

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

Timothy F. Kazmaier, et al.

Appellees

v.

Fat Jacks, LLC

Appellant

Court of Appeals Nos. WD-09-048
WD-09-057

Trial Court Nos. CVG 0900240
CVG 0900674

DECISION AND JUDGMENT

Decided: August 6, 2010

* * * * *

Thomas G. Mackin, for appellees.

William F. Hayes, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This accelerated appeal arises from two judgments of the Perrysburg Municipal Court in two separate forcible entry and detainer ("FED") actions. In the first

action, case No. CVG 0900240, the court granted the landlord, plaintiffs-appellees, Timothy Kazmaier, et al., restitution of the premises. In the second action, case No. CVG 0900674, the court entered a default judgment against the tenant, Fat Jack's, LLC. We sua sponte consolidated the two cases for purposes of appeal and Fat Jack's now challenges those judgments through the following assignments of error.

{¶ 2} "First Assignment of Error: The trial court's finding that the lease had not been renewed for an additional three year period was against the manifest weight of the evidence.

{¶ 3} "Second Assignment of Error: The trial court erred in finding that the contract period of the lease was a month to month rather than a one year period.

{¶ 4} "Third Assignment of Error: In case number CVG 900674, the second FED case, the court had no authority to render a judgment on the same set of facts and issues that existed in case number CVI 0900240."

{¶ 5} The relevant facts of this case are as follows. In March 2005, the parties, Kazmaier and his then wife, Rose M. Kazmaier, and Fat Jack's, entered into a commercial lease of property located at 202 Louisiana Avenue, Perrysburg, Ohio, for an initial three year term, commencing March 1, 2005, and ending February 28, 2008. The rent terms of the lease read:

{¶ 6} "Lessee hereby covenants and agrees to pay to Lessor as rent for the above described premises, for the initial term a base annual rent in the sum of * * * \$14,000.00,

payable in equal monthly installments of * * * \$1,200.00. The full amount of the monthly installment of the base annual rent shall be due and payable on March 1, 2005 and the remaining installment payments are due and payable on the first day of each successive month thereafter."

{¶ 7} The lease further required Fat Jack's to notify the Kazmaiers of its intent to renew the lease not less than two months prior to the expiration of the initial three-year term. Fat Jack's asserted in the proceeding below that it timely notified the Kazmaiers of its intent to renew the lease. The Kazmaiers countered that they never received a notice of Fat Jack's intent to renew. After February 28, 2008, the Kazmaiers continued to accept Fat Jack's lease payments, until January 2009, but considered it a hold-over tenant.

{¶ 8} On February 2, 2009, the Kazmaiers served Fat Jack's with a three-day notice to vacate the premises pursuant to R.C. 1923.04. When Fat Jack's failed to vacate, the Kazmaiers filed the first FED action on February 12, 2009, case No. CVG 0900240. Fat Jack's responded with an answer and counterclaims for bad faith, anticipatory breach of contract, and breach of contract. Because the damages sought by Fat Jack's exceeded the Perrysburg Municipal Court's jurisdictional amount, the counterclaims were ultimately transferred to the Wood County Court of Common Pleas, where that case was stayed pending appeal of the two FED actions.

{¶ 9} The first FED action, case No. CVG 0900240, proceeded to a hearing before a lower court magistrate on March 31, 2009. Fat Jack's asserted that it had

properly and timely notified the Kazmaiers of its intent to renew the lease and submitted an unsigned copy of a letter to that effect, dated December 1, 2007. In addition, John White, a partner in Fat Jack's, testified that he prepared the letter notifying the Kazmaiers of Fat Jack's intent to renew and mailed it to the Kazmaiers at the same address to which he sent rent payments. The notice, however, was not sent by certified mail. In contrast, the Kazmaiers asserted that they never received any notice of intent to renew. Both Rose and Timothy Kazmaier testified to that fact.

