[Cite as *Anderson v. Ballard*, 2010-Ohio-3926.]

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

Brenda F. Anderson
and Daniel D. Anderson

Appellees

v.

Jennifer Ballard

Defendant

[Billy P. Jones-Appellant]

Case No. L-10-1007

Trial Court No. CVG 09-11165

DECISION AND JUDGMENT

Decided: August 20, 2010

* * * * *

Jenelda E. Witcher, for appellant.

* * * * *

COSME, J.

{¶ 1} This is an appeal from a judgment in which the Toledo Municipal Court awarded damages for unpaid rent on appellees' second claim for relief in an action for

forcible entry and detainer, but failed to consider appellant's arguments that the rental agreement was unconscionable and the premises uninhabitable. Because we find those issues to have been sufficiently raised and the rental agreement in this case to be unconscionable as a matter of law, we reverse the judgment of the trial court.

I. BACKGROUND

{¶ 2} On October 1, 2007, appellant, Billy Jones, and his daughter, Jennifer Ballard, executed two agreements entitled "Residential Lease" and "Option to Purchase." Both agreements concern property at 3110 Warsaw Street, Toledo, Ohio, which is owned by appellees Daniel Anderson, an attorney, and his wife, Brenda Anderson.

{¶ 3} The "Residential Lease" denominates and is signed by appellees as the landlord, Jennifer Ballard as tenant, and Billy Jones as guarantor. The lease provides for a monthly rental amount of $400 for the period October 1, 2007, through April 31, 2010, and provides that no security "deposit is being charged in consideration for tenant painting and or decorating the kitchen and bathroom * * *." The lease requires the tenant to notify "Daniel Anderson promptly *in writing* of any hazards or items in need of repair and allow a reasonable time for the repair to be made" and prohibits the tenant from hiring "any individual to do work on the property and seek any reimbursement from Daniel Anderson." (Emphasis sic.) The lease further provides: "***Property is inspected accepted as is with no repairs promised or expected by tenants***." (Emphasis sic.)

{¶ 4} Pursuant to the lease, the tenant is responsible for payment of electric, gas, water, sewer, and garbage. The lease also provides that monthly rent is due before the first day of each month and must be mailed and "physically ***received*** prior to the FIRST of each month to avoid a $55.00 late fee," that "[n]o rent will be accepted after the 6th of the month and lease may be terminated," and that "[t]enant and guarantor agree to be liable for rent for the duration of this lease even if lease is terminated by landlord for violations of the lease terms." (Emphasis sic.)

{¶ 5} The "Option to Purchase" lists appellees as the seller and designates Jennifer Ballard as "Purchaser" and Billy Jones as "Purchaser Number 2." It then provides:

{¶ 6} "Jennifer Ballard is the tenant at 3110 Warsaw Street, Toledo, Ohio. One half of the monthly rental payment received will be applied to the purchase price of $24,000.00.

{¶ 7} "Should tenant pay rent payments on this property for a term of 120 months the property will be paid in full and a deed will be issued.

{¶ 8} "Should Jennifer Ballard default on the rental payment agreement, Billy Jones will be given first option to continue the monthly payments. He will then be the owner of this purchase option and may take title to said house when the 120 month rental term has been met. The rental term will start as of October 1, 2007 and continue for 111 [sic] additional months until the purchase option is satisfied in full.

{¶ 9} "Should both parties, Jennifer Ballard and Billy Jones default on this purchase option * * * Daniel Anderson will retain the property along with any and all improvements that may have been made by occupants.

{¶ 10} "Price is fixed on property and if parties exercise this option they are responsible for any and all costs of modifications, improvements, repairs, and maintenance.

{¶ 11} "Occupants will maintain insurance to cover contents of the property."

{¶ 12} On June 3, 2009, appellees filed a complaint in forcible entry and detainer against Ballard and Jones with a second cause of action for money damages, primarily for unpaid rent. Appellees attached only a copy of the lease to their complaint. The matter of restitution of the premises was heard by a magistrate on June 17, 2009. Neither Ms. Ballard nor Mr. Jones appeared at the hearing, and the magistrate recommended that judgment be entered for restitution as to Ballard only.

