[Cite as *Metzner Bldg., Ltd. v. Hamaoui*, 2009-Ohio-3457.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91770

METZNER BUILDING, LTD.

PLAINTIFF-APPELLANT

vs.

NABIL S. HAMAOUI

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cleveland Municipal Court
Case No. 07-CVG-20382

BEFORE: McMonagle, P.J., Dyke, J., and Celebrezze, J.

RELEASED: July 16, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Plaintiff-appellant, Metzner Building, Ltd., appeals the May 22, 2008 judgment of the Cleveland Municipal Court, which reduced a judgment Metzner Building had received against defendant-appellee Nabil S. Hamaoui. We affirm.

{¶ 2} The record before us demonstrates that in September 2007, Metzner Building filed a forcible entry and detainer action against Hamaoui in the Cleveland Municipal Court. The complaint requested five different damages: (1) an order of eviction (referring to Count 1); (2) compensatory damages in the amount of $1,900 (referring to Count 2); (3) compensatory damages for any damage to the premises that might be discovered upon vacancy of the premises or costs incurred in removing Hamaoui's property from the premises (a claim not made in any count); (4) pre- and post-judgment interest; and (5) court costs.

{¶ 3} A hearing was held on September 27, 2007; Hamaoui appeared, and was ordered to vacate the subject premises. A second hearing was held on October 25, 2007; Hamaoui did not appear, and the magistrate recommended judgment in favor of Metzner Building and against Hamaoui in the amount of $12,689.25. The court provisionally adopted the magistrate's recommendation on October 31, 2007.

{¶ 4} On February 12, 2008, Hamaoui filed a motion to vacate the judgment under Civ.R. 60(B). The motion was granted and the judgment was vacated. Metzner Building did not appeal from this order. There were subsequently numerous pretrials and mediations (all apparently unsuccessful). Eventually, on May 22, 2008, the court entered an order modifying the magistrate's recommendation, and awarded Metzner Building damages in the amount of $1,900. In its order, the trial court stated that the intent of Civ.R. 54 limits default judgment damages to "the expectations created by the complaint." Metzner Building now contends that the trial court erred in applying Civ.R. 54 to the second hearing because the rule relates to default judgment, which was not applicable here because Hamaoui appeared and participated in the proceedings. We disagree.

{¶ 5} The October 25 hearing on the second cause of action was a default hearing —Hamaoui neither filed an answer nor appeared upon that claim. The requested relief upon that claim stated: "9.) Defendant failed to pay Plaintiff the Delinquent rent due under the lease," and "10.) As a result of Defendant's breach of the Lease, as of today, Plaintiff has suffered damages in the amount of $1900.00."

{¶ 6} Metzner Building did not allege any cause of action relating to "damages discovered upon vacancy of the premises," nor any cause of action for "costs incurred in removing defendant's property from the premises." Nor is any

sum of money mentioned in the complaint in connection with these alleged damages. These additional damages, connected to no cause of action in the complaint, and requested in no specific monetary amount, are therefore not recoverable in default. See *Masny v. Vallo,* 8th Dist. No. 84983, 2005-Ohio-2178; *Bransky v. Shahrokhi,* 8th Dist. No. 84262, 2005-Ohio-97; *Buckley v. Lucas* (June 8, 1999), 5th Dist. No. 98CA14; *Borges v. Everdry Waterproofing of Wapakoneta, Inc.* (1994), 95 Ohio App.3d 175, 642 N.E.2d 16.[1]

{¶ 7} We note with approval the trial judge's Solomon-like attempt to be totally fair to both parties in this matter. In his May 22, 2008 judgment, after modifying the magistrate's recommendation of damages in the amount of $12,689.25 to $1,900, the judge held, "[a]ccordingly, the Court retains jurisdiction of this case and affords Plaintiff until June 18, 2008 to file an amended complaint listing damages with specificity. In the event of such filing, the $1900.00 judgment will be vacated and the case will be set for trial de novo. If no amended complaint is forthcoming, the present judgment for $1900.00 will remain in effect." At no time, from Hamaoui's move-out, up to and including June 16, 2008, did Metzner Building ever amend its complaint.

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[1]In *Borges*, the complaint requested "past due rent plus damages." No specific dollar amount was pled. The monetary claim was heard as a default. The court held, "[s]ince the appellee never specified a dollar amount in his initial complaint, no damages may be awarded in this case unless the appellee's demand was properly amended." (Citation omitted.) Id. at 178.

{¶ 8} In sum, the trial court could only award damages that were affiliated with a cause of action in the complaint and pled in a specific dollar amount. *Borges*, supra at 178. That is precisely what it did.

{¶ 9} Accordingly, the trial court's judgment is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cleveland Municipal 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.