{¶ 10} In a decision dated April 13, 2009, the lower court magistrate determined that Fat Jack's failed to notify the Kazmaiers of its intent to renew the lease. Accordingly, the written lease expired at the end of February 2008, and, upon the Kazmaiers' acceptance of rent, Fat Jack's became a periodic tenant. On the issue of the term of the periodic tenancy, the magistrate determined that because the lease provided for annual rent, although payable in monthly installments, Fat Jack's became a year-to-year tenant on March 1, 2008, with that term not expiring until February 28, 2009. The magistrate therefore concluded that the Kazmaiers' attempt to terminate the lease through the three day notice was premature, and the magistrate recommended that the case be dismissed.

{¶ 11} The Kazmaiers responded by filing objections to the magistrate's decision. On May 7, 2009, the lower court issued a judgment on the objections which amended the magistrate's decision. The lower court determined that because Fat Jack's paid rent on a

monthly basis, the periodic tenancy that arose upon the expiration of the lease was month to month. The court therefore held that the Kazmaiers had properly instituted the first FED action and ordered restitution of the premises.

{¶ 12} Following the magistrate's decision in the first FED action, and while awaiting the lower court's ruling on their objections, the Kazmaiers, on April 17, 2009, served Fat Jack's with a second notice to vacate the premises. Then, on April 24, 2009, the Kazmaiers filed a new FED action based on the second notice to vacate, case No. CVG 0900674. That action sought to evict Fat Jack's from the premises following the termination of the tenancy that expired on February 28, 2009. Fat Jack's failed to appear in that action, and in a decision of May 19, 2009, the magistrate determined that the periodic tenancy was terminated and recommended that the Kazmaiers be granted a judgment for possession of the premises. Fat Jack's filed objections to that magistrate's decision on the ground that the court had no authority to hear the matter because the facts in the case were identical to the facts in case No. CVG 0900240. On June 9, 2009, however, the lower court issued a judgment entry affirming the magistrate's decision and entering a default judgment against Fat Jack's. Fat Jack's now challenges both judgments below.

{¶ 13} In their first assignment of error, Fat Jack's contends that the lower court's finding that Fat Jack's had not renewed the lease was against the manifest weight of the evidence.

{¶ 14} It is well settled in Ohio that "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. Matters relating to the credibility of a witness at trial and/or the weight accorded to the evidence offered at trial are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. A reviewing court gives these determinations of fact great deference, as the trier of fact is best able to evaluate the credibility of the proffered testimony. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶ 15} At the trial below, John White, a partner in Fat Jack's, testified that he prepared the letter notifying the Kazmaiers of Fat Jack's' intent to renew and mailed it to the Kazmaiers in December 2007, at the same address to which he sent rent payments. He did not send the letter by certified mail and did not keep a copy of the signed letter. Rather, Fat Jack's introduced into evidence a print-out of a "screen shot" from White's computer showing a file named "Lease Renewal2008.doc," which was purportedly last modified on December 1, 2008 at 11:31 p.m., as evidence of his preparation of the letter. The Kazmaiers both testified, however, that they never received the letter. The trial court found the Kazmaiers' testimony more credible.

{¶ 16} Upon consideration, we find there was competent, credible evidence to support the trial court's finding that Fat Jack's did not renew the lease. The finding was

not against the manifest weight of the evidence and the first assignment of error is not well-taken.

{¶ 17} In its second assignment of error, Fat Jack's asserts that the lower court erred in finding in the first FED action that the periodic tenancy, following the expiration of the lease, became month to month. For the following reasons, we agree.

