[Cite as *Associated Estates Realty Corp. v. Samsa*, 2004-Ohio-6635.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84297

ASSOCIATED ESTATES REALTY CORP.,	:	
	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
	:	and
vs.	:	OPINION
	:	
JACOB SAMSA,	:	
	:	
Defendant-Appellant	:	

DATE OF ANNOUNCEMENT OF DECISION	:	DECEMBER 9, 2004
CHARACTER OF PROCEEDING	:	Civil appeal from
	:	Common Pleas Court
	:	Case No. 491143
JUDGMENT	:	AFFIRMED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

For plaintiff-appellee: Alan B. Glassman, Esq.
14650 Detroit Avenue
Suite 450
Lakewood, Ohio 44107-9946

For defendant-appellant: David S. Bartos, Esq.
Christopher R. Fortunato, Esq.
13363 Madison Avenue
Lakewood, Ohio 44107

MICHAEL J. CORRIGAN, A.J.:

{¶ 1} Appellant, Jacob Samsa ("Samsa"), appeals the trial court's decision granting summary judgment on his claim for retaliatory eviction in favor of appellee, Associated Estates Realty Corporation d/b/a Watergate Apartments ("appellee"). For the following reasons, we affirm the trial court's decision.

{¶ 2} Samsa became a tenant of appellee when he moved into the Watergate Apartments in April 1983 pursuant to a yearly lease agreement. In May 1991, Samsa's yearly lease was converted into a month-to-month lease. On September 4, 2002, appellee hand-delivered a 45-day notice to Samsa that his lease was not going to be renewed at the end of the lease term. However, on the day the lease was to expire per the notice, November 1, 2002, Samsa did not vacate the property and, as a result, appellee filed an eviction action in the municipal court.

{¶ 3} Samsa filed his answer to the eviction action and asserted a counterclaim against appellee, alleging that appellee had a duty to repair and maintain the premises in a safe manner, but failed to do so, and that Samsa was evicted as retaliation for complaining about appellee's alleged failure to repair and maintain the premises in a safe manner. Because Samsa's prayer for relief sought damages in excess of the municipal court's monetary jurisdiction, the entire action was transferred to the trial court.

{¶ 4} The trial court bifurcated the proceedings into the eviction action and Samsa's counterclaim. As to the eviction action, the parties entered into a consent judgment entry which granted restitution in favor of appellee, required Samsa to vacate the premises, and stated that any other claims held by the parties would not be waived. With respect to Samsa's counterclaim, appellee moved for summary judgment, arguing that Samsa's allegations for retaliatory eviction

cannot be raised as a defense when the tenant is holding over his term. The trial court granted appellee's motion for summary judgment, holding that "Samsa has failed to raise an issue of material fact that [appellee's] eviction action was in retaliation for Samsa's complaints about accumulating garbage, and not for Samsa's status as a holdover tenant."

{¶ 5} Samsa now appeals, arguing as his sole assignment of error that the trial court erred in granting summary judgment to appellee by failing to take into consideration notice requirements that exceeded statutory notice requirements. In essence, Samsa argues that he was not given proper notice when appellee placed under Samsa's door the 45-day notice to terminate the lease. However, Samsa's argument is without merit.

{¶ 6} R.C. 5321.17(B) provides as follows:

{¶ 7} "Except as provided in division (C) of this section, the landlord or the tenant may terminate or fail to renew a month-to-month tenancy by notice given the other at least thirty days prior to the periodic rental date."

{¶ 8} R.C. 1923.04(A) provides as follows:

{¶ 9} "Except as provided in division (B) of this section, a party desiring to commence an action under this chapter shall notify the adverse party to leave the premises, for the possession of which the action is about to be brought, three or more days before beginning the action, by certified mail, return receipt requested, or by handing a written copy of the notice to the defendant in person, or by leaving it at his usual place of abode or at the premises from which the defendant is sought to be evicted.

