILTY OF

WRONGFUL EVICTION EVEN WHEN DEFENDANT DECLARED IN CASE OF EVICTION 'IT MUST BE LAWFUL' LEASE NO. 14.

{¶8} "THIRD ASSIGNMENT OF ERROR

{¶9} TRIAL COURT ERRED BY NOT FINDING DEFENDANT GUILTY OF CONVERSION.

{¶10} "FOURTH ASSIGNMENT OF ERROR

{¶11} TRIAL COURT ERRED WHEN JUDGMENT ENTRY WRONGFULLY ACUSED (sic) PLAINTIFF OF ABANDONING HER PROPERTY AND AWARDING HER PROPERTY ILLEGALLLY TO DEFENDANT.

{¶12} "FIFTH ASSIGNMENT OF ERROR

{¶13} TRIAL COURT ERRED WHEN IT CORRECTED THE ANNUAL RENT AMOUNT AND AWARDED DEFENDANT JUDGMENT FOR NON PAYMENT OF RENT.

{¶14} "SIXTH ASSIGNMENT OF ERROR

{¶15} TRIAL COURT ERRED WHEN IT DID NOT AWARD DAMAGES AS REQUESTED IN COMPLAINT TO PLAINTIFF.

{¶16} "SEVENTH ASSIGNMENT OF ERROR

{¶17} TRIAL COURT ERRED WHEN IT DID NOT ADDRESS STORAGE ITEMS LEFT ON PURPOSE IN LEASED SPACE TO PLAINTIFF CORRECTLY.

{¶18} "EIGHT (sic) ASSIGNMENT OF ERROR

{¶19} TRIAL COURT ERRED WHEN IT DID NOT ADDRESS THE TRUTH ABOUT UTILITIES, MEANING AND RESPONSIBILITIES.

{¶20} "NINTH ASSIGNMENT OF ERROR

{¶21} APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

{¶22} TENTH ASSIGNMENT OF ERROR

{¶23} TRIAL COURT HAD NO LAWFUL RIGHT TO UPHOLD THE FRAUDELENT (sic), LYING, CRIMINAL NOTE HANDED TO PLANITIFF TO FORCE HER TO MOVE.

{¶24} ELEVENTH ASSIGNMENT OF ERROR

{¶25} TRIAL COURT ERRED WHEN IT DID NOT DEFINE PREMISES NOR AS IS CORRECTLY AND TRY (sic) THE MEANINGS PROPERLY WITH THE APPLICATIONS IN THE LEASE."

{¶26} Appellant's first assignment of error alleges that the summary judgment was against the manifest weight of the evidence. The trial court's grant of a motion for summary judgment is reviewed de novo. *Brown v. Scioto Bd. Of Commrs*. (1993), 87 Ohio App.3d 704, 711. Thus, this court will employ the same test under Civ.R. 56(C) as a trial court. A grant of summary judgment requires that no genuine issue of material fact exists, that the movant is entitled to judgment as a matter of law and "that reasonable minds can come to but one conclusion." *Turner v. Turner* (1993), 67 Ohio St.3d 337, 339-40, quoting *Temple v. Wean United, Inc*. (1977), 50 Ohio St.2d 317, 327. Moreover, "[a]n appellate court reviewing a trial court's decision to grant a Civ.R. 56(C) motion must look at the evidence in a light most favorable to the non-moving party, construing all doubt in favor of that party." *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356,

360. The moving party bears the initial burden to identify and inform the trial court of the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The non-moving party then has the burden to "set forth specific facts showing that there is a genuine issue for trial." Id.

