[Cite as *Presser v. RCP Mayfield, L.L.C.*, 2009-Ohio-3380.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92073

DAVID L. PRESSER

PLAINTIFF-APPELLANT

vs.

RCP MAYFIELD, LLC, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-634288

BEFORE: Stewart, P.J., Boyle, J., and Sweeney, J.

RELEASED: July 9, 2009
JOURNALIZED:

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MELODY J. STEWART, P.J.:

{¶ 1} Plaintiff-appellant, David Presser, appeals the decision of the Cuyahoga County Court of Common Pleas that granted summary judgment against him on all of his claims and dismissed the case. For the reasons that follow, we affirm.

{¶ 2} Appellant resided in an apartment at The Village of Mayfield apartment complex from June 5, 1998 until April 9, 2007. The apartment complex was owned and operated by defendant-appellee, RCP Mayfield, LLC ("RCP"). Defendant-appellee, Carey Young ("Young"), was employed by RCP as property manager beginning June 13, 2006.

{¶ 3} Appellant's lease was due to expire on March 31, 2007. On January 15, 2007, RCP sent appellant a written lease renewal offer with a financial incentive if he renewed for another one-year term. On February 6, 2007, appellant sent a Notice To Vacate to RCP, indicating his intent to move out. Appellant planned to move to another apartment complex named The Lakes of Aurora ("The Lakes").

{¶ 4} The Lakes sent a Verification of Residency form to RCP. Young filled out the form and returned it by facsimile on February 26, 2007. On the form, in response to the questions, "Is the tenant leaving on good terms?" and "Would you consider renting to this tenant in the future?" – Young checked the box marked "No." In response to why she responded "No," Young wrote, "Harrassment [sic] of other residents and staff & will not agree with terms of lease after signed."

{¶ 5} That same day Young spoke to The Lakes leasing consultant Penelope Meschewski by phone and discussed appellant's residency at RCP. Based upon Young's comments, The Lakes rejected appellants' rental application and appellant had to find another place to live. On March 29, 2007, appellant informed Young that he had found a new place but would not be able to move out until April 9, 2007, after his lease had expired. Appellant moved out on April 7, 2007.

{¶ 6} On August 29, 2007, appellant filed this action against RCP and Young seeking recovery for damages based upon claims of defamation, intentional infliction of emotional distress, interference with contract, breach of the lease, and breach of the covenant of quiet enjoyment. The trial court granted summary judgment to RCP and Young on all claims. Appellant timely appealed this judgment, raising the following two assignments of error for review.

{¶ 7} "I. The trial court erred when it granted Appellee's motion for summary judgment."

{¶ 8} Summary judgment is appropriate when, looking at the evidence as a whole: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) construing the evidence most strongly in favor of the nonmoving party, it appears that reasonable minds could only conclude in favor of the moving party. Civ.R. 56(C); *Horton v. Harwick Chem. Corp*., 73 Ohio St.3d 679, 686-687, 1995-Ohio-286. If any doubts exist, the issue must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59, 1992-Ohio-95.

{¶ 9} A party seeking summary judgment on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis of the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential elements of the nonmoving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. If the moving party has satisfied this initial burden, the nonmoving party has a reciprocal burden under Civ.R. 56(E) to set forth facts showing that there is a genuine issue for trial. Id. at 293.

Tort Claims

{¶ 10} Appellant's complaint alleged that Young, acting for RCP, intentionally made false claims against him resulting in The Lakes refusing his residency application and causing him severe emotional distress. Appellees defended and moved for summary judgment on these claims asserting that Young's statements were primarily offers of opinion, and that any statements of fact were truthful. Additionally, appellees contend that appellant has failed to demonstrate actual damage.

{¶ 11} Defamation is a false publication that injures a person's reputation, exposes him to public hatred, contempt, ridicule, shame or disgrace; or affects him adversely in his trade or business. *Matalka v. Lagemann* (1985), 21 Ohio App.3d 134, 136. To prevail on a defamation claim, a plaintiff must establish the following: (1) the defendant made a false statement of fact; (2) the statement was defamatory; (3) the statement was published; (4) the plaintiff was injured as a result of the

statement; and (5) the defendant acted with the required degree of fault. *Lynch v. Studebaker*, Cuyahoga App. No. 88117, 2007-Ohio-4014. There are two forms of defamation: libel and slander. Generally, slander refers to spoken defamatory words and libel refers to written defamatory words. *Retterer v. Whirlpool Corp*. (1996), 111 Ohio App.3d 847, 857.