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., CONCURS

ANN DYKE, J., DISSENTS WITH SEPARATE OPINION

ANN DYKE, J., DISSENTING:

{¶ 10} For the following reasons, I respectfully dissent. I agree with the majority that the October 25 hearing on the second cause of action for damages was a default hearing. However, I disagree that plaintiff's damages should be limited to the amount of past due rent or $1,900.

{¶ 11} The majority maintains that Metzner Building is not entitled to the additionally requested $10,789.25. First, the majority asserts that Metzner Building

failed to allege any cause of action relating to "damages discovered upon vacancy of the premises," or "costs incurred in removing defendant's property from the premises." The complaint, however, contained a second cause of action for monetary damages and incorporated all of the allegations contained in the first cause of action for the eviction. Accordingly, Metzner Building presented allegations regarding Hamaoui's failure to vacate the premises in his second cause of action for monetary damages.

{¶ 12} Metzner Building then, in its prayer for relief, requested the following damages:

{¶ 13} "(a) an order of eviction, ordering the Defendant to give the Plaintiff possession of and vacate the Premises;

{¶ 14} "(b) an award of compensatory damages for $1,900.00, representing the Delinquent Rent;

{¶ 15} ***"(c) compensatory damages for any damage to the Premises that may be discovered upon vacancy of the Premises or costs incurred in removing Defendant's property from the Premises;***

{¶ 16} "(d) prejudgment and postjudgment interest at the rate of 8% per annum beginning July 11, 2007, through the date on which all amounts owed to the Plaintiff have been paid in full;

{¶ 17} "(e) court costs of this action." (Emphasis added.)

{¶ 18} Thus, the majority is mistaken that "Metzner did not allege any cause of action relating to 'damages discovered upon vacancy of the premises,' nor any

cause of action for 'costs incurred in removing defendant's property from the premises.'"

{¶ 19} Furthermore, I disagree with the majority that the damages pled did not sufficiently put Hamaoui on notice of his potential liability pursuant to Civ.R. 54(C).

{¶ 20} The current version of Civ.R. 54(C) provides:

{¶ 21} "A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded the relief in the pleadings."

{¶ 22} The majority interprets this rule to require a plaintiff to plead in the complaint the exact dollar amount it is seeking for damages prior to a default judgment. I disagree with this interpretation.

{¶ 23} In *White Oak Communities v. Russell* (Nov. 9, 1999), Franklin App. No. 98AP, the appellee's failure to demand a specific dollar figure in its prayer for relief with respect to damages for the cost of a pool and finance charges did not prevent the trial court from awarding such damages to him. Id. In the appellee's demand, he requested "an amount sufficient to compensate and make Russell whole for all damages, costs, expenses, interest, and any other expenditure incurred in the defense of the complaint and the prosecution of this Third Party Complaint" and for "compensatory and punitive damages, attorney's fees, costs, and interest at 10% from June 22, 1995." The court determined that appellee made a "definite" demand

for compensatory damages for the cost of the pool, finance charges, and costs for removing the pool. Id. The court determined that appellant was put on notice of the specific amount of the damages, in the least, because it was a party to the home improvement contract that indicated these costs. Id.

{¶ 24} The court further provided that:

{¶ 25} "* * * [T]here is nothing in Civ.R. 54(C) that mandates that a party plead a specific dollar amount in its demand for judgment; rather, Civ.R. 54(C) only requires that the complaint state an 'amount.' It is apparent that the major purpose behind Civ.R. 54(C) is to put the defendant on notice prior to trial as to his potential liability so that he may make a rational decision whether to defend the action. See *Bishop v. Grdina* (1985), 20 Ohio St.3d 26, 28, 485 N.E.2d 704." Id.; see, also, *Nieman v. Bunnel Hill Development Co., Inc.*, Butler App. No. CA2002-10-249, 2004-Ohio-89 (failing to make a demand for a specific dollar amount does not prevent a trial court from awarding damages proposed in a prayer for relief as long as the damages were for a definite amount.)

{¶ 26} In this case, I acknowledge that Civ.R. 54(C) requires Metzner Building to plead with some specificity; a prayer, however, comports with the requirements of Civ.R. 54(C) if it notifies Hamaoui of the specific type of damages being sought even though it lacks the formality of a dollar amount. Metzner Building specifically prayed for "compensatory damages for any damage to the Premises that may be discovered upon vacancy of the Premises or costs incurred in removing Defendant's property from the Premises." This prayer clearly stated a definite amount that provided

Hamaoui with notice that he was potentially liable for a sum of money for damages discovered after his vacancy.

