

[Cite as *Miller v. Kilcullen*, 2009-Ohio-5723.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STEVEN MILLER

Plaintiff-Appellee/Cross-Appellant

-vs-

KIMBERLY KILCULLEN

Def.-Appellant/Cross-Appellee

JUDGES:

Hon. W. Scott Gwin, P. J.

Hon. John W. Wise, J.

Hon. Patricia A. Delaney, J.

Case No. 2008 CA 00260

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common
Pleas, Case No. 07 CV 04170

JUDGMENT:

Reversed

DATE OF JUDGMENT ENTRY:

October 28, 2009

APPEARANCES:

For Plaintiff-Appellee/Cross-Appellant

For Defendant-Appellant/Cross-Appellee

STANLEY R. RUBIN
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Canton, Ohio 44702

ROBERT E. SOLES, JR.
6545 Market Avenue North
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Wise, J.

{¶1} Defendant-Appellant/Cross-Appellee Kimberly Kilcullen appeals from the September 18, 2008, Judgment Entry entered in the Stark County Court of Common Pleas granting judgment in favor of Plaintiff-Appellee Steven Miller on his claims for self-help eviction and conversion.

{¶2} Plaintiff-Appellee/Cross-Appellant Steven Miller appeals from the trial court's calculation of damages and its award of attorney fees.

STATEMENT OF THE FACTS AND CASE

{¶3} On February 10, 2005, Plaintiff-Appellee Steven Miller entered into a land contract with the Estate of Carolyn Cole by its executrix, Defendant-Appellant Kimberly Kilcullen, Cole's daughter. The contract provided that Miller agreed to purchase the property at 1812 Fourth Street, Northeast, in Canton, Ohio, for \$50,000.00, payable in 144 monthly installments of \$425.00. Miller fell behind in his payments beginning in February, 2006. Miller asked Kilcullen to accept reduced payments, but she refused. Miller then told Kilcullen he would move out and return the keys to her, but it would take some time because he had many personal items in the home.

{¶4} In August, 2006, Miller moved in with his mother after finding another job about 90 miles away, but he did not complete moving his items out of the home. When he returned to the home in September, 2006, the locks had been changed and his personal items were gone.

{¶5} Although Kilcullen had left a three-day eviction notice at the home in June 2006, she did not follow up with the eviction proceeding.

{¶6} Miller filed a Complaint in the Stark County Court of Common Pleas on October 11, 2007, alleging a self-help eviction in violation of R.C. §5321.15, and conversion, naming Kilcullen only in her individual capacity and not in her capacity as executrix of Cole's estate.

{¶7} Kilcullen's attorney filed an answer on her behalf and a counterclaim wherein she asserted two affirmative defenses: failure to state a claim upon which relief may be granted and failure to join a necessary party.

{¶8} Miller submitted discovery requests to Kilcullen, which included Interrogatories, Requests for Admission and Requests for Production of Documents.

{¶9} Kilcullen failed to respond to Miller's discovery requests.

{¶10} On March 19, 2008, Miller filed a Notice of Deemed Admissions.

{¶11} The trial court held a pretrial on Miller's Notice of Deemed Admissions. The trial court gave Kilcullen two weeks to file a response, but her attorney failed to do so.

{¶12} On June 10, 2008, the trial court entered an order conclusively establishing the facts contained in the Requests for Admissions as true.

{¶13} On July 16, 2008, this matter came on for trial. Following same, Miller's attorney filed a post-hearing brief; Kilcullen's trial counsel did not.

{¶14} On September 18, 2008, the trial court filed a judgment entry ruling in Miller's favor on both counts, awarding him \$9,800, including \$1,500 in attorney fees. Miller later obtained an order of garnishment against Kilcullen's wages.

{¶15} It is from this Judgment Entry that Appellant and Cross-Appellant prosecute the instant appeal, raising the following assignments of error for review:

ASSIGNMENTS OF ERROR

Appeal

{¶16} “I. THE TRIAL COURT'S VERDICT IN FAVOR OF MILLER ON HIS CLAIM FOR SELF-HELP EVICTION WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE BECAUSE KILCULLEN SIGNED THE LAND INSTALLMENT CONTRACT IN HER CAPACITY AS EXECUTRIX OF HER MOTHER'S ESTATE AND NOT IN HER INDIVIDUAL CAPACITY

{¶17} “II. THE TRIAL COURT'S VERDICT IN FAVOR OF MILLER ON HIS CLAIM FOR CONVERSION WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE BECAUSE KILCULLEN WAS ACTING IN HER CAPACITY AS EXECUTRIX OF HER MOTHER'S ESTATE AND NOT IN HER INDIVIDUAL CAPACITY.”