{¶27} A claim of fraud in the inducement requires an intentional material misrepresentation that was relied upon to the detriment of the relying party. *Beer v. Griffith* (1980), 61 Ohio St.2d 119, 123. Appellee filed a motion to dismiss this claim. The motion to dismiss was converted to summary judgment and then granted by the trial court. Appellee, in its motion, relied upon paragraph 2 of the lease, which states: "Lessor shall in no way be obligated to improve or change the premises in any way." It is undisputed that appellant and appellee's president, Mr. Dietrich, met on several occasions, prior to signing the lease, to discuss the terms of the lease. Thus appellee satisfied its initial burden to identify to the court the absence of a genuine issue of material fact. Specifically, that appellant did not rely on any representations because she agreed, over a series of negotiations, to an "as-is" clause.

{¶28} Appellant did not satisfy her burden in opposing the motion for summary judgment. See *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. "Documents submitted in opposition to a motion for summary judgment which are not sworn, certified, or authenticated by affidavit have no evidentiary value and may not be considered by the court in deciding whether a genuine issue of material fact remains for trial." *Green v. B.F. Goodrich Co.* (1993), 85 Ohio App.3d 223, 228, citing *Citizens Ins. Co. v. Burkes*

(1978), 56 Ohio App.2d 88, 95-96. Appellant failed to properly authenticate much of her evidence offered in opposition.

{¶29} Only two documents were properly "sworn, certified, or authenticated." These documents were the lease and Dietrich's responses to appellant's first set of interrogatories. First, the lease was the very instrument that appellant was allegedly induced to execute by fraudulent misrepresentation. It only contains rebuttal of the alleged misrepresentations, the "as-is" clause in paragraph 2, an integration clause, and a no oral-modification clause. Second, Dietrich's responses also rebut misrepresentation. In his responses, Dietrich answered that the only term agreed to, beyond the signed lease, was that the property would be, and was, painted. Moreover, Dietrich answered that the parties met at least five times to discuss the terms of the lease. This suggests that the parties formed a mutually agreeable lease. It does not suggest that the parties agreed to the lease and several extraneous representations. Reasonable minds could only find that appellant was not fraudulently induced to execute the lease agreement. Accordingly, appellant's first assignment of error is found not well-taken.

{¶30} Assignments of error numbered two through eleven, except the ninth, allege that the judgment is against the manifest weight of the evidence. An assignment of error as against the manifest weight of the evidence requires appellant to ensure that a transcript of the proceedings is included in the record. App.R. 9(B). "[W]here a transcript of any proceeding is necessary for disposition of any question on appeal, the appellant bears the burden of taking steps required to have the transcript prepared for inclusion in the record." *State ex rel. Montgomery v. R & D Chemical Comp*. (1995), 72

Ohio St.3d 202, 204, quoting *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197. Appellee challenges appellant's right to use an App.R. 9(C) statement of evidence in lieu of the transcript. Where no report is made or the transcript is unavailable a statement of evidence or proceedings will suffice under App.R. 9(C). Moreover, "a transcript is unavailable for the purpose of App.R. 9(C) to an indigent appellant unable to bear the cost of providing a transcript." *State ex rel. Motley v. Capers* (1986), 23 Ohio St.3d 56, 58.

{¶31} Here, the transcript is unavailable under App.R.9(C) because appellant is indigent. An appellant "must prove by way of affidavit that he is truly indigent when he requests the trial court settle a narrative statement pursuant to App.R. 9(C)." *Metcalf v. Ohio Dept. of Rehab. & Corr.* (Sept. 20, 2001), Franklin App. Nos. 01AP-292, 01AP-293. Appellant offered an affidavit swearing that she could not afford to post security for the costs of the appeal. This unchallenged affidavit satisfies appellant's duty to prove her indigent status. The trial court satisfied its duty to settle and approve appellant's App.R.9(C) statement by rejecting it and including its own statement of evidence. *State ex rel. Fant v. Trumbo* (1986), 22 Ohio St.3d 207, 208. Thus, we reject appellee's contention that appellant is not entitled to use a statement of evidence in place of a transcript of proceedings.