{¶ 27} I also note that the cases cited by the majority in support of its proposition that a plaintiff is required to plead a specific monetary amount prior to default are clearly inapplicable to the instant case. First, in *Borges v. Everdry Waterproofing of Wapakoneta, Inc.* (1994), 95 Ohio App.3d 175, 642 N.E.2d 16, the Third Appellate District reviewed a judgment resulting from a bench trial and not a default judgment as in this case. As such, the *Borges* court considered a completely different provision of the rule when it rendered its decision that the prayer must include a specific dollar amount. More specifically, the court considered the provision of Civ.R. 54(C) that read:

{¶ 28} "However, a demand for judgment which seeks a judgment for money shall limit the claimant to the sum claimed in the demand unless he amends his demand not later than seven days before the commencement of the trial."[2]

{¶ 29} As previously stated, in this case, we are concerned with the provision of Civ.R. 54(C) dealing with default judgments and that states, "[a] judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment." Because the court in *Borges* considered a different provision

[2]This was the effective provision of Civ.R. 54(C) at the time the Third Appellate District rendered its decision in the *Borges* case. The rule was amended on July 1, 1994 and significantly altered this provision of the rule. The legislature, however, did not change the provision of the rule applying to default judgments.

of Civ.R. 54(C) in rendering its decision, the case is clearly irrelevant to the instant matter.

{¶ 30} Next, in *Masny v. Vallo,* Cuyahoga App. No. 84983, 2005-Ohio-2178, the landlord only demanded judgment in the amount of $695 but was awarded $3,275. He made no other prayer for relief. Clearly, that case is unlike the situation currently before us in which Metzner Building requested, in addition to other damages, "compensatory damages for any damage to the Premises that may be discovered upon vacancy of the premises or costs incurred in removing Defendant's property from the Premises."

{¶ 31} The case of *Buckley v. Lucas* (June 8, 1999), Perry App. No. 98CA14, is also distinguishable from the case sub judice. In *Buckley*, the trial court found the generic language "for such other relief as may be just and equitable" contained in the prayer of the complaint insufficient to place the defendant on notice of the plaintiff's claimed damages for restoration of the premises. The situation in *Buckley* differs from this case where Metzner Building pled with specificity the type of damages he was requesting: those discovered after defendant left the premises and the costs of removing defendant's belongings.

{¶ 32} Finally, the case of *Bransky v. Shahrokhi*, Cuyahoga App. No. 84262, 2005-Ohio-97, is not applicable in any way as it reverses the trial court's award of damages after determining that the trial court did not award the landlord ***enough*** damages.

{¶ 33} As a practical matter, I note that the majority's application of Civ.R. 54(C) erroneously rewards Hamaoui for bad behavior. In the instant matter, Hamaoui appeared at the eviction proceedings and was ordered to leave the premises after October 11, 2007. He was also notified of the time, date, and place of the second cause of action for monetary damages.

{¶ 34} After the eviction proceedings, Hamaoui returned to the premises to retrieve his belongings. He also removed the stainless steel cooking hood over the stove. He then, by his own choosing, failed to appear for the damages trial, although he was well aware of its existence.

{¶ 35} Only after the court awarded Metzner Building $12,689.25 for the cooking hood taken by Hamaoui, as well as other damages, Hamaoui then decided to take a second bite of the apple and argue that he was not aware that he would owe Metzner Building when he took the cooking hood. The majority's outcome in this case rewards Hamaoui for not appearing at the second cause of action and does not make Metzner Building whole as a result of Hamaoui's confiscation of the cooking hood. Civ.R. 54(C) should not be applied so rigidly so as to defeat the ends of justice or work an injustice. Accordingly, despite the majority's assertions to the contrary, the judgment of the trial court was clearly ***not*** "totally fair to both parties."

{¶ 36} Finally, I also comment that frequently included with an action for eviction is an action for damages. In those instances, only after the court awards the landlord an eviction may the landlord assess the premises and determine what other

damages he has suffered other than past due rent. Thus, at the time the landlord files his complaint, he is unaware of the specific dollar figure of his damages.

{¶ 37} The majority would like the landlord, in between the time of the eviction and the damages hearing, in this case less than 14 days,[3] in addition to assessing the damages and acquiring all necessary documentation to support the amount of damages, to file a motion to amend the complaint and include a specific dollar amount, just in case the defendant, who appears at the first cause of action, fails to appear at the second in order to put him on notice. The majority, however, in applying such a requirement, ignores the fact that the defendant is well aware of the damages he or she has caused. Instead, the majority relies on a strict, rigid, and impractical application of Civ.R. 54(C). Equity demands that Hamaoui, and others like him, be estopped from using Civ.R. 54(C) to deprive Metzner Building of the damages it has suffered as a result of Hamaoui's intentional, irresponsible, and perhaps, malicious behavior.

[3]On September 27, 2007, the trial court held the eviction proceedings and ordered Hamaoui to vacate the premises on or after October 11, 2007. The court further notified him that the damages cause of action would be held on October 25, 2007. Accordingly, only after Hamaoui vacated the premises, on or after October 11, 2007, was the landlord legally permitted to enter the premises and assess the damages. Fourteen days later, the court held a hearing on the damages cause of action where Metzner Building presented documentary evidence establishing its damages.