{¶ 10} "Every notice given under this section by a landlord to recover residential premises shall contain the following language printed or written in a conspicuous manner: 'You are being

asked to leave the premises. If you do not leave, an eviction action may be initiated against you. If you are in doubt regarding your legal rights and obligations as a tenant, it is recommended that you seek legal assistance.'"

{¶ 11} Here, it is undisputed that Samsa's yearly lease was converted into a month-to-month lease in May 1991. It is also undisputed that on September 4, 2002, appellee placed under Samsa's door its notice to terminate the lease on November 1, 2002, giving Samsa 45 days notice, and the notice conspicuously stated the statutory language provided in R.C. 1923.04(A). Samsa does not argue that he did not receive notice of appellee's intent to terminate the lease; instead, he argues that appellee did not comply with the terms of the lease requiring any notice to terminate the lease be sent by mail. However, appellee complied with the statutory provisions of both R.C. 5321.17(B) and 1923.04(A) when he left the notice to terminate the lease at Samsa's "usual place of abode" within 45 days of the date of the termination. Simply because appellee chose to place the notice under Samsa's door rather than place it in the mail does not render the otherwise valid notice[1] ineffective or

[1] Even under the terms of the lease between Samsa and appellee, the parties are entitled to 45 days notice to terminate the lease. Appellee complied with the lease terms by providing Samsa 45 days written notice, which exceeds the 30 days notice requirement as provided in R.C. 5321.17(B).

void. More importantly, Samsa does not dispute that he received the notice. As such, Samsa's argument that the trial court erred by granting summary judgment to appellee without taking into consideration notice requirements that exceeded the statutory requirements is not well-taken.

{¶ 12} Moreover, this court's holding in *Indian Hills Senior Community, Inc. v. Sanders* (Aug. 23, 2001), Cuyahoga App. No. 78780, is controlling and bars Samsa's counterclaim for retaliatory eviction. As held in *Indian Hills*, the "retaliatory conduct of the landlord may not be raised as a defense in a forcible entry and detainer proceeding when the tenant is holding over his term." Further, this court held "nothing in R.C. 5321.02 *** precludes the nonrenewal of a lease upon the expiration of a term of tenancy." Here, Samsa's lease naturally expired on November 1, 2002, but when Samsa failed to vacate the premises, he became a holdover tenant. When Samsa did not leave the premises, appellee filed its eviction action, to which Samsa answered and filed his counterclaim alleging, in essence, retaliatory eviction. Just like in *Indian Hills*, Samsa became a holdover tenant when he failed to move out at the end of the lease after appellee exercised its rights under the lease to not renew the lease. Thus, based on this court's holding in *Indian Hills*, the trial court did not err in granting summary judgment in favor of appellee.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MICHAEL J. CORRIGAN
ADMINISTRATIVE JUDGE

ANTHONY O. CALABRESE, JR., J., CONCURS.

DIANE KARPINSKI, J., DISSENTS WITH SEPARATE OPINION.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R.22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).\

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NO. 84297

ASSOCIATED ESTATES	:	
	:	
	:	
Plaintiff-appellee	:	
	:	DISSENTING
v.	:	
	:	OPINION
	:	
JACOB SAMSA	:	
	:	
	:	
Defendant-appellant	:	

DATE: DECEMBER 9, 2004

KARPINSKI, J., DISSENTING:

{¶ 13} I respectfully, but vigorously dissent because the majority fails to consider the legal effect of the 1983 lease the parties executed. By ignoring the lease, the majority erroneously concludes that "Samsa's yearly lease was converted into a month-to-month lease in May 1991[]" and he became a holdover tenant in November 2002. Majority Op. at 4. The express terms of the lease, however, do not support the majority's conclusion.