{¶ 13} On June 18, 2009, Ballard filed an objection to the magistrate's ruling on the basis that she was injured and in the hospital emergency room on the date of the hearing. She also alleged in her objection that the lease and option to purchase that she signed in October of 2007 were, or at least were supposed to be, a land contract; that the "house was in ver[y] poor condition" and "not livable" at the time; and that she was required to make extensive repairs to the house "before me and my son could physically move in." Attached to her objection was an itemized list of the repairs that she and Jones

had made before and after her occupancy in the amount of $8,150. Ballard claimed that at the time of contracting with the Andersons, she was enrolled at Penta Career Center Adult Education in a carpentry program and agreed to invest in repairs "with the assumption that I was buying the house." On June 22, 2009, Jones filed an answer alleging that he did "not sign a lease for Miss Ballard," but instead signed "a land contract and inform[ed] Mr. Anderson if she [Ballard] lost the house I would like to be the first one to try an[d] buy the house."

{¶ 14} By judgment entry dated July 8, 2009, the trial court denied Ballard's objection. No appeal was taken from that judgment.

{¶ 15} The matter of damages against Ballard and Jones proceeded to evidentiary hearing on August 17, 2009. Ballard, Jones, and Mr. Anderson testified and presented evidence in their own behalf. Mrs. Anderson did not appear as a witness. Ballard and Jones testified that they did not intend to sign a residential lease agreement with the Andersons. Instead, they requested and were led to believe by Mr. Anderson that Ballard was entering into a land installment contract for a term of 120 months and that Jones was being given the option to continue the installment payments on the property in the event that Ballard failed to complete her land contract. Ballard testified that she did not receive a copy of the purported residential lease and option to purchase until several months after she signed them, and Jones testified that he never received a copy of either document until after the present action was commenced. They both stated that they would not have

accepted a lease agreement given the need for extensive repairs to the house. Specifically, Ballard summarized, "I would never have moved in the house on a lease because it wasn't worthy of a lease. It was in terrible condition. And I had to work on the house for a whole month before I could move me and my son in there."

{¶ 16} Ballard also testified that the furnace ceased working twice during her occupancy of the premises and that she paid to have it repaired:

{¶ 17} "I called Mr. Anderson [about the furnace] and * * * talked to his wife the first time, Brenda Anderson, and * * * she said, well, it's not our problem because you're buying the house. I didn't have any money to get the furnace fixed. Mr. Jones helped me pay for the furnace. That was the first year. The second year the furnace went out again and I didn't even call him."

{¶ 18} Defendants presented the itemized list of repairs that was attached to Ballard's objections to the magistrate's decision on the issue of restitution. Although the list was admitted into evidence, the trial court made clear during Jones' cross-examination of Anderson that it did not consider the repairs or the condition of the premises to be of any relevance, stating that defendants needed to file a counterclaim "in order to get your matters into the court." Anderson cross-examined Ballard on the basis that she agreed in the lease to accept the premises "as is" with no repairs expected by tenants.

{¶ 19} Anderson testified on direct examination that Ballard and Jones each signed and received a copy of the lease on October 1, 2007, and that the lease was "designed

specifically to accommodate the needs of the property and the specific needs of the defendant." He also testified that the premises were in a livable condition and that he was never notified about problems with the furnace. When asked on cross-examination by Jones why he failed to attach a copy of the purchase option to his complaint, Anderson replied that the option to purchase "is independent [of the lease] and had [Ballard] lived there for ten years, she could have chosen to exercise that option as well as you could have." However, the trial court precluded Ballard from asking Anderson on cross-examination why she would have to fix up his property if their agreement was truly for a lease. At that point in her cross-examination, the trial court interjected: "The lease has indicated clearly what your obligations were. You signed that and executed the lease. Now I'm not going to allow this continuing line of questions that makes no sense and is not relevant."