Cross-Appeal

{¶18} “I. THE TRIAL COURT'S CALCULATION OF MILLER'S DAMAGES WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶19} “II. THE TRIAL COURT ERRED IN FAILING TO AWARD MILLER'S [SIC] THE FULL AMOUNT OF HIS ATTORNEY'S FEES AND FAILING TO ALLOW MILLER TO PRESENT EVIDENCE REGARDING THESE FEES AT A POST-TRIAL HEARING.”

I., II.

{¶20} In Appellant's first and second assignments of error, Appellant argues that the trial court's verdicts on Appellee's claims for self-help eviction and conversion were against the manifest weight of the evidence.

{¶21} As an appellate court, we neither weigh the evidence nor judge the credibility of the witnesses. Our role is to determine whether there is relevant, competent and credible evidence upon which the fact finder could base its judgment. *Cross Truck v. Jeffries* (Feb. 10, 1982), Stark App. No. CA5758. Accordingly, judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr.* (1978), 54 Ohio St.2d 279. A reviewing court must not substitute its judgment for that of the trial court where there exists some competent and credible evidence supporting the judgment rendered by the trial court. *Myers v. Garson* (1993), 66 Ohio St.3d 610.

{¶22} Appellee argues that because Appellant was authorized to act on behalf of the Estate to manage the property pursuant to R.C. §5321.01(B), she was in effect a landlord, being “the agent of the owner” or “any person authorized by the owner ... to manage the premises or to receive rent from a tenant under a rental agreement” and was therefore obligated to comply with provisions of the Landlord-Tenant Act, specifically those contained in R.C. §5321.15.

{¶23} Upon review, we find that Appellant Kimberly Kilcullen signed the Land Installment Contract in her representative capacity as “Executrix for the Carolyn L. Cole Estate.” In doing so, Appellant Kilcullen was not acting as an “agent” of the Estate but rather as the personal representative of the decedent. 32 Ohio Jurisprudence 3d 453-454.

{¶24} Under Ohio law, an “agency relationship” is a consensual fiduciary relationship between two persons where the agent has the power to bind the principal

by his or her actions, and the principal has the right to control the actions of the agent. *Evans v. Ohio State Univ.*, 112 Ohio App.3d 724, *appeal not allowed*, 77 Ohio St.3d 1494. “Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act.” Restatement of Law 2d, Agency (1958).

{¶25} An executrix is not an “agent” of the estate because the estate cannot have a “right to control” to executrix. Any such “right to control” would belong to the probate court or to the heirs of the estate.

{¶26} We therefore find that Estate of Carolyn Cole was the “landlord” under R.C. §5321.01(B), not Appellant Kimberly Kilcullen.

{¶27} We further find that the actions taken by Appellant Kilcullen herein, in both pursuing a self-help eviction and in removing and thereby converting Appellee’s property, were done in her representative capacity as executrix for the estate.

{¶28} As Plaintiff-Appellee’s Complaint only named Kimberly Kilcullen individually and not in her capacity as executrix of the Estate of Carolyn L. Cole, we find that Appellee failed to name the proper party in this matter.

{¶29} This Court therefore finds that while the facts in the case sub judice would support judgments pursuant to R.C. §5321.15 and conversion, such judgments would have to be entered against Kimberly Kilcullen in her representative capacity as the Land Installment Contract herein was signed by her as “executrix for the Carolyn L. Cole Estate” and not against her in her individual capacity.

{¶30} Whether Appellant’s actions, which were taken as executrix in this matter, fall outside of her duties as executrix under the will in this case and/or result in personal

liability as a result thereof, are matters within the jurisdiction of the Probate Division pursuant to R.C. 2101.24(A)(1)(c), which gives the probate court exclusive jurisdiction “to direct and control the conduct and settle the accounts of executors and administrators.”

{¶31} Based on the foregoing, we find Appellant's first and second assignments well-taken and hereby sustain same.

Cross-Appeal

I., II.

{¶32} In Cross-Appellant's first and second assignments of error, Cross-Appellant contends that the trial court's award of damages was against the manifest weight of the evidence and further that the trial court erred in failing to award the full amount of attorney fees and in failing to allow him a hearing to present evidence of such fees.

{¶33} Based on our disposition of the assignments of error raised in the appeal in this matter, we find the assignments of error raised in this cross-appeal moot.

{¶34} Appellant's first and second assignments of error are overruled.

{¶35} For the foregoing reasons, the judgment of the Court of Common Pleas, Stark County, Ohio, is reversed.

By: Wise, J.

Gwin, P. J., and

Delaney, J., concur.

/S/ JOHN W. WISE_____

/S/ W. SCOTT GWIN_____

/S/ PATRICIA A. DELANEY_____

JUDGES

JWW/d 928