{¶ 14} The lease explains how it is renewed and how it can be terminated. The lease, in pertinent part, imposes the following terms and conditions upon **both** parties:

> **{¶ 15}** *** this agreement shall automatically renew itself *** for periods of one year from the expiration date of the original term of this lease, unless either party shall give to the other not less than Forty-Five (45) days written notice prior to the expiration of the term then running of their intention to terminate said tenancy at the expiration of the then existing term, which notice shall be in writing and sent by normal mail channels.
>
> **{¶ 16}** ***
>
> **{¶ 17}** *** This lease shall not be changed or modified except by written instrument signed by the parties hereto.

{¶ 18} The lease is clear and unambiguous. It will automatically renew every year beginning in May 1983, until one of the parties provides the other with written notice of their intention to terminate the annual lease no later than March 17th of any given year. Moreover, if either party intends to give notice of termination, that notice must be in writing and sent by normal mail channels. Such notice is not in the record.

{¶ 19} On September 4, 2002, defendant slipped its notice to vacate under Samsa's apartment door. Under the terms of the lease, the notice is untimely and the form of delivery improper because it was not delivered through the mail as required.

{¶ 20} It is true that Samsa stated in his deposition that he had a month-to-month tenancy starting in May 1991. Samsa's statement, however, is not enough to warrant granting summary judgment in plaintiff's favor. First, Samsa, a lay witness, cannot proffer a legal conclusion. *Byrley v. Nationwide Life Ins. Co.* (1994), 94 Ohio App.3d 1, 640 N.E.2d 187; *Deck v. Wellston City Schs.*, (Mar. 10, 1997), Jackson App. No. 96 CA 788. His attorney, moreover, expressly disputes the lease validly converted to a month-to month tenancy. Second, Samsa never waived his right to review and sign the deposition and he never signed the deposition. Additionally, the court reporter failed to provide her signature as required under Civ.R. 30(E) in the event "the deposition is not signed by the witness ***."

{¶ 21} Regardless of what Samsa may have believed or what plaintiff argues, however, the lease expressly prohibits any modification of the annual lease term absent a signed writing by both parties. There is no such writing in the record. Nor does either party assert they mutually agreed to waive the lease terms and to conduct themselves on a month-to-month basis. In either case, these issues cannot be resolved on summary judgment.

{¶ 22} The pressing question in this case is whether the conflicting pieces of evidence can be sufficiently reconciled to support summary judgment for plaintiff. I think not.

{¶ 23} Without a written and mutual modification of the lease and without a signed or properly verified deposition, reasonable minds could conclude that the 1983 lease has automatically renewed itself every year on May 1st since 1983. There is not enough in the record to resolve this issue.

{¶ 24} Finally, but certainly not least, the record reveals another compelling question of material fact, namely, whether the landlord continued to accept rent from Samsa after it purportedly

terminated his tenancy. If so, the landlord has waived its argument that Samsa was ever a holdover tenant. *Associated Estates Corp. v. Bartell* (1985), 24 Ohio App.3d 6, 492 N.E.2d 841.

{¶ 25} If, arguendo, the deposition is admitted, then Exhibit A would be part of the record. It is a chronology of notes he kept about his apartment since 2002. In that exhibit is an entry stating that Samsa received a "resident account number" and that he is to record that number on his future rent checks. On November 2, 2002, Samsa records delivery of his November rent to the management office. Later, on December 3, 2002, Samsa pays his December 2002 rent again to the management office. That entry states that the assistant property manager "accepts check." There is nothing in the record contradicting either of these entries. If Samsa tendered November and December 2002 rent and both of those payments were accepted by defendant, then plaintiff's claim that Samsa was a holdover tenant is moot.

{¶ 26} For all the foregoing reasons, I would reverse the trial court granting summary judgment to plaintiff. On the record before this court, a jury is best suited to decide the term of Samsa's tenancy and whether Samsa was ever a holdover tenant either on the basis of the lease or defendant's acceptance of his rent payments after it had given him notice that his lease would be terminated.