{¶ 20} On September 8, 2009, the trial entered judgment against Ballard and Jones, jointly and individually, in the amount of $5,695. Jones thereafter retained counsel, who entered an appearance in the case on October 23, 2009. Jones then moved to set aside the judgment under Civ.R. 60(B)(3) and (5), arguing that the lease and option to purchase were unconscionable and procured through fraud or mistake. On December 10, 2009, the trial court denied Jones' motion.

{¶ 21} The cause is now before this court upon appeal by Jones.

II. UNCONSCIONABILITY OF RENTAL AGREEMENT

{¶ 22} Appellant sets forth the following assignments of error:

{¶ 23} "I. The trial court erred when it failed to address the Defendant-Appellant's argument that there was a mistake as to the contractual agreement entered into, which rendered the contract void.

{¶ 24} "II. The trial court erred when it failed to address the Defendant-Appellant's argument that the premises where [sic] of an uninhabitable nature that should have terminated the contract as illegal and void."

{¶ 25} Although these two assignments of error are separately stated, they are argued together in appellant's brief. It is appellant's basic contention that "the contracts were illegal and unconscionable and should have been voided." Appellant contends that Mr. Anderson is a sophisticated legal professional who misled unsophisticated individuals into believing they were signing a land installment contract with an option to purchase, when in fact they were executing conflicting agreements. As a result, appellees were enabled to avoid their statutory and common-law obligations to make appropriate repairs, maintain a working furnace, and put and keep the premises in a fit and habitable condition. In light of these circumstances, appellant urges this court to find the lease unenforceable and return the parties to their original positions.

{¶ 26} The Andersons have failed to file an appellee's brief with this court. App.R. 18(C) provides that when an appellee fails to file a brief, "in determining the

appeal, the court may accept the appellant's statement of the facts and issues as correct and reverse the judgment if appellant's brief reasonably appears to sustain such action." Accordingly, we accept appellant's statement of the facts and issues as correct; and since appellant's brief reasonably appears to sustain such action, we reverse the judgment of the trial court.

{¶ 27} The unconscionability of a disputed agreement between the parties is an appropriate ground for relief from judgment under Civ.R. 60(B)(5). See *Khoshbin v. Khoshbin* (Sept. 24, 1997), 9th Dist. No. 18237. Whether a particular contract is unconscionable is a question of law subject to de novo review. *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, ¶ 35-37.

{¶ 28} R.C. 5321.14 provides:

{¶ 29} "(A) If the court as a matter of law finds a rental agreement, or any clause thereof, to have been unconscionable at the time it was made, it may refuse to enforce the rental agreement or it may enforce the remainder of the rental agreement without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

{¶ 30} "(B) When it is claimed or appears to the court that the rental agreement, or any clause thereof, may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its setting, purpose, and effect to aid the court in making the determination."

{¶ 31} In addition, the doctrine of unconscionability is generally perceived as a limitation on the freedom of contract. Its basic purpose is to prevent oppression and unfair surprise. *Deutsche Bank Natl. Trust Co. v. Pevarski*, 4th Dist. No. 08CA52, 2010-Ohio-785, ¶ 30. Broadly speaking, a contract is unconscionable "'where one party has been misled as to the "basis for the bargain," where a severe imbalance in bargaining power exists, or where specific contractual terms are outrageous.'" Id. at ¶ 31, quoting *Orlett v. Suburban Propane* (1989), 54 Ohio App.3d 127, 129.

{¶ 32} As explained by the Eighth District Court of Appeals in *Martin v. Byke*, 8th Dist. No. 88878, 2007-Ohio-6816, ¶ 28-30:

{¶ 33} "'Unconscionability is generally recognized to include an absence of meaningful choice on the part of one of the parties to a contract, combined with contract terms that are unreasonably favorable to the other party.' *Collins v. Click Camera & Video, Inc*. (1993), 86 Ohio App.3d 826, 834. 'Unconscionability thus embodies two separate concepts: 1) unfair and unreasonable contract terms, i.e., "substantive unconscionability," and 2) individualized circumstances surrounding each of the parties to a contract such that no voluntary meeting of the minds was possible, i.e., "procedural unconscionability" * * *. These two concepts create what is, in essence, a two-pronged test of unconscionability. One must allege and prove a "quantum" of both prongs in order to establish that a particular contract is unconscionable.' *Id*., quoting White & Summers, Uniform Commercial Code (1988) 219, Section 4-7.