{¶32} "In a civil proceeding, qualitative and quantitative distinctions between weight and sufficiency of the evidence are not recognized." *Paulus v. Rucker*, 11th Dist. No. 2002-P-0080, 2003-Ohio-2816 at ¶ 9, citing *State v. Hunter* (2001), 144 Ohio App.3d 116, 121. "Therefore, under the civil standard, 'judgments supported by some competent,

credible evidence going to all the essential elements of the case will not be reversed by a reviewing court.'" Id., quoting *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 280. Under this manifest weight standard "a court of appeals [is] guided by a presumption that the findings of the trier-of-fact were indeed correct." *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 79-80 (Citations omitted). Because "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 *** an appellate court should not substitute its judgment for that of the trial court." Id. at 80.

{¶33} Appellant's fifth assignment of error alleges the trial court's reformation of the contract was against the manifest weight of the evidence. The lease provides for an "annual rental" at the rate of $400, in equal installments. Yet appellant paid at least $900 in rent over the first three months of the lease. The first month appellant paid $400, equal to the "annual" amount. The second month appellant paid an additional $300. The third month appellant paid only $200 and noted on the check itself the following: "Partial Payment-Rent – 343 Morris 9-8-99 thru 10-8-99." Appellee testified that rent was $400 per month. Appellee also issued a demand letter for back-rent after the $200 payment. The trial court found this conduct of the parties to evidence a mutual mistake and reformed the contract, changing the rent amount from $400 annually to $400 monthly.

{¶34} "Reformation of a contract is an equitable remedy whereby a court modifies an instrument that, due to a mutual mistake of the original parties, does not reflect the intent of those parties." *Erie Metroparks Bd. of Commrs. v. Key Trust Co. of Ohio,* 145

Ohio App.3d 782, 787, 2001-Ohio-2888 at ¶ 30, citing *Mason v. Swartz* (1991), 76 Ohio App.3d 43, 50. The standard of proof is clear and convincing evidence. Id. Yet, on appeal the manifest weight standard of some competent, credible evidence is still applicable. See *State v. Scheibel* (1990), 55 Ohio St.3d 71, 74. The course of performance amongst the parties is significant. *Castle v. Daniels* (1984), 16 Ohio App.3d 209, 212. The essential element necessary for reformation is mutual mistake of the original parties. Appellant's conduct and appellee's testimony comprise competent, credible evidence that both parties believed the rent amount to be $400 monthly. Accordingly, the trial court's reformation is not against the manifest weight of the evidence. Appellant's fifth assignment of error is found not well-taken.

{¶35} Appellant's seventh, eighth and eleventh assignments of error seemingly deal with the terms of the lease agreement. Except for the reformation of the rent amount there is no evidence to suggest that the terms contained in the lease were to have anything except their plain meanings. Appellant visited the property several times and spoke with Dietrich several times about the terms of the agreement, prior to signing the lease. Appellant testified that she read the whole lease and understood it. Appellant signed the lease.

{¶36} The lease provides that the "Lessor shall in no way be obligated to improve or change the premises in any way." Paragraph 3 of the lease continues: "Lessee acknowledges that the premises are in good order and repair, unless otherwise indicated herein. *** Lessee shall be responsible for all repairs required." Paragraph 7 provides: "All applications and connections for necessary utility services *** shall be made in the

name of the Lessee only, and Lessee shall be solely liable for utility charges as they become due, including those for sewer, water, gas, electricity, and telephone services. Lessor shall supply electrical current for $100.00 per month."

{¶37} Yet appellant alleged in the trial court, and now assigns as error, that appellee failed to provide heat, water, adequate lighting and restroom facilities. Moreover, the lease twice provides that appellant's only redress "[s]hould the Lessee find the premises unsuitable" or "[in] the event Lessor cannot provide such electric" is for the Lessee to move out. The lease stands as some competent, credible evidence that appellee was obligated to provide electricity and that all other utilities or improvements were the responsibility of appellant. Accordingly, appellant's seventh, eighth and eleventh assignments of error are found not well-taken.

