

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

Angela Fairbanks-Kern

Court of Appeals No. S-13-006

Appellant

Trial Court No. CVI 0700525

v.

Tanya Kohlenburg

DECISION AND JUDGMENT

Appellee

Decided: August 16, 2013

* * * * *

Zachary J. Selvey, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an accelerated appeal from a judgment of Sandusky County Court # 1 that granted appellee Tanya Kohlenburg’s motion to dismiss. For the following reasons, the judgment of the trial court is reversed and this matter is remanded for further proceedings.

{¶ 2} Appellant sets forth the following sole assignment of error:

1. Appellant's case was improperly dismissed against the weight of the evidence.

{¶ 3} On August 16, 2007, appellant executed a one-year lease for a residential property owned by appellee. The landlord-tenant relationship began to deteriorate from the outset for a variety of reasons that are not relevant to the resolution of this appeal. After appellant decided that for the safety of her family she could not remain on the premises, she gave written notice and vacated the property on September 23, 2007. On December 18, 2007, appellant filed suit against appellee in small claims court seeking judgment for the return of money paid for her first and last months' rent, return of rental deposit, legal fees and "mental anguish and moving costs" in the total amount of \$3,000. Subsequent settlement negotiations failed and the matter was set for a bench trial on April 29, 2008. By judgment entry filed May 2, 2008, the trial court found, based on testimony adduced, that appellant had been constructively evicted and was entitled to relief for unused rent, wrongfully withheld security deposit and a return of the last month's rent. After doubling pursuant to statute, appellant was awarded total damages in the amount of \$2,377.92 plus reasonable attorney fees of \$750.

{¶ 4} On October 10, 2008, appellant requested a hearing on execution of the judgment. At the hearing, appellee paid \$100 toward the amount owed and agreed to pay an additional \$50 per month thereafter beginning April 1, 2009. On October 23, 2012, when appellee still had not paid the full amount, appellant filed an affidavit and motion

for a debtor's examination hearing. The matter was set for hearing on December 11, 2012. Both parties appeared without counsel. The record reflects that when the parties could not agree on the amount owed, the court took the matter under advisement.

{¶ 5} On December 21, 2012, an entry of appearance was filed by an attorney for appellee along with a motion to dismiss based on appellant's alleged failure to cash some of appellee's checks in a timely manner. Appellee claimed that appellant had failed to accept payments and that the judgment should therefore be deemed to have been paid in full. The record reflects that, five days later, on December 26, 2012, the trial court signed a judgment entry finding that the judgment was deemed paid in full and granting appellee's motion to dismiss without appellant having an opportunity to respond.

Appellant appeals that judgment.

{¶ 6} This court has reviewed the record of proceedings in the trial court, including the transcript of the December 11, 2012 hearing. Appellant testified that appellee still owed \$2,759.18, while appellee stated she believed the balance owed was \$1,572.37. Due to the discrepancy, the judge stated on the record that he would have to go through the record of payments "line by line to figure out the total balance" going forward. The judge also indicated concern that the May 2008 order did not calculate or address the issue of interest owed, and stated that was a matter he intended to review. Appellee stated that she was prepared to make a \$30 payment on that date and would make future payments of \$30 monthly. At no point during the hearing did the judge discuss dismissing the case, nor did appellee orally request dismissal.

{¶ 7} Additionally, appellant was given no opportunity to respond to the motion to dismiss. Appellant left the hearing on December 11, 2012, believing that the court would review the payment history and determine an amount owing, most likely a sum between appellee's figure of \$1,572.37 and appellant's submitted figure of \$2,759.18. The motion to dismiss was filed at 1:45 p.m., Friday, December 21, 2012. Appellee certified that copies were delivered by mail to appellant's post office box and faxed to the court that same day. The following five days included the weekend, one weekday, Christmas Eve Day and Christmas Day. The trial court's judgment entry was filed on the sixth day, December 26. Given that scenario, it would be unreasonable to expect anyone to have an opportunity to draft and file a response prior to the trial court's decision.

{¶ 8} We further find that the amount appellant asserted was owed was based on the court's 2008 judgment entry. Appellee's evidence of payments made to appellant was significantly less than the total amount she was ordered to pay following the October 2008 hearing.

{¶ 9} For all of the foregoing reasons, we find that the trial court erred by granting appellee's motion to dismiss. Accordingly, appellant's sole assignment of error is well-taken.

{¶ 10} On consideration whereof, the judgment of Sandusky County Court # 1 is reversed and remanded for further proceedings consistent with this decision. Costs of this appeal are assessed to appellee 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.

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.