

[Cite as *Tourville v. Terzuoli*, 2009-Ohio-2743.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

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SHAWN M. TOURVILLE, ET AL.	:	
Plaintiffs-Appellants	:	C.A. CASE NO. 22802
vs.	:	T.C. CASE NO. 07CVI03609
	:	(Civil Appeal From
ANDREW J. TERZUOLI, JR.	:	Kettering Mun. Court,
Defendant-Appellee	:	Small Claims Division)

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O P I N I O N

Rendered on the 5th day of June, 2009.

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GRADY, J.

{¶ 1} Plaintiffs, Shawn M. and Jennifer P. Tourville,
appeal from a judgment for Defendant, Andrew J. Terzuoli, Jr.,
in an action the Tourvilles filed on claims for monies due and
owing them by Terzuoli.

{¶ 2} The Tourvilles leased a residential property from

Terzuoli on December 29, 2006. The lease term was month-to-month, at the rate of \$1,050.00 per month. The Tourvilles paid a security deposit of \$1,200.00, a pet deposit of \$300.00, and a heating oil deposit of \$600.00. The Tourvilles took possession of the property on December 30, 2006.

{¶3} In July of 2007, Terzuoli notified the Tourvilles that their monthly rent would increase by \$275.00 on August 20, 2007, and that they would be required to pay an additional \$400.00 in security deposits. The Tourvilles subsequently informed Terzuoli in writing that they were terminating the month-to-month lease. The parties agreed to a move-out date of August 21, 2007.

{¶4} The Tourvilles moved out on August 19, 2007, and returned the keys to Terzuoli on August 21, 2007. The Tourvilles informed Terzuoli that the refund of their security deposit should be mailed to them. In an envelope postmarked September 25, 2007, Terzuoli sent the Tourvilles a check for a refund of part of the security deposit and an itemization of deductions from the security deposit the Tourvilles had paid.

Shawn Tourville telephoned Terzuoli to discuss the itemized deductions. The Tourvilles then cashed Terzuoli's check.

{¶5} On October 16, 2007, the Tourvilles filed a complaint in the small claims division of the Kettering

Municipal Court, seeking \$1,946.40 in damages for refunds of their deposits Terzuoli owed them, plus interest, costs, and attorney fees. Terzuoli filed a counterclaim, alleging that he had been damaged by the Tourvilles in the amount of \$14,268.00, but requesting an award of damages only in the amount of the court's jurisdictional limit of \$3,000.00.

{¶ 6} A hearing was held before a magistrate on December 11, 2007. The magistrate found that the Tourvilles' claim for the remainder of the security deposit is barred by the doctrine of accord and satisfaction because the Tourvilles cashed Terzuoli's check, and that Terzuoli would therefore be granted judgment on the Tourvilles' complaint. The magistrate stated that he would dismiss Terzuoli's counterclaim.

{¶ 7} The magistrate filed a decision on the findings he made at trial. The Tourvilles filed timely objections to the magistrate's decision. On May 2, 2008, the trial court overruled these objections and adopted the magistrate's decision. The Tourvilles filed a timely notice of appeal.

SECOND ASSIGNMENT OF ERROR

{¶ 8} "THE TRIAL COURT ERRED IN HOLDING THAT THE AFFIRMATIVE DEFENSES OF ACCORD AND SATISFACTION, AS WELL AS WAIVER, ARE SUPPORTED BY THE FACTS IN THIS CASE."

{¶ 9} In his Decision, the magistrate found "that the

Plaintiffs readily acknowledge that they received and negotiated a refund check from the Defendant. The Court further finds that there has been a waiver, and an accord and satisfaction of Plaintiffs' claims for the return of any further portion of their security deposit."

{¶ 10} "Accord and satisfaction is an affirmative defense to a claim for money damages. If a party against whom a claim for damages is made can prove accord and satisfaction, that party's debt is discharged by operation of law." *Allen v. R.G. Industrial Supply*, 66 Ohio St.3d 229, 231, 1993-Ohio-43.

{¶ 11} "When an accord and satisfaction is pled by the defendant, the court's analysis must be divided into three distinct inquiries. First, the defendant must show that the parties went through a process of offer and acceptance-an accord. Second, the accord must have been carried out-a satisfaction. Third, if there was an accord and satisfaction, it must have been supported by consideration." *Id.* at 231-32 (citation omitted).

{¶ 12} When the accord and satisfaction relates to the cashing of a check, the plaintiff "must have reasonable notice that the check is intended to be in full satisfaction of the debt.'" *Id.* at 232 (citation omitted). The simple fact that a plaintiff cashes the check does not indicate accord and

satisfaction. *Lightbody v. Rust*, Cuyahoga App. No. 80927, 2003-Ohio-3937, at _23.

{¶ 13} The trial court erred in finding that the claims of the Tourvilles are barred by the defense of accord and satisfaction. If there was an accord, it was carried out to satisfaction when the Tourvilles cashed Terzuoli's check. However, there was no evidence that the check was the product of a negotiation between the Tourvilles and Terzuoli regarding the amount of the security deposit that should be refunded. Instead, Terzuoli returned a check for the amount of the security deposit he believed was due. Therefore, there is no evidence that an accord was reached. Further, there is no evidence of any additional consideration that Terzuoli paid to the Tourvilles in exchange for their agreement to accept the check in full satisfaction of the debt Terzuoli owed.

{¶ 14} The second assignment of error is sustained.

FIRST ASSIGNMENT OF ERROR

{¶ 15} "THE TRIAL COURT ERRED IN ITS APPLICATION OF THE LAW AND FACTS TO APPELLANTS' CLAIMS UNDER ORC 5321.16"

{¶ 16} R.C. 5321.16(A) requires a landlord to pay interest on a tenant's security deposit he holds, in certain circumstances. R.C. 5321.16(B) requires a landlord, after deducting for unpaid rent and damage to the premises, to

return the balance of the security deposit due the tenant within thirty days after the tenancy terminates. R.C. 5321.16(C) authorizes an award of money damages and attorney fees to a tenant for a landlord's failure to satisfy those requirements.

{¶ 17} The magistrate's finding that the additional refund the Tourvilles claim they are due is barred by accord and satisfaction prevented the magistrate from deciding the issues presented by a claim made pursuant to R.C. 5321.16(C). On this record, we cannot determine whether the Tourvilles are entitled to money damages pursuant to that section. The trial court must address those issues on remand.

{¶ 18} The first assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 19} "THE TRIAL COURT ERRED IN HOLDING THAT APPELLEE'S COUNTERCLAIMS WERE DISMISSED WITHOUT PREJUDICE."

{¶ 20} Civ.R. 41(A)(2) provides that a plaintiff may voluntarily dismiss any claim for relief after the trial has commenced. The claim "shall not be dismissed except on order of the court and upon such terms and conditions as the court deems proper." *Id.* Further, "[u]nless otherwise specified in the order, a dismissal under division (A)(2) of this rule is without prejudice." *Id.*

{¶ 21} A dismissal with prejudice by court order pursuant to Civ.R. 41(A)(2) is a dismissal on the merits. *Manoher v. Massillon Community Hospital* (1997), 122 Ohio App.3d 715. Subsequent actions on claims for relief which have been dismissed on their merits are barred by the doctrine of res judicata. *Grava v. Parkman* (1995), 73 Ohio St. 3d 379. A dismissal ordered pursuant to Civ.R. 41(A)(2) is without prejudice unless the court otherwise states in its order. *Chadwick v. Barba Lou, Inc.* (1982), 69 Ohio St.2d 222.

{¶ 22} When the hearing before the magistrate commenced, Terzuoli's attorney moved to voluntarily dismiss Terzuoli's counterclaim, except for a claim for \$550 for costs of repair.

Thereafter, without hearing evidence on that claim, the magistrate stated that Terzuoli's counterclaim is retaliatory and without merit. (T. 14, 16, 18). The written decision the magistrate filed merely stated that Terzuoli had voluntarily dismissed his counterclaim. The magistrate did not order that the voluntary dismissal was with prejudice.

{¶ 23} The Tourvilles objected that the magistrate's decision should have ordered dismissal of Terzuoli's counterclaim with prejudice, a result consistent with and supported by the magistrate's several statements at the hearing that the counterclaim was without merit. The trial

court overruled the objection and adopted the magistrate's decision.

{¶ 24} The Tourvilles rely on the same contention to argue on appeal that the trial court erred when it overruled their objection and adopted the magistrate's decision. We find no abuse of discretion.

{¶ 25} Civ.R. 41(A)(2) invests the court with broad discretion in determining whether to order that a Civ.R. 41(A)(2) dismissal is with prejudice. The magistrate's written finding that the counterclaim was voluntarily dismissed is not necessarily inconsistent with his oral pronouncements at the hearing that the counterclaim was also without merit. Furthermore, inasmuch as any finding the magistrate makes must be in a written decision, per Civ.R.53(D)(3)(a)(i), the written decision controls over any oral pronouncements the magistrate made. The trial court did not abuse its discretion in failing to order the dismissal was with prejudice merