[Cite as *Cincinnati Ins. Co. v. Evans*, 2010-Ohio-2622.]

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

Cincinnati Insurance Co., et al.	Court of Appeals No. WD-09-012
Appellees	Trial Court No. 08-CVF-00414
v.	
Kyle Evans, et al.	**DECISION AND JUDGMENT**
Appellants	Decided: June 11, 2010

* * * * *

Stephen C. Roach, for appellee Cincinnati Insurance Company.

Gregory E. Bakies, for appellees Michael and Christina Wallace.

George C. Rogers, for appellants.

* * * * *

ABOOD, J.

{¶ 1} This is an appeal from a judgment of the Bowling Green Municipal Court which found that appellants Kyle and Molly Evans were liable to their prior landlords, appellees Michael and Christina Wallace, and the Wallace's insurer, appellee The Cincinnati Insurance Company, for damage to property that they had occupied under a

lease agreement with the Wallaces, and found that appellants were entitled to a credit against those damages in an amount equal to one month rent as a result of a breach of their right to quiet enjoyment of the property by the Wallaces.

{¶ 2} In support of their appeal, appellants set forth four assignments of error:

{¶ 3} "Assignment of Error No. I

{¶ 4} "The trial court erred in denying the Evanses' motion for summary judgment of October 24, 2008, as ruled upon in the final judgment entry of January 22, 2009.

{¶ 5} "Assignment of Error No. II

{¶ 6} "The trial court erred in entering judgment for Cincinnati Insurance Company upon a document assigning rights which assignment was not even in existence until the day of trial.

{¶ 7} "Assignment of Error No. III

{¶ 8} "The trial court erred in entering judgment for Cincinnati Insurance Company and for the Wallaces on the claim that the Evanses caused damage to the foundation of the front porch, there being no competent, credible evidence supporting the elements of such claim, and, indeed, the undisputed testimony of plaintiffs' own expert, who worked on the foundation attributed the damages thereto to the aging of the house.

{¶ 9} "Assignment of Error No. IV

{¶ 10} "The trial court erred in after finding a breach of the covenant of quiet enjoyment, and there being undisputed testimony that the Evanses were denied the

security of the premises for 24 hours a day after a key lock box was placed on their door, in not awarding the Evanses damages for each of the four months such condition persisted."

{¶ 11} The facts that are relevant to the issues raised on appeal are as follows. Appellants entered into a one year lease agreement with appellees Michael and Christine Wallace (Wallace) for the residence at 2435 W. 2nd Street, Grand Rapids, Ohio, with the term of the lease to begin on October 1, 2006. Appellants vacated the property when the lease expired on October 1, 2007, without paying the rent for the last month. Once appellants were out of the residence, Wallace found several instances of damage having been caused to the property, the most significant of which was damage to the front concrete steps and house foundation under the front porch. The ultimate cost of the repair to the front steps and the foundation was $3,260, $2,760 of which was paid by Wallace's insurer, The Cincinnati Insurance Company ("CIC").

{¶ 12} Once all of the repairs were completed, Wallace and CIC brought this action against appellants in which CIC sought recovery of the $2,760 that it had paid for the repair of the foundation, and Wallace sought reimbursement of the $500 deductible that it paid for the repair to the steps and foundation, and additional amounts for unpaid rent, unpaid utility bills and a variety of other damage that they claimed appellants had caused to the property. In response, appellants filed an answer and a counterclaim against Wallace in which they claimed, among other things, that they were entitled to damages for breach of their right to quiet enjoyment of the property that resulted when

Wallace put the property up for sale, put a lock box on the door and a prospective purchaser walked in on them.

{¶ 13} Between the time of the filing of the original complaint and the trial, the complaint was amended twice, the counterclaim was amended once, a motion for summary judgment was filled by appellants, and Wallace executed two separate Sworn Proof of Loss statements, the second of which was signed on the day of trial. On December 18, 2008, appellants' motion for summary judgment was denied and the case proceeded to trial to the court.

{¶ 14} The following is a summary of the testimony and evidence presented at the trial. Judy K. Kline Brown, testified that she lived across the street from appellants during the time that they occupied the rental property and stated that, in late September 2007, she noticed that they were moving out of the house. She stated that she saw a white van type truck backing into the Evans' driveway up to the front porch. She did not recall seeing that it had a U-Haul or other company logo on it, and did not see the driver. Brown said that when the truck gave a little jerk, as if it had hit a pothole, someone got out of the passenger side and looked under the back of the truck. Brown said that she walks her dog everyday and later noticed that the front porch foundation and step were pushed in with one of the corners of the steps pushed under the wood part of the porch. Brown verified that photos of the porch that were shown to her showed the damage to the porch and foundation that she had observed but stated that, in the photos, the steps appeared to be back out from under the porch.

