

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

Rodney A. Hicks

Court of Appeals No. E-12-076

Appellee

Trial Court No. 2008 CV 1153

v.

Jacquelyn D. Hicks aka
Jacquelyn D. Kitchens, et al.

DECISION AND JUDGMENT

Appellant

Decided: September 6, 2013

* * * * *

D. Jeffery Rengel and Thomas R. Lucas, for appellee.

Geoffrey L. Oglesby, for appellant.

* * * * *

JENSEN, J.

{¶ 1} Defendant-appellant, Jacquelyn D. Hicks (aka Jacquelyn Kitchens) (“Kitchens”), appeals the October 24, 2012 judgment of the Erie County Court of Common Pleas which awarded damages of \$201,264 to plaintiff-appellee, Rodney A. Hicks (“Hicks”). For the reasons that follow, we affirm the trial court’s judgment.

I. Factual Background

{¶ 2} This case arises from a dispute between family members over property they inherited from their grandmother. Hicks sued his sister, Kitchens, and his mother, Alexine Hicks (“Alexine”). He also named as defendants his brother, Terence Hicks, and two other sisters, Constance Beverly and Deborah Robinson, whom he believes may claim an interest in the property at issue.

{¶ 3} According to Hicks’ complaint and motion for summary judgment, on September 16, 1991, Alexine, as power-of-attorney for her mother-in-law, Leona Hicks, transferred properties located at 813 Filmore Street, 1709 McDonough Street, and 1716 McDonough Street to her five children. She allegedly made this transfer without her children knowing. Although not entirely clear, Hicks appears to claim that Alexine and Kitchens resided in one or more of the properties without paying rent beginning in 1991. He says that he became aware of his ownership interest in the properties in 2000. He contends that in or around 2000, Kitchens agreed to pay her siblings \$300 per month on a land contract to purchase the Filmore Street and 1709 McDonough Street properties. He also claims that as part of that agreement, Kitchens was not permitted to make alterations or improvements to the properties, and she was required to pay property taxes and maintain insurance.

{¶ 4} Hicks filed this lawsuit on December 30, 2008, first pro se, and then with the assistance of counsel, who filed an amended complaint on July 27, 2011. Many of the allegations and claims are directed toward Alexine, against whom Hicks was granted a

default judgment. As to Kitchens, Hicks asserted claims for breach of contract, bailment, fraud, and unjust enrichment. He alleges that starting in 2000, Kitchens lived rent-free at 1709 McDonough Street, until it was condemned and demolished due to her failure to properly maintain the property. She then moved to the Filmore Street property where she failed to pay rent and property taxes, failed to maintain insurance, and constructed a garage and an additional room. Hicks claims that the 1716 McDonough Street property was sold to an unrelated third-party on July 12, 2000, and he received only \$800 from the sale proceeds.

{¶ 5} Kitchens retained counsel and responded to Hicks' pro se complaint by filing a "Response" dated July 10, 2009. In it, she denied Hicks' allegations and asserted that the claims were barred by estoppel, res judicata, and laches because the matter had "already been settled by this Court." She provided no evidence of this. Essentially nothing else happened until June 23, 2011, when Hicks' attorney entered an appearance and was granted leave to file an amended complaint. Kitchens never answered. Instead, without seeking leave to file beyond the 28 days permitted by the civil rules, she filed a motion to dismiss three months later on October 27, 2011. This motion made reference to exhibits that were not attached. Hicks' counsel did not receive the motion until November 7, 2011. He also had not received responses to discovery requests (which included requests for admission) that he served on October 11, 2011, or copies of the exhibits referenced in Kitchens' motion, which he had also requested. He was granted an

extension to respond to the motion to dismiss and to file his own motion for summary judgment.

{¶ 6} More time passed. Having received no responses to his discovery requests and, more specifically, his requests for admission, Hicks filed an opposition to the motion to dismiss and a motion for summary judgment on March 16, 2012. Again, Kitchens did not respond. The trial court entered judgment denying Kitchens' motion to dismiss and granting Hicks' motion for summary judgment. In its May 31, 2012 judgment entry (file-stamped May 22), the trial court ordered damages: (1) equal to the difference between the post-demolition and pre-demolition value of 1709 McDonough Street; and (2) in the amount of the fair rental value for Kitchens' occupancy of the 1709 McDonough Street and 813 Filmore Street properties from June 1991 to the present. The court held that there was no land contract for the sale of any of the properties, and it reserved a finding on the specific amount of damages, indicating that it would "be determined by subsequent judgment entry to follow from this court."

{¶ 7} A new attorney for Kitchens filed a Civ.R. 60(B) motion to vacate the judgment almost a month later on June 19, 2012. In it she complained that the court should have ruled on her motion to dismiss before requiring a response to the motion for summary judgment. She also claimed that the court had failed to set a hearing date on the motion, in violation of Civ.R. 56. Hicks opposed Kitchens' motion, arguing that it should be denied because Kitchens failed to establish (1) that she had a meritorious defense, (2) that there were operative facts warranting relief under Civ.R. 60(B)(1), and

(3) that her motion was made within a reasonable time. The trial court agreed with Hicks and denied Kitchens' motion in a July 11, 2012 judgment entry.