{¶38} In the second and tenth assignments of error, appellant essentially argues that the trial court's finding of no wrongful eviction is against the manifest weight of the evidence. Because appellant failed to perform under the lease and appellee properly demanded performance, the eviction was not wrongful. Upon failure to pay rent, appellant had no legal right under the lease to the property. Accordingly, appellant's second and tenth assignments of error are found not well-taken

{¶39} In the third and fourth assignments of error appellant challenges the trial court’s holdings regarding conversion and abandonment. The trial court found that appellant abandoned her property and, thus, appellee did not convert the property. Appellant assigns error to both of these holdings as against the manifest weight of the evidence. “Conversion is the wrongful exercise of dominion over property to the

exclusion of the rights of the owner, or withholding it from his possession under a claim inconsistent with his rights." *State ex. rel Toma v. Corrigan* (2001), 92 Ohio St.3d 589, 592, quoting *Joyce v. General Motors Corp.* (1990), 49 Ohio St.3d 93, 96. "Abandoned property then is property over which the owner has relinquished all right, title, claim, and possession with the intention of not reclaiming it or resuming its ownership, possession or enjoyment." *Doughman v. Long* (1987), 42 Ohio App.3d 17, 21, citing *Jackson v. Steinberg* (1949), 186 Ore. 129. The trial court found that appellant abandoned her property and that, consequently, appellee is not liable for conversion. We agree.

{¶40} "Abandonment requires affirmative proof of the intent to abandon coupled with acts or omissions implementing the intent." *Village of New Richmond v. Painter*, 12th Dist. No CA2002-10-080, 2003-Ohio-3871 at ¶ 9, citing *Davis v. Suggs* (1983), 10 Ohio App.3d 50, 52. Intent to abandon "must be shown by unequivocal and decisive acts indicative of abandonment." *Erie Metroparks Bd. of Commrs. v. Key Trust Co. of Ohio*, 145 Ohio App.3d 782, 790, 2001-Ohio-2888 at ¶ 47 (Citations omitted). After appellant defaulted and appellee chained the premises, appellant was presented with at least three opportunities to retrieve her belongings. On November 27, 1999, standing outside the premises, appellant was offered access provided that she sign a note which allowed her only 40 minutes to remove her property. Appellant declined. Later, appellee notified appellant's two different attorneys that appellant could pick up her property anytime. Appellant declined. It wasn't until August 2000, when appellant filed a complaint against appellee, that any affirmative claim to this property was asserted.

{¶41} In any event, the trial court found an intention to abandon the property. That finding is supported by some competent, credible evidence and will, therefore, not be reversed. Indeed, appellant was given at least three opportunities to pick up her property at any time, over several months. Appellant declined. Because appellant abandoned her property appellee did not convert the property to its own use. Accordingly, appellant's third and fourth assignments of error are found not well-taken.

{¶42} Appellant, in her sixth assignment of error, asserts that the trial court erred when it did not award her damages. Appellant owed a total of $2,900, in light of the reformation and adjusting for the cancellation of electricity in November, but only paid a total of $1,500. Appellee testified to the damages under the lease and appellant did not offer any further evidence of payment. This constitutes some competent, credible evidence to prove liability for back-rent and electricity costs under the reformed lease agreement. Moreover, appellant is not entitled to damages because she failed to perform under the contract. Appellant's sixth assignment of error is found not well-taken.

{¶43} Lastly, in her ninth assignment of error, appellant assigns as error ineffective assistance of trial counsel. Criminal defendants are entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. *Strickland v. Washington* (1984), 466 U.S. 668, 686. Civil litigants, however, have no such constitutional right. *Roth v. Roth* (1989), 65 Ohio App.3d 768, 776. Appellant's ninth assignment of error is found not well-taken.

{¶44} On consideration whereof, this court finds that appellant was not prejudiced or prevented from having a fair trial, and the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

Peter M. Handwork, P.J. _____
JUDGE

Richard W. Knepper, J. _____
JUDGE

Judith Ann Lanzinger, J. _____
CONCUR.
JUDGE