{¶ 34} "Substantive unconscionability concerns the actual terms of the agreement and whether the terms are unfair and unreasonable. *Collins*, supra, at 834. Contract clauses are unconscionable where the 'clauses involved are so one-sided as to oppress or unfairly surprise [a] party.' *Neubrander v. Dean Witter Reynolds, Inc.* (1992), 81 Ohio App.3d 308, 311-312.

{¶ 35} "Procedural unconscionability involves the circumstances surrounding the execution of the contract between two parties and occurs where no voluntary meeting of the minds was possible. *Collins*, supra, at 834. In determining procedural unconscionability, a court should consider factors bearing on the relative bargaining position of the contracting parties—including age, education, intelligence, business acumen, and experience in similar transactions—whether the terms were explained to the weaker party, and who drafted the contract. *Id.*, citing *Johnson v. Mobile Oil Corp.* (E.D.Mich.1976), 415 F. Supp. 264, 268."

{¶ 36} We can discern no requirement in the statute or the case law that the issue of whether a rental agreement or other contract is unconscionable must be presented by way of counterclaim. Unconscionability is generally regarded as a defense to a claim brought on contract. *Pevarski*, supra, 2010-Ohio-785, at ¶ 29. Moreover, R.C. 5321.14(B) provides that the court shall determine the issue of unconscionability whenever "it is claimed *or appears to the court* that the rental agreement * * * may be unconscionable." (Emphasis added.) Besides, a review of the pleadings and transcript of

the damage hearing in this case makes eminently manifest that Ballard and Jones were in fact alleging, arguing, and offering proof as to all the essential elements of a claim for unconscionability.

{¶ 37} The agreements in this case are substantively unconscionable. Contrary to Mr. Anderson's assertions at hearing, the lease agreement cannot be considered "independent" of the purported option to purchase. Although separately captioned as a "Residential Lease" and "Option to Purchase," the agreements drafted by Mr. Anderson and signed by Ballard and Jones are inextricably intertwined and inherently inconsistent in regard to the status, rights, and obligations of the contracting parties. They contain overlapping and contradictory characteristics of a lease, purchase agreement, guaranty, and option contract, which allows appellees to assume the status of seller or landlord at their discretion and bind Ballard and Jones to whatever set of obligations is most convenient to appellees.

{¶ 38} The lease itself contains provisions that are substantively unconscionable. By requiring Ballard to provide notice of needed repairs and precluding her from performing the work herself, the lease implies that appellees are responsible for maintaining the premises. However, the lease then provides in bold-faced, italicized, and underlined type that the property is "inspected accepted as is with no repairs promised or expected by tenants." Such an "as is" clause is inimical to a lease agreement, as it

improperly attempts to negate the landlord's duties under R.C. 5321.04. Cf. *Arndt v. P&M LTD.*, 11th Dist. Nos. 2007-P-0038, 2007-P-0039, 2008-Ohio-2316, ¶ 82.

{¶ 39} R.C. Chapter 5321 is a remedial statute and intended to provide tenants with greater rights than existed for their protection at common law. *Howard v. Simon* (1984), 18 Ohio App.3d 14, 15-16. A lease agreement between the landlord and tenant is a contractual relationship with an implied warranty of habitability. In addition to this contractual responsibility, the landlord has a statutory obligation to maintain the premises in a habitable condition pursuant to R.C. 5321.04. Pursuant to R.C. 5321.13(A), this obligation may not be modified or waived by agreement. Thus, an attempted waiver of the implied warranty of habitability in a residential lease by the use of an "as is" clause is inherently unconscionable. *See Fair v. Negley* (1978), 257 Pa. Super. 50, 390 A.2d 240.

{¶ 40} The lease also provides that monthly rent of $400 is due in advance prior to the first day of each month and imposes a late fee of $55 if rent is one day late. A late fee of $55 if monthly rent of $400 under a residential lease is one day late is unconscionable. See *Spring Valley Gardens Assoc. v. Earle* (1982), 112 Misc.2d 786, 447 N.Y.S.2d 629 (holding that late fee of $50 if monthly rent of $405 under a residential lease was over ten days late is excessive and unconscionable).