{¶ 12} "The elements essential to recovery for a tortious interference with a business relationship are: (1) a business relationship; (2) the wrongdoer's knowledge thereof; (3) an intentional interference causing a breach or termination of the relationship; and (4) damages resulting therefrom. The torts of interference with business relationships and contract rights generally occur when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relation with another, or not to perform a contract with another. The basic principle of a 'tortious interference' action is that one, who is without privilege, induces or purposely causes a third party to discontinue a business relationship with another is liable to the other for the harm caused thereby." (Citations omitted.) *Barilla v. Patella* (2001), 144 Ohio App.3d 524, 532, quoting *Miller Bros. Excavating, Inc. v. Stone Excavating, Inc*. (Jan. 16, 1998), Greene App. No. 97- CA-69.

{¶ 13} To establish intentional infliction of emotional distress, appellant must prove four elements: (a) that the actor either intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress to the plaintiff; (b) that the actor's conduct was extreme and outrageous, that

it went beyond all possible bounds of decency and that it can be considered as utterly intolerable in a civilized community; (c) that the actor's actions were the proximate cause of the plaintiff's psychic injury; and (d) that the mental anguish suffered by plaintiff is serious and of a nature that no reasonable person could be expected to endure it. *Pyle v. Pyle* (1983), 11 Ohio App.3d 31, paragraph two of the syllabus.

{¶ 14} "Extreme and outrageous conduct is conduct that goes beyond all possible bounds of decency and is so atrocious that it is 'utterly intolerable in a civilized society. Mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities' are insufficient to sustain a claim for relief." (Internal citations omitted.) *Charles Gruenspan Co. v. Thompson*, Cuyahoga App. No. 80748, 2003-Ohio-3641, _37.

{¶ 15} Upon review of the record, we find no issues of material fact remain to be resolved in relation to appellant's claims of defamation and tortious interference with contract/business relations. Contrary to appellant's arguments, Young's comments are not actionable. Appellees submitted evidence demonstrating that Young's comments were truthful; other residents had complained about appellant's behavior, appellant had made complaints about dogs on the property, and at least one RCP employee felt harassed by appellant's behavior. In fact, as a result of that employee's complaints, in July 2006 Young sent appellant a letter informing him that he was no longer permitted to speak to that employee and was to bring his concerns to Young only.

{¶ 16} The reasons cited by The Lakes property manager for denying appellant's residency application were appellant's objection to dogs and his personal problems with management. Even viewing the evidence in a light most favorable to appellant, Young's comments as noted on the Verification of Residency form and reflected in Meschewski's notes, do not rise to the level of intentional and improper interference with appellant's contractual rights.

{¶ 17} Appellant's intentional infliction of emotional distress claim also fails as a matter of law. Even construing the evidence in a light most favorable to appellant, there was no evidence of outrageous conduct beyond all bounds of decency and there was no evidence of the severe emotional distress necessary to sustain a claim for relief. Accordingly, summary judgment was properly granted for appellees on appellant's tort claims.

Breach of Contract Claims

{¶ 18} Appellant alleged that RCP breached the terms of the April 2005 through March 2006 lease when it began charging appellant for natural gas on December 1, 2005. Appellees moved for summary judgment on the grounds that the lease agreement signed by appellant gave RCP authority to begin charging for natural gas.

{¶ 19} Under the terms of the written lease, the monthly rent payment did not include any utility charges. Instead, charges for "utilities and other services" were considered "additional rent." The lease provided that appellant was responsible for electricity charges for his apartment. Additionally, appellant was charged for water

and sewer based upon an allocation formula. RCP also made provision for the future imposition of charges for other utilities and services through the "Utility Addendum Allocation," which was signed by appellant, and made a part of the lease agreement.

{¶ 20} RCP did not charge appellant for natural gas from April through November 2005. On November 1, 2005, RCP gave appellant written notice of its intent to begin charging for natural gas effective December 1, 2005. Paragraph 11 of the addendum provides:

{¶ 21} "Resident agrees that resident may, upon thirty (30) days prior written notice from landlord to resident, begin receiving a bill for additional utilities and services, at which time such additional utilities and services shall for all purposes be included in the term utilities."

{¶ 22} We are unpersuaded by appellant's argument that the language of the addendum is ambiguous due to the use of the word "may." Neither do we find merit with appellant's argument that the clause is unconscionable because it appears near the end of the addendum and is not highlighted. The record demonstrates that RCP gave the required written notice before instituting the natural gas charges, therefore, summary judgment was properly granted against appellant on this claim.

