

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

THOMAS JERELS, et al.

C. A. No. 24700

Appellants

v.

ROGER BEGUE

APPEAL FROM JUDGMENT
ENTERED IN THE
AKRON MUNICIPAL COURT
COUNTY OF SUMMIT, OHIO
CASE No. 06CV03047

Appellee

DECISION AND JOURNAL ENTRY

Dated: May 5, 2010

BELFANCE, Judge.

{¶1} Plaintiff-Appellant Thomas Jerels appeals from a decision of the Akron Municipal Court. For reasons set forth below, we reverse.

BACKGROUND

{¶2} In 1999, Jerels entered into a written lease agreement to rent a residence from Defendant-Appellee Roger Begue. Jerels paid a \$1,290 security deposit. Jerels vacated the premises in 2005 after giving Begue the required thirty-day notice. Jerels subsequently provided Begue with his new address. Begue sent Jerels an itemized statement indicating monies to be withheld from the security deposit; Begue alleged \$2,444.50 in late fees and \$229.50 in physical damage.

{¶3} Jerels filed a complaint pursuant to R.C. 5321.16 for Begue's failure to return Jerels' security deposit. Jerels claimed he timely paid rent except for two or three months when he did pay late, but also paid the accompanying late fee. Jerels claimed that Begue had waived

any claim to late fees as he accepted the payment and never notified Jerels that late fees were due. Jerels sought “\$1290.00, plus 5% per annum interest thereon pursuant to R.C. 5321.16(A), less any sum found by the court to [be] owed for tenant-caused damages, plus twice that amount pursuant to R.C. 5321.16(B) and reasonable attorney fees of \$750.00 pursuant to R.C. 5321.16(C).”

{¶4} Begue filed a counterclaim seeking the late fees and payment for damage to the property, which after applying the security deposit and the interest accumulated on the deposit, totaled \$1,177.06.

{¶5} The parties tried the matter to the court in February 2007. The trial court found that Begue had waived his claim for late fees and that his testimony concerning the damages was not credible as he failed to supply receipts supporting his claim. The court awarded Jerels \$2,820.94 (twice the security deposit plus accumulated interest), costs, attorney fees, and statutory interest.

{¶6} A hearing on attorney fees was held on August 19, 2008. Jerels’ counsel requested \$3,135 in attorney fees for 20.9 hours of work at \$150 per hour; however, the trial court awarded counsel only half that figure.

{¶7} Jerels has appealed raising one assignment of error for our review. Begue has not filed a brief with this Court, thus, this Court will “accept [Jerels’] statement of the facts and issues as correct and reverse the judgment if [Jerels’] brief reasonably appears to sustain such action.” App.R. 18(C).

R.C. 5321.16(C)

{¶8} Jerels contends that the trial court erred in reducing the award of attorney fees and in failing to tax the attorney fees as costs. We agree.

{¶9} R.C. 5321.16 provides in relevant part:

“(B) Upon termination of the rental agreement any property or money held by the landlord as a security deposit may be applied to the payment of past due rent and to the payment of the amount of damages that the landlord has suffered by reason of the tenant's noncompliance with section 5321.05 of the Revised Code or the rental agreement. Any deduction from the security deposit shall be itemized and identified by the landlord in a written notice delivered to the tenant together with the amount due, within thirty days after termination of the rental agreement and delivery of possession. The tenant shall provide the landlord in writing with a forwarding address or new address to which the written notice and amount due from the landlord may be sent. If the tenant fails to provide the landlord with the forwarding or new address as required, the tenant shall not be entitled to damages or attorneys fees under division (C) of this section.

“(C) If the landlord fails to comply with division (B) of this section, the tenant may recover the property and money due him, together with damages in an amount equal to the amount wrongfully withheld, and reasonable attorneys fees.”

The Supreme Court of Ohio held in *Smith v. Padgett* (1987), 32 Ohio St.3d 344, 349, that “under R.C. 5321.16(B) and (C), a landlord who wrongfully withholds a portion of a tenant's security deposit is liable for damages equal to twice the amount wrongfully withheld and for reasonable attorney fees.” “If the trial court finds that a landlord has wrongfully withheld a portion of the tenant's security deposit, it shall determine the amount of reasonable attorney fees to be awarded on the basis of the evidence presented.” *Id.*

{¶10} The Supreme Court went on to note that “the award of attorney fees must relate solely to the fees attributable to the tenant's security deposit claim under R.C. 5321.16, and not to any additional claims. Where * * * a tenant brings additional claims against the landlord, the tenant may not use R.C. 5321.16(C) to recover attorney fees attributable to the additional claims.” *Id.* at 349-350.

{¶11} In this matter, the trial court conducted a hearing on the fee request. Jerels’ counsel offered the testimony of an expert witness who had examined the entries in the fee statement and the corresponding charges. The expert witness concluded that the amount of fees

requested was appropriate and reasonable. The expert also characterized the fee award as conservative.