{¶ 15} Kyle Evans then testified, as if on cross-examination, that he and his wife, Molly, rented the Wallace property under a one year lease agreement. He acknowledged leaving a couch in the living room and initially stated they left the property "pretty much" in the same condition as when they rented it, except for minor wear and tear. Kyle then stated that, when they moved out, they rented a U-Haul truck for a day but that it was never closer than 10 to 12 feet from the front porch. Kyle denied that he had backed his own vehicle, a white pickup truck, up to the front steps and denied causing or knowing who caused the damage to the front porch. He also noted that some of the foundation cracks shown in the photos were not present when he vacated the rental premises.

{¶ 16} Kyle acknowledged that he had a dog on the property without written permission as required by the lease but stated that he had obtained verbal permission to have the dog. Kyle denied that they owed anything on the water bill but did not dispute that they did not pay the last month's rent of $650 and a $50 late fee. Various other damaged items were also discussed, including chewed and missing woodwork, a hole in the kitchen wall, a broken kitchen cupboard drawer, broken window blinds, a dirty stove and refrigerator, a broken baseboard heater knob, a missing toilet paper dispenser, a missing bedroom door that Kyle said was in the garage, dead grass from a pool, and large amounts of bagged and loose trash.

{¶ 17} John Miller testified that he provided the estimate and made the repairs for the damage to the foundation under the porch. He stated that the porch had to be lifted up, so that he could repair the block that had been pushed in. The amount paid directly to

him from Wallace was $3,260. He agreed that some of the foundation cracks on the side of the porch could have been caused by age.

{¶ 18} Molly Evans, testified as if on cross-examination, that neither the rented U-Haul nor their own white pickup truck was ever backed up to the front porch while they were moving out. She also denied knowing what caused the damage to the front porch and stated that it was not damaged at the time they moved. She also confirmed that they had a dog on the premises. She agreed that they had left a couch, but said they had not left trash scattered in the house. Molly acknowledged that they did not clean the stove or refrigerator and did not pay the September rent or late fee.

{¶ 19} Michael Wallace testified as to the unpaid rent and water bills, damage to the inside of the house, and the damage to the porch. He stated that when he went to the property in the first week of September 2007, the porch foundation was not damaged but when he went back around October 4-5, 2007, he noticed that the porch steps and foundation were pushed in. He took photos, which were introduced into evidence. Wallace stated that he obtained an estimate from John Miller, had the repairs made, and submitted a claim to CIC, his insurer, for $3,260. CIC subtracted $500 for his deductible, and paid $2,760 for the claim.

{¶ 20} Wallace also discussed the cost of repairing the other damage that he claimed was caused by appellants which included damage to woodwork, a missing bedroom door, replacement of locks, repair of a deadbolt, cleaning of kitchen appliances, trash and woodpile removal, lawn mowing and re-seeding, repainting interior walls, and

missing light bulbs. Wallace stated that the additional costs for those items were $2,389.14 and that that amount did not include the liquidated damages of $500 that he was entitled to because appellants had a dog without written permission as provided for in the lease, or a credit for appellants' security deposit. Wallace acknowledged that he executed the first insurance assignment and proof of loss in August 2008. He said that, at CIC's request, he signed an amended proof of loss on the morning the trial began.

{¶ 21} On cross-examination, Wallace acknowledged that Newlove Realty placed a "For Sale" sign in the yard at the property in April of 2007 and that, while he didn't know if the real estate agent put a lockbox on the door, he had anticipated that that would happen. Wallace further acknowledged that he had not seen the foundation and porch being damaged and didn't know if it had been the result of deliberate vandalism by someone other than his renters. Wallace agreed that the photos didn't show tire tracks near the porch but stated that the pictures were not broad enough to show where tracks from a large overhang truck might have been and that the photos were taken three weeks after appellants moved out which would have allowed time for the tire marks to heal.