{¶ 8} On June 21, 2012, Hicks submitted an affidavit in support of his damages, and also submitted the affidavits of Elijah and Rochelle Wooten and Jeffrey Berquist. The Wootens' affidavits stated that they had rented 813 Filmore Street from August 1992 to May 1997 for \$475 per month. Berquist, the owner and operator of Prudential Stadtmiller Realty in Sandusky, purported to offer expert opinions about the fair rental value of 1709 McDonough Street during 1991 to 2000, and of 813 Filmore Street during 2000 to 2012. He also provided opinions about the pre- and post-demolition values of 1709 McDonough Street.

{¶ 9} Kitchens did not respond to Hicks' affidavits. In an October 24, 2012 judgment entry (file-stamped October 4, 2012), the trial court awarded Hicks damages of \$201,264 with respect to his claims against Kitchens: \$36,164 for the rental value of 1709 McDonough Street for the period of September 1991 through 2000; \$97,600 for the rental value of 813 Filmore Street for the period of 2000 through the present; \$67,500 for the difference between the post-demolition and pre-demolition value of 1709 McDonough Street; and interest at the statutory rate from the date of judgment. Kitchens now appeals that judgment, assigning the following errors:

Assignment of Error No. 1: The trial court erred by not having a jury trial on damages when there was a request for a jury trial on all issues.

Assignment of Error No. 2: Summary judgment is inappropriate to a plaintiff who fails to meet their initial burden notwithstanding a failure by defendant to respond to admissions and production of a self-serving affidavit by plaintiff.

Assignment of Error No. 3: The trial court erred by not granting appellants [sic] motion to vacate appellee's motion for summary judgment when there was no date to respond.

II. Analysis

{¶ 10} As explained below, we are unable to reach the merits of any of Kitchens' assignments of error. She waived the error alleged in her first assignment of error and she failed to properly appeal the judgments pertinent to her second and third assignments of error.

A. First Assignment of Error

{¶ 11} In her first assignment of error, Kitchens argues that because Hicks made a jury demand in his complaint, the court was required to submit the damages claim to a jury. Kitchens did not raise this argument in the trial court.

{¶ 12} The trial court's May 31, 2012 judgment entry granting plaintiff's motion for summary judgment indicates that the court would award damages in a "subsequent judgment entry to follow from this Court." Kitchens did not object at that time to the court determining Hicks' damages award. On June 21, 2012, Hicks filed affidavits in support of his damages claim. Kitchens did not respond to that filing at all and again

made no objection to the court determining damages. Kitchens also did not object when the trial court issued its October 24, 2012 judgment awarding damages to Hicks. She had at least three opportunities to assert her position that a jury trial on damages was required, yet failed to make that argument in the trial court. Kitchens is precluded from raising it for the first time on appeal. *Hanley v. DaimlerChrysler Corp.*, 158 Ohio App.3d 261, 2004-Ohio-4279, 814 N.E.2d 1245, ¶ 23.

{¶ 13} We, therefore, find Kitchens' first assignment of error not well-taken.

B. Second and Third Assignments of Error

{¶ 14} In her second and third assignments of error, Kitchens urges that the trial court erred in granting Hicks' motion for summary judgment and in denying Kitchens' motion to vacate. However, Kitchens failed to properly appeal from those judgments.

{¶ 15} Kitchens filed her notice of appeal on November 21, 2012. At that time, there were three judgments pertinent to the issues raised in Kitchens' appellate brief: (1) May 31, 2012 judgment granting Hicks' motion for summary judgment; (2) July 11, 2012 judgment denying Kitchens' motion to vacate; and (3) October 24, 2012 judgment awarding damages to Hicks.

{¶ 16} App.R. 3(D) requires an appellant to identify in her notice of appeal the judgment or order being appealed. In addition, 6th Dist.Loc.App.R. 3(A) provides:

The notice of appeal shall have attached to it a copy of the judgment or order from which the appeal is taken, signed by the trial court judge and indicating the date the judgment or order was entered on the journal.

Failure to attach the final judgment entry or order may be grounds for dismissal.

{¶ 17} The only order specified by Kitchens and attached to her notice of appeal was the October 24, 2012 judgment. The other two judgments were not properly appealed and will not be considered by this court. *See Jones & Scheich v. Maunz*, 6th Dist. Lucas No. L-02-1395, 2003-Ohio-3102, ¶ 10 (refusing to consider assignment of error relating to judgment not appealed from). We, therefore, find Kitchens' second and third assignments of error not well-taken.

III. Conclusion

{¶ 18} Appellant waived the issue raised in her first assignment of error. She failed to appeal the judgments pertaining to her second and third assignments of error. We, therefore, affirm the October 24, 2012 judgment of the Erie County Court of Common Pleas. The costs of this appeal are assessed to appellant 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.

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>.