{¶ 18} "In Ohio, a tenant who holds over after the term of his lease expires is a tenant at sufferance. *Anderson v. Brewster* (1886), 44 Ohio St. 576, 580 * * * . As such, the landlord may elect to treat the tenant as a trespasser, or hold him to a new lease term. *Gladwell v. Holcomb* (1899), 60 Ohio St. 427, * * * paragraph two of the syllabus. When a tenant holds over beyond the lease term and pays rent according to the former terms, the law implies a contract on the tenant's part to hold over for an additional term under the same conditions which governed the prior term. * * * The election to hold the tenant to a new term lies with the landlord and his acceptance of rent implies an election to treat the tenant as a holdover. *Baltimore & Ohio RR. Co. v. West* (1897), 57 Ohio St. 161, 165-166 * * * . " *Craig Wrecking Co. v. S.G. Loewendick & Sons, Inc.* (1987), 38 Ohio App.3d 79, 81. To determine the length of the term of the hold-over tenancy, courts look to the provision for the payment of rent set forth in the expired lease. *Cesta v. Manfredi* (1995), 101 Ohio App.3d 326, 329. Accordingly, an expired lease that provided for annual rent creates a hold-over tenancy from year to year and one that provided for

monthly rent creates a hold-over tenancy from month to month. *Id.*, citing *Wineburgh v. Toledo Corp.* (1932), 125 Ohio St. 219, 222.

{¶ 19} In the present case, the lease in question required Fat Jack's to pay "base annual rent" of \$14,400, payable in equal monthly installments of \$1,200. The lease also provided that if the tenant exercised all three renewal options, after the termination of the third renewal option, the lease was renewable year to year upon the same terms except the "annual rent" would be negotiated between the parties.

{¶ 20} In our view, the lease at issue clearly provided for annual rent. Upon the expiration of the initial lease term, Fat Jack's continued payment of the rent, the Kazmaiers continued to accept the rent, and Fat Jack's became a hold-over tenant on a year-to-year tenancy. Our conclusion is consistent with the holdings in *Cesta*, *supra* and *Baltimore*, *supra*. In *Cesta*, *supra*, at 327, the lease provided for "yearly rent of \$8,400 payable in equal monthly installments of \$700." The court held that the lease, although defective, created a year long tenancy which obligated the tenant to pay rent for the entire year. *Cesta* follows *Baltimore*, in which a five year lease required the tenant to pay rent at \$386 per year, payable monthly. Upon expiration of the five year term, the tenant became a hold-over tenant and paid rent at the same rate as set forth in the lease. The court held that the term of the tenancy became year to year and the tenant was responsible for rent for the remainder of the year.

{¶ 21} Because Fat Jack's was a hold-over tenant on a year-to-year tenancy, the term of that tenancy was from March 1, 2008, until February 28, 2009. The Kazmaiers' service on Fat Jack's of the three-day notice to vacate on February 2, 2009, and subsequent filing of the first FED action on February 12, 2009, were premature, as Fat Jack's was still in lawful possession of the premises. Accordingly, the lower court should have dismissed the first FED action as premature, as was recommended by the magistrate. The second assignment of error is well-taken.

{¶ 22} In its third assignment of error, Fat Jack's asserts that the lower court erred in granting the Kazmaiers a default judgment in the second FED action.

{¶ 23} The second FED action was filed on April 24, 2009, following the April 17, 2009, filing of a new three-day notice to vacate. At that time, the Kazmaiers had ceased accepting Fat Jack's' lease payments and noted February 28, 2009, as the date of the termination of the periodic tenancy. The Kazmaiers were, therefore, well within their rights to terminate the year-to-year periodic tenancy. See *Mark v. Long*, 180 Ohio App.3d 832, 2009-Ohio-581. Fat Jack's did not respond to the complaint or appear in court to defend the action. The lower court magistrate recommended that judgment be granted for the Kazmaiers. Fat Jack's filed objections to that recommendation, which the lower court rejected. The court then entered a default judgment for the Kazmaiers.

{¶ 24} Fat Jack's now contends that the lower court had no authority to render a judgment in the second FED action on the same facts that it rendered judgment in the first

action. Given our ruling under the second assignment of error, however, that the trial court should have dismissed the first FED action as premature, we see no error in the lower court's granting a default judgment and restitution of the premises in the second FED action. The third assignment of error is not well-taken.