{¶12} The trial court concluded in its entry awarding fees that:

“While expert testimony established the aforementioned hours and rate as reasonable and customary for this area and type of work, [Jerels] failed to precisely breakdown and separate out the amount of hours spent in relation to this matter versus the amount of hours spent on defending against [Begue’s] counterclaim for late fees and damage to the property. The court is, however, aware that given the nature of this claim such a breakdown may be impossible. Additionally, new counsel for [Begue] raised the issue of the additional time expended after this matter was set for trial and then continued.

“In light of the above facts, the court finds that it would be reasonable to attribute 50% of the attorney fees to litigating the security deposit claim. Accordingly, [Begue] is liable to [Jerels] in the amount of \$1,567.50.”

We note that it is unclear whether the trial court found that the fees requested were in fact reasonable. It appears that, despite the trial court’s observation that the fees might be impossible to break down, it felt constrained to reduce the fees in some manner that would apportion some of the fees to the defense of the landlord’s counterclaim and some of the fees to the claim for return of the security deposit. It appears the trial court interpreted *Smith* to mean that Jerels’ counsel could not recover all of the attorney fees because some of those fees resulted from time spent defending Begue’s counterclaim.

{¶13} We conclude that the trial court misinterpreted *Smith* and therefore erred as a matter of law. We do not read *Smith* as broadly as the trial court. *Smith* did not address the situation before us, a claim pursuant to R.C. 5321.16 and a corresponding counterclaim. In *Smith*, not only did the plaintiffs file a claim pursuant to R.C. 5321.16, they also filed an additional claim for breach of contract. *Smith*, 32 Ohio St.3d at 345. The Court stated that “[w]here, as here, a tenant brings additional claims against the landlord, the tenant may not use R.C. 5321.16(C) to recover attorney fees attributable to the additional claims.” *Id.* at 349-350.

In the instant matter, the parties were arguing, in part, over the same sum of money. Begue believed he was entitled to keep the security deposit and Jerels believed he was entitled to get it back. The *Smith* Court did not address whether fees attributable to defending a related counterclaim could be recovered. We hold that if the trial court concludes that the work completed in support of the claim pursuant to R.C. 5321.16(C) and the work completed in defending the related counterclaim are indivisible, it is within the trial court's discretion to award the prevailing tenant the attorney fees he or she reasonably incurred in both pursuing the claim and defending against the counterclaim. To hold otherwise would be illogical. This is not to say that our decision mandates that the trial court award the prevailing tenant all the fees even if the trial court finds the fees indivisible. The trial court maintains discretion to make the determination as to what fee award is reasonable in light of all the facts and circumstances of the case.

{¶14} We note that other courts also find merit in this approach and “have allowed attorney fees that relate to both the security deposit claim and to defending against a landlord's counterclaim for alleged damages and/or unpaid rent when such claims are virtually indivisible.” *Nelson v. Tipton* (Nov. 18, 1999), 10th Dist. No. 99AP-277, at *8. See, also, *Lacare v. Dearing* (1991), 73 Ohio App.3d 238, 241-242.

{¶15} Jerels is also correct in his assertion that attorney fees awarded pursuant to R.C. 5321.16(C) should be assessed as costs. *Christe v. GMS Mgt. Co.* (2000), 88 Ohio St.3d 376, syllabus (“Attorney fee awards made pursuant to R.C. 5321.16(C) are to be assessed as costs.”). Jerels' assignment of error is sustained. Therefore, we remand the matter to the trial court so that it may determine a reasonable award of attorney fees, and so that it can award those fees as costs.

CONCLUSION

{¶16} In light of the foregoing, we reverse the judgment of the Akron Municipal Court and remand this matter for proceedings consistent with this opinion.

Judgment reversed
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Akron Municipal court, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

EVE V. BELFANCE
FOR THE COURT

CARR, J.
CONCURS

DICKINSON, P. J.
CONCURS, SAYING:

{¶17} I agree with the majority's judgment and most of its opinion. I write separately to note that, while the majority has written in ¶13 that, "if the trial court concludes that the work

completed in support of the claim pursuant to R.C. 5321.16(C) and the work completed in defending the related counterclaim are indivisible, it is within the trial court's discretion to award the prevailing tenant the attorney fees he or she reasonably incurred in both pursuing the claim and defending against the counterclaim," any conclusion that the fees incurred in this case are divisible would be impossible and, therefore, a decision not to award Mr. Jerels all the attorney fees he reasonably incurred would be a mistake of law. Accordingly, the only question legitimately before the trial court on remand is whether \$3135 in attorney fees is reasonable for prosecuting Mr. Jerels's claim and defending against Mr. Begue's counterclaim and, if not, what amount is reasonable.

APPEARANCES:

RUTH A. GIBSON, Attorney at Law, for Appellant.

TONY DALAYANIS, Attorney at Law, for Appellee.