{¶ 41} More important, the lease in this case, which is purportedly for a term of two and one-half years, is modified and directly contradicted by the option to purchase, which is essentially a land installment contract that denominates the installment payments

as rent and applies only half of the payment amount to the purchase price. R.C. 5313.01(A) defines a land installment contract as "an executory agreement which by its terms is not required to be fully performed by one or more of the parties to the agreement within one year of the date of the agreement and under which the vendor agrees to convey title in real property located in this state to the vendee and the vendee agrees to pay the purchase price in installment payments, while the vendor retains title to the property as security for the vendee's obligation. Option contracts for the purchase of real property are not land installment contracts."

{¶ 42} The fact that an agreement is titled "Option to Purchase," however, does not necessarily make it so. In *Fadelsak v. Hagley*, 4th Dist. No. 02CA41, 2003-Ohio-3413, ¶ 12, the court held that an agreement captioned "Lease with Option to Purchase" was actually a land installment contract because it "applies all rent paid to the purchase price [,] * * * obligates the Fadelsaks to make rent payments for two hundred forty months, and implies that the Fadelsaks would gain ownership of the property upon the end of the lease term." In *Vorhees v. Jovingo*, 4th Dist. Nos. 04CA16, 04CA17, 04CA18, 2005-Ohio-4948, the court held that an agreement entitled "Land Contract" could be construed as a lease with an option to purchase because it was valid only for a term of one year, did not clearly credit the rent payments to the purchase price, and provided that the property may be purchased for a stated price at the end of the one-year term.

{¶ 43} In this case, the agreement captioned "Option to Purchase" sets forth a purchase price of $24,000 and provides that one-half of Ballard's monthly rental payments "will be" applied toward the purchase price for a term of 120 months at which point "the property will be paid in full and a deed will be issued." It then provides that if Jones opts to continue the monthly payments for Ballard upon her default, he "may take title to said house when the 120 month rental term has been met." Clearly, such an arrangement is in the nature of a land contract between the Andersons and Ballard without any obligation or liability on the part of Jones in regard to monthly payments or Ballard's nonperformance.

{¶ 44} In his testimony at the damage hearing, Mr. Anderson advanced the theory that the option to purchase could not be exercised until after Ballard or Jones had already completed their 120 months of payments in satisfaction of the purchase price. But an option to purchase that commences after the property has already been purchased through ten years of periodic payments is either a land contract or an unconscionable illusion in its own right

{¶ 45} It is apparent that the agreements in this case are entirely one-sided in favor of the Andersons. They are carefully drafted and designed to provide an inordinate degree of protection for the Andersons, while frustrating or giving exceedingly little recognition to the expectations of Ballard and Jones. We find them to be substantively unconscionable as a matter of law.

{¶ 46} The lease in this case is also procedurally unconscionable. Mr. Anderson is an attorney with obvious experience in real estate law, and the agreements in this case were drafted by him. Appellant and his daughter are quite unsophisticated in such matters. Ballard and Jones both testified that they intended to enter, and believed they had entered, into a land installment contract with an option for Jones to continue the payments in the event that Ballard defaulted. At the time, Ballard was an unemployed student enrolled in a carpentry program and looking for a house that she could fix up and eventually own, while Jones was seeking to protect his daughter's investment. It is clear that Ballard and Jones did not understand the nature or terms of the agreements they entered into with the Andersons. Considering the circumstances surrounding the execution of the agreements, as well as the incongruity between the lease and option to purchase, we cannot see how a meeting of the minds between the parties was possible in this case.

{¶ 47} Based on the foregoing, we find as a matter of law that the rental agreement in this case was unconscionable at the time it was made and should not be enforced against appellant. Accordingly, appellant's assignments of error, considered together, are well taken.

CONCLUSION

{¶ 48} The judgment of the Toledo Municipal Court is reversed. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

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

Keila D. Cosme, J. _____
CONCUR.
JUDGE