{¶ 22} Dave Ruhe, a CIC claims adjustor, testified that the initial claim filed by Wallace was for vehicle damage to the front porch and that, when the claim was made, it did not indicate that it was caused by appellants. Ruhe stated that he took photos of the damage on October 9, 2007, and that it was Wallace's decision not to present the claim as one of vandalism by his tenant. Ruhe said that several months later CIC decided to pursue a subrogation claim against appellants, and that in August 2008 he asked the

Wallaces to sign the first proof of loss documentation. Ruhe said he had first considered the claim in the loss report as vandalism but, after reviewing the file in preparation for trial, he determined that the claim had been paid under a vehicle damage claim. Ruhe acknowledged that he had Wallace execute an amended proof of loss statement based on vehicle damage just before trial began. Appellees rested their case.

{¶ 23} Appellant Kyle Evans then testified in response to the damage claims that had been made by Wallace. He denied much of Wallace's allegations and stated that on a number of occasions he had complained to Wallace about problems at the house and that Wallace had promised to make repairs but never did.

{¶ 24} As to the water bill, Kyle stated that there had been plumbing issues and water leaks which caused high water bills in August. He said that a water company service man verified that there was a water leak somewhere which was causing the water gauge to move even with the water shut off. Kyle said that he notified Wallace but nothing was done about it. As to the dog, Kyle acknowledged that there had been a dog at the house but only for about two weeks.

{¶ 25} Kyle then testified that, in April 2007, a real estate agent put a "For Sale" sign in the front yard and a lock box on the front door. Kyle said that the agent called once, and when Kyle said they could not show the house because he was going to be out of town, the agent did not call again. Kyle said that people did, however, use the lock box to enter the house. On one occasion, a couple walked into the home without warning, saying that the real estate company had given them the lock box code and told

them that they could look at the house. On other occasions, people would stop, look in the windows, and then leave after realizing someone was living in the home.

{¶ 26} Kyle denied causing any damage to the porch, stating that the house floor was already very slanted in the living room near the porch foundation. He stated that when they moved out, he rented a U-Haul truck which was not white, but had the U-Haul logo on it. He stated that he never drove either the U-Haul or his white pickup onto the grass area in front of the porch. Kyle stated that he did not make the September rent payment, and had not received notice from Wallace regarding the return of the security deposit. Kyle said that Wallace's earlier testimony was the first he knew that Wallace was charging him the $500 animal fee.

{¶ 27} Molly Evans then gave testimony which affirmed most of what Kyle had stated. As to the water bill, she corroborated that the water company service man said the house had a leak, likely in the pipes somewhere. She said that at the end of August, she paid the outstanding water bill of $531. On cross-examination, Molly viewed a copy of their water bill and acknowledged that they sometimes did not pay the bill on time and that a balance would carry forward. She further acknowledged that they did not pay anything for water after the August 31, 2008 payment. As to the incident of a prospective purchaser coming into the house unannounced, Molly stated that when the couple walked in, she had just gotten out of the shower and had a towel around her.

{¶ 28} On rebuttal, Michael Wallace verified the water billing log that was provided by the Village of Grand Rapids. He stated that after appellants paid the bill in

August, balances of $148.81 and $21.83 for part of August and all of September remained. Wallace stated that he paid those balances after appellants moved out.

{¶ 29} On January 22, 2009, the court filed a judgment entry in which it found that CIC was entitled to reimbursement on its subrogated claim and awarded judgment to CIC against appellants in the amount of $2,760 pus 5 per cent per annum interest and court costs.

{¶ 30} The court found further that the Wallaces were entitled to the following on their claim for damages: Insurance Deductible - $500; September Rent, plus $50 late fee - $700; Water bill - $176.64; Liquidated damages for dog – $500; Repairs, replacements, and cleaning - $993.00; for a total of $2,869.64.

{¶ 31} The court then found that there had been a breach of the covenant of quiet enjoyment when prospective purchasers entered the house unannounced and found further that "the degree of interruption and impairment to defendant's quiet enjoyment of the premises equals damages in the amount of one month's rent ($650.00) * * *."

{¶ 32} The court then credited appellants with that $650 and their $650 security deposit, and awarded judgment to Wallace against appellants in the amount of $1,569.64 plus 5 percent per annum interest and court costs.

{¶ 33} It is from those judgments that appellants bring this appeal.

I.

{¶ 34} In their first assignment of error, appellants contend that the trial court erred in denying their motion for summary judgment against CIC. In support thereof,

appellants argue that CIC did not have standing when it filed suit against them in March 2008, because the "sworn proof of loss" and assignment of rights to the insurer had not yet been executed and that the proof of loss and assignment of rights actually proceeded on was not signed until the morning of trial on December 18, 2008.

{¶ 35} Before summary judgment can be granted it must be shown that there remains no genuine issue as to any material fact and, when construing the evidence that is before the court most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 36} Civ.R. 17(A) states that "[e]very action shall be prosecuted in the name of the real party in interest. * * * No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

{¶ 37} A real party in interest is "'generally considered to be the person who can discharge the claim on which the suit is brought * * * [or] is the party who, by substantive law, possesses the right to be enforced.'" *Discover Bank v. Brockmeier*, 12th Dist. No. CA2006-07-078, 2007-Ohio-1552, ¶ 7, quoting *In re Highland Holiday Subdivision* (1971), 27 Ohio App.2d 237, 240. When an insurance company has paid

benefits on behalf of its insured and the insurance contract includes a subrogation clause, the insurance company becomes a real party in interest to the action. *Shealy v. Campbell* (1985), 20 Ohio St.3d 23, 25; *Smith v. Travelers Ins. Co.* (1977), 50 Ohio St.2d 43, 45; *Keegan v. Sneed* (Oct. 16, 2000), 12th Dist. No. CA2000-02-029.

{¶ 38} In addition, while Civ.R. 10(D) requires that a copy of a written instrument be attached to a complaint when a claim is based on that writing, the complainant's failure to attach a copy does not mandate dismissal of the claim under Civ.R. 12(B)(6). Rather, the proper procedure is to move for a more definite statement under Civ.R. 12(E). See *Landskroner v. Landskroner* (2003), 154 Ohio App.3d 471, 2003-Ohio-4945, ¶ 57; *Point Rental Co. v. Posani*, 52 Ohio App.2d 183, 186.

{¶ 39} In this case, Michael Wallace testified that he agreed to permit the insurance company to seek reimbursement from appellants by executing the proof of loss documents. Appellants do not argue that CIC could *never* have standing or was not a real party in interest to the suit, but only that the assignment documents were not executed until after the suit was filed. Although appellants did not file a motion for more definite statement as required, it ultimately would have made no difference. CIC eventually attached a copy of the insurance policy to its second amended complaint which was accepted by the trial court, in compliance with Civ.R.10(D).

{¶ 40} Since CIC paid the claim made by its insureds, the Wallaces, it was entitled to seek reimbursement of that payment from appellants, in accordance with the subrogation provisions in the insurance contract. Consequently, CIC is and was a real

party in interest and had a right to file suit against appellants. Even presuming the delayed assignment had some bearing on CIC's interest, the later attached policy and executed assignment agreement ultimately cured any possible defect.

{¶ 41} In accordance with the foregoing, this court finds that appellants have not shown that they were entitled to judgment as a matter of law on appellees' second amended complaint and the first assignment of error is not well-taken.

II.

{¶ 42} In their second assignment of error, appellants contend that the trial court erred in entering judgment against them in favor of CIC, again because the proof of loss and assignment of rights documents were filed after the initial complaint was filed and then amended on the day of trial. For the same reasons discussed in appellants' first assignment of error, this court finds that appellants' argument that the delay in filing the amended proof of loss and assignment of rights documents precluded the trial court from entering judgment in favor of appellees, is without merit.

{¶ 43} Accordingly, appellants' second assignment of error is not well-taken.

III.

{¶ 44} In their third assignment of error, appellants essentially claim that the trial court's determination that appellants caused damage to the foundation was not supported by competent, credible evidence, and was, thus, against the manifest weight of the evidence.

{¶ 45} A trial court judgment in a civil case will not be reversed on appeal as against the manifest weight of the evidence where the judgment is "supported by some competent, credible evidence going to all the essential elements of the case." *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. Furthermore, an appellate court generally defers to the findings of the trier-of-fact. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80; see, also, *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. In factual determinations, an appellate court should not substitute its judgment for that of a trial court, which is in a better position to observe the witnesses, view their demeanor, and use these observations to weigh the credibility of witness testimony. *Seasons Coal*, supra, at 80.

{¶ 46} In an action against a former tenant, a landlord bears the burden of presenting evidence that is sufficient to link any alleged damage to the tenant's failure to fulfill obligations under R.C. 5321.05 or a lease agreement. *Whitestone Co. v. Stittsworth*, 10th Dist. No. 06AP-371, 2007-Ohio-233, ¶ 27, citing *Zilka v. Asberry*, 6th Dist. No. H-04-022, 2005-Ohio-1881, ¶ 9. See, also, *Oakwood Management Co. v. Young* (Oct. 27, 1992), 10th Dist. No. 92AP-207 (landlord has burden to prove that tenant was responsible for the alleged damages). Where a landlord has done so and has been able to repair the damage that has been done by the tenant to the property, "the proper measure of damages will usually be the reasonable costs necessary to restore the structure." *Arrow Concrete Co. v. Sheppard* (1994), 96 Ohio App.3d 747, 750.

{¶ 47} In this case, evidence was presented that damage occurred to the foundation of the porch during a limited period of time - somewhere between the end of September, before appellants vacated the home, and the first week in October, after they left. Testimony was also presented that, in late September, before appellants moved out, a neighbor observed a large white van or U-Haul type truck backing up to the porch. She saw the truck "jerk" like it hit a pothole and a passenger get out to look at the back of the truck. The neighbor also said the truck was at the house for a day, and that after it was gone, she noticed the steps pushed into the foundation. Although she said she did not see a U-Haul logo on the truck, and didn't see who the occupants of the truck were, an inference can be made that it was the U-Haul rented by appellants. The conflicting evidence presented regarding whether it was backed up to the porch and caused the damage is a matter of credibility for the trial court to determine.

{¶ 48} Since this court may not substitute its judgment for that of the trier of fact, who was in the best position to judge the credibility of the witnesses, we decline to disturb the trial court's findings. Upon consideration thereof, this court finds that the trial court's findings are supported by some competent, credible evidence and, therefore, not against the manifest weight of the evidence.

{¶ 49} Accordingly, appellants' third assignment of error is not well-taken.

IV.

{¶ 50} In their fourth assignment of error, appellants contend that the trial court erred in failing to award them damages equal to four months rent instead of just one, as compensation on their breach of the covenant of quiet enjoyment claim.

{¶ 51} In Ohio, a covenant of quiet enjoyment is implied in every lease contract for realty. *Hamilton Brownfields Redevelopment, LLC v. Duro Tire & Wheel*, 156 Ohio App.3d 525, 2004-Ohio-1365, ¶ 23, citing *Dworkin v. Paley* (1994), 93 Ohio App.3d 383, 386. A covenant of quiet and peaceful enjoyment is breached when the landlord substantially interferes with the beneficial use of the premises by the tenant. *Howard v. Simon* (1984), 18 Ohio App.3d 14, 16, citing *Frankel v. Steman* (1915), 92 Ohio St. 197, 200. The degree of the impairment required is a question for the finder of fact. *Dworkin*, supra.

{¶ 52} Damages awarded for a breach of a covenant of quiet enjoyment should fully and adequately compensate the tenant for the losses he has sustained. *Kostoglou v. Midkiff Enterprises, Inc.* (Nov. 6, 2001), 7th Dist. No. 01 C.A. 23, citing *Howard*, supra, at 16-17, and *Woolworth Co. v. Russo* (App.1933), 16 Ohio Law Abs. 307, 310. Ohio law is unsettled how this measure should be applied. *Howard*, supra, at 16-17. When a landlord breaches the covenant of quiet enjoyment, a tenant may be relieved of his or her obligation to pay rent for the premises. See *GMS Mgt. Co., Inc. v. Datillo* (June 15, 2000), 8th Dist. No. 75838.

{¶ 53} The Ohio Supreme Court has allowed a tenant whose covenant has been breached to recover all rent paid during the period when a landlord's action has taken away a part of the privileges leased to him. See *Frankel*, supra. Later cases, however, have measured damages more conservatively, awarding the difference between the rent paid and the actual value received. *Woolworth Co.*, supra, at 310. The latter measure is substantially the same as the measure for either a breach of duty set forth in a lease or a statutory duty. *Kostoglou*, supra.

{¶ 54} In this case, the trial court determined that the amount of damages that appellants were entitled to receive for loss of quiet enjoyment was equal to one month's rent, $650. The trial court was not required to award the full amount of rent for each month after the real estate agency began sending potential buyers to the property. It is for the trier of fact to determine the degree or amount of intrusion and loss of use for which the tenants will be compensated. This court has reviewed the evidence presented at trial and upon consideration thereof and the law, finds that appellants have not shown that the trial court erred in awarding damages equal to one month's rent or $650, for loss of quiet enjoyment of the property.

{¶ 55} Accordingly, appellants' fourth assignment of error is not well-taken.

{¶ 56} The judgment of the Bowling Green Municipal Court is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Charles D. Abood, J. _____
CONCUR.
JUDGE

Judge Charles D. Abood, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.