{¶ 25} On consideration whereof, the court finds that the judgment of the Perrysburg Municipal Court in case No. CVG 0900240 is reversed and the case is hereby ordered dismissed. The judgment of the Perrysburg Municipal Court in case No. CVG 0900674 is affirmed. Costs of this appeal are ordered to be shared equally by the parties pursuant to App.R. 24. Appellees' request for a decision is moot.

REVERSED IN PART, AND
AFFIRMED IN PART.

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

Mark L. Pietrykowski, J.

Arlene Singer, J.
CONCUR.

Keila D. Cosme, J.,
CONCURS IN PART, AND
DISSENTS IN PART.

JUDGE

JUDGE

COSME, J.

I. Background

{¶ 26} Appellant, Fat Jack's, LLC, and appellees, Timothy Kazmaier and Rose Williams fka Kazmaier, executed a commercial lease for a term of three years providing for the payment of annual rents in equal monthly installments, and a renewal option for two additional three-year terms. The first three-year term expired February 20, 2008. Fat Jack's failed to deliver a written option to renew for an additional three-year term. Nevertheless, Fat Jack's remained in possession and continued to pay rent.

{¶ 27} Appellees assert that Fat Jack's became a holdover tenant subject to month-to-month tenancy. Appellees attempted to terminate the lease by giving Fat Jack's 30 days notice sometime in December 2008. But Fat Jack's refused to vacate the premises, leading appellees to bring an action against Fat Jack's under R.C. Chapter 1923 to repossess their property.

{¶ 28} Appellees filed their first complaint for forcible entry and detainer on February 12, 2009 (16 days before the anniversary date). Fat Jack's responded by filing an answer in which it asserted that it had renewed the lease for an additional three-year term. Fat Jack's also filed a counterclaim for bad faith, anticipatory breach of contract, and breach of contract in which it requested compensatory damages, punitive damages, and attorney fees. Because Fat Jack's' claims were in excess of the municipal court's jurisdictional limits, the counterclaim was transferred to the Wood County Court of

Common Pleas, where it was stayed pending appeal of the judgments of the municipal court concerning the forcible entry and detainer actions.

{¶ 29} The parties disputed whether a written renewal for a second three-year term was created under the terms of the contract. Fat Jack's claimed that it sent a letter of renewal and provided the trial court with an unsigned copy of the letter. Appellees said they never received it. The magistrate concluded that the letter had not been sent. The magistrate also concluded that Fat Jack's was a holdover tenant and that the lease provision for an annual rent, although payable in monthly installments, created a tenancy from year-to-year that did not expire until February 28, 2009. The magistrate recommended that appellee's premature forcible entry and detainer action be dismissed.

{¶ 30} Appellees objected to the magistrate's decision, asserting that the magistrate misapplied the law. While this first action remained pending, appellees filed a second forcible entry and detainer action on April 24, 2009. This time they sought to evict Fat Jack's from holding over beyond February 28, 2009, the date on which the holdover tenancy expired—whether monthly or annually. Appellees stopped accepting rent payments at the end of February.

{¶ 31} Believing the second action was improper, Fat Jack's declined to answer or appear for the hearing before the magistrate, who accordingly ruled in appellees' favor. Fat Jack's objected to the trial court, arguing that the magistrate erred in ruling on the

second action because it was fully encompassed within the first action that remained pending with the court.

{¶ 32} The trial court disposed of the first action on May 7, 2009, holding that a month-to-month holdover tenancy was created, and ordering Fat Jack's eviction. On June 9, 2009, the trial court disposed of the second action in the same manner. Fat Jack's timely appealed both judgments, which we consolidated for review. Three assignments of error are presented.

II. Lease Renewal

{¶ 33} In its first assignment of error, Fat Jack's maintains:

{¶ 34} "The trial court's finding that the lease had not been renewed for an additional three year period was against the manifest weight of the evidence."

{¶ 35} Specifically, Fat Jack's argues that the trial court erred in finding that "no written notice of renewal was received" by appellees. Fat Jack's asks that we reject the magistrate's fact finding and credibility determinations.