{¶ 23} Appellant's final claim asserts that RCP breached the covenant of quiet enjoyment. In Ohio, a covenant of quiet enjoyment is implied into every lease contract for realty and protects the tenant's right to a peaceful and undisturbed enjoyment of its leasehold. *Dworkin v. Paley* (1994), 93 Ohio App.3d 383, 386. The

covenant is breached when a landlord obstructs, interferes with, or takes away from the tenant in a substantial degree the beneficial use of the leasehold. *Howard v. Simon* (1984), 18 Ohio App.3d 14, 16. Although the degree of the impairment is a question for the finder of fact, to constitute a breach of the covenant, "the interference with the tenant's quiet enjoyment must be so substantial as to be tantamount to an eviction, actual or constructive." *GMS Mgmt. Co. v. Datillo* (June 15, 2000), Cuyahoga App. No. 75838.

{¶ 24} Appellant's complaints center around the presence of dogs on the premises and issues related to the entry doors to his building. For the first seven years of appellant's residency, animals were not permitted in his building. In 2005, RCP began allowing residents in appellant's building to have dogs. Appellant clearly took issue with this new policy and made numerous complaints to management and to other residents about noise and odor from the presence of animals. Appellant's issues with the building doors concerned an inside security door that did not always close securely and an outside door that would slam loudly on windy days.

{¶ 25} A review of the record, including the motion for summary judgment, supporting and opposing briefs, affidavits, and the 10 depositions taken in this case, fails to demonstrate that a reasonable person would conclude that the acts complained of by appellant amount to a substantial deprivation of the beneficial use of appellant's leasehold.

{¶ 26} Having found no error in the grant of summary judgment, appellant's first assignment of error is overruled.

{¶ 27} "II. The trial court erred when it denied Plaintiff's motion for additional discovery."

{¶ 28} Absent an abuse of discretion, a reviewing court must affirm a trial court's disposition of discovery issues. *State ex rel. The V Cos. v. Marshall*, 81 Ohio St.3d 467, 469, 1998-Ohio-329. An abuse of discretion is more than an error of judgment, but instead connotes "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 1993-Ohio-122. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. Id.

{¶ 29} Appellant argues that the trial court's denial of his request for additional discovery after the discovery deadline had passed was an abuse of discretion because the trial court ignored the overriding purpose of litigation and failed to take into consideration his pro se status. We disagree.

{¶ 30} A review of the record indicates that during the case management conference on November 7, 2007, appellant agreed to the terms of discovery that set a discovery cut-off date of March 24, 2008. The trial court extended this date to June 2, 2008 upon joint motion of the parties. There were no other requests to extend discovery. Between November 2007 and May 2008, both parties actively conducted discovery.

{¶ 31} On June 12, 2008, appellant called appellees' counsel requesting for the first time, permission to enter upon the property with a photographer to take photographs of certain common areas of the property. Appellee refused permission

on the grounds that per the court's order, discovery had ended 10 days earlier. Appellant filed a motion to compel discovery on July 24, 2008.

{¶ 32} In the entry denying appellant's motion to compel, the trial court correctly noted that appellant's June 12, 2008 request was outside of the discovery time limits and failed to comply with the requirements of Civ.R. 34 relating to a request for permission to enter upon property.

{¶ 33} We find no merit to appellant's arguments that the trial court's denial of his motion prevented a fair resolution of the merits of the lawsuit and demonstrated an unreasonable refusal to make accommodations for the difficulties facing appellant as a self-represented litigant. During the seven months of pre-trial discovery, appellant propounded interrogatories pursuant to Civ.R. 33, requests for production of documents pursuant to Civ.R. 34, noticed depositions pursuant to Civ.R. 30, and filed a motion to compel pursuant to Civ.R. 37. There is no evidence that he had any difficulty following the rules of procedure or was prevented from acquiring the evidence needed to support his claims due to his self-representation.

{¶ 34} The record also reflects that in his complaint, filed almost 10 months prior to his request to take photographs, appellant makes allegations that reference issues relating to the hallway carpet, the security door, the outer door, the presence of dogs on the property, and the lack of individual gas meters. We are, therefore, unpersuaded by appellant's assertions that the need for photographs to support his case only became apparent after the May 20, 2008 depositions of appellant's witnesses.

{¶ 35} For the above stated reasons, appellant's second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellees recover of appellant their 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 Cuyahoga County Court of Common Pleas 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.

MELODY J. STEWART, PRESIDING JUDGE

MARY J. BOYLE, J., and
JAMES J. SWEENEY, J., CONCUR