{¶ 36} "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279. Since the trial court is in a better position to evaluate the credibility of the witnesses and their testimony, an appellate court is bound to accept the trial court's findings of fact if they are supported by such evidence. *Hill v. Briggs* (1996),

111 Ohio App.3d 405, 412, discretionary appeal not allowed (1996), 77 Ohio St.3d 1469, citing *State v. Schiebel* (1990), 55 Ohio St.3d 71. "A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not." *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 81. See *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶ 37} I agree with the majority that the magistrate's decision regarding lease renewal, which was adopted by the trial court, was supported by some competent, credible evidence, such that we are bound to accept it. Specifically, Fat Jack's' claim that it sent the written notice of renewal was supported only by a screen shot of a computer showing the date on which a letter was created. Despite the importance of the letter, Fat Jack's did not send it by certified mail, nor could its owners specify anything they did to ensure that the notice was sent, other than to talk about it. In accepting the assertions of appellees that they never received the notice of renewal, the magistrate relied on the credibility of the witnesses and the presumption that the mail is delivered when it is sent.

III. Lease Term of Years

{¶ 38} In the second assignment of error, Fat Jack's maintains, "The trial court erred in finding that the contract period of the lease was a month to month rather than a one year period." Fat Jack's asserts that any holdover tenancy was a year-to- year, rather than a month-to-month, because the lease called for an annual rent payable in monthly installments. I agree with the majority that under applicable law, the language of the

lease agreement supports a finding that Fat Jack's' holdover created a year-to-year tenancy.

{¶ 39} In *Baltimore & Ohio R.R. Co. v. West* (1897), 57 Ohio St. 161, 165, the Supreme Court of Ohio held that "under a lease for a term of years at an annual rent, if the lease for any cause be void he becomes a tenant for a year at the rent reserved in the lease, and subject to all of its provisions, except its duration, and when his possession is continued into the next year a tenancy from year to year is created, and continues so long as he enters upon a new year, until the end of the term; and this is so though the rent be payable quarterly or monthly, or at shorter periods." See, also, *Wineburgh v. Toledo Corp.* (1932), 125 Ohio St. 219, 222.

{¶ 40} More pointedly, the court held that "when, after the expiration of the term, he holds over into another year, without any new agreement or arrangement with the landlord, the latter may treat him as a tenant for that year, at the same rent, and upon the terms and conditions of his prior occupancy, or as a trespasser, at his election; but, if the landlord accept the rent, or acquiesce in such holding over for a considerable time, his election will be regarded as made in favor of the tenancy, and then it cannot be terminated before the end of the year by either party without the consent of the other." *Baltimore & Ohio RR. Co.*, supra, at 165.

{¶ 41} Appellees propose that we instead look to *Wineburgh* and *Weishaar v. Strimbu* (1991), 76 Ohio App.3d 276, for guidance in determining whether a month-to-

month tenancy was created. But *Weishaar* and *Wineburgh* are inapposite. In *Weishaar*, supra, at 284, the Eighth Appellate District held, "The duration of a lease is determinable by the provisions for payment of rent, so a lease providing for annual rent creates a tenancy from year to year. A month-to-month tenancy is created where a lease provides for monthly payments." See *Wineburgh*, 125 Ohio St. at 222. See, also, *Manifold v. Schuster* (1990), 67 Ohio App.3d 251, 256; *Lithograph Building Co. v. Watt* (1917), 96 Ohio St. 74, paragraph six of the syllabus.

{¶ 42} *Weishaar* involved an oral lease agreement for a period of two years. The court held that a tenancy at will was created when the lessee took possession of premises under an invalid lease, and that a tenancy at will converts to a periodic tenancy upon payment and acceptance of rent. See Restatement of Law 2d, Property (1976), 82-83, Section 2.3 and Comment a. In *Weishaar*, there was no language indicating an "annual rent." As such, this was never an issue.

{¶ 43} Similarly, in *Wineburgh*, no reference was made to annual rent. The Supreme Court of Ohio held, "A defectively executed lease for a term of five years upon monthly rental creates a tenancy in the lessee from month to month." *Wineburgh*, supra, at paragraph one of the syllabus. The *Wineburgh* court applied the statement of law articulated in *Baltimore & Ohio RR. Co. v. West*—the duration of a holdover tenancy is determinable by the lease provision for payment of rent. A lease providing for annual rent creates a tenancy from year to year; a lease providing for monthly rent creates a

tenancy from month to month. *Wineburgh*, supra, at 222. See *Cesta v. Manfredi* (1995), 101 Ohio App.3d 326, 329.

{¶ 44} The terms of the lease between Fat Jack's and appellees provided for the payment of annual rent in the sum of \$14,400 in equal monthly installments of \$1,200. Pursuant to *Baltimore & Ohio RR. Co.*, *Wineburgh*, and *Weishaar*, the lease at issue here created a year-to-year tenancy because it provided for an annual rent. The trial court erred in finding that a month-to-month tenancy existed.

IV. Propriety Of Relitigating The Issues

{¶ 45} In its third assignment of error, Fat Jack's claims, "In case number CVG 900674, the second FED case, the court had no authority to render a judgment on the same set of facts and issues that existed in case number CVI 0900240." Fat Jack's asserts the second action for forcible entry and detainer ("FED") against it was improper because "a claim litigated to finality * * * cannot be re-litigated." In essence, Fat Jack's is claiming the second action is barred by the doctrine of res judicata. While I do not agree with Fat Jack's reasoning, I conclude the second FED claim nevertheless was improper. Therefore, I dissent from the majority's disposition of this assignment of error, and would reverse and remand the case for further proceedings.

{¶ 46} A judgment in a forcible entry and detainer action does not necessarily bar a later action between the same parties growing out of the same subject matter. See 37 Ohio Jurisprudence 3d (2002) 157, Ejectment, Section 109. However, a judgment in a

forcible entry and detainer action does bar relitigation of issues that were actually and necessarily decided in the former action. See *McAlpine v. Patrick*, 8th Dist. No. 86453, 2006-Ohio-1101, ¶ 10; *Great Lakes Mall, Inc. v. The Deli Table* (Sept. 16, 1994), 11th Dist. No. 93-L-154.

{¶ 47} In this case, appellees filed two FED actions. The first was filed February 12, 2009, and prematurely sought to terminate the holdover tenancy effective January 31, 2009. The second action was filed April 14, 2009, and sought termination at the end of the one-year holdover tenancy on February 28, 2009. The problem lies with Fat Jack's' claim in the first action that it had effectively renewed the lease for a three-year term, as well as its counterclaims that are predicated on allegations inconsistent with appellees' claimed right to possession.

{¶ 48} An adjudication of whether the lease was effectively renewed for a second three-year term completely encompasses the issues asserted in the second forcible entry and detainer action—rightful possession of the premises. This issue remained pending when the second action was brought. Indeed, at the time the second action was filed, the trial court had not yet ruled on appellee's objections to the magistrate's decision, which found that a year-to-year holdover tenancy existed. Simply amending the pleadings in the first action would avert the risk of multiple, inconsistent rulings inherent in permitting two different triers of fact to adjudge the same question.

{¶ 49} The majority concludes that the first FED action was premature and therefore subject to dismissal. That may be so, but it does not change the fact that at the time the second FED action was filed, the first FED action was not dismissed, but instead remained pending. Further, even if we ignore appellees' first (defective) claim for possession, we simply cannot ignore Fat Jack's' pending counterclaims, as the majority does. If meritorious, Fat Jack's' claims would defeat both the first and second attempt by appellees to retake possession of the property.

{¶ 50} Fat Jack's was correct, albeit ill-advised, to ignore the second FED action because the court could not assert jurisdiction over claims that were already pending in the first action. Therefore, I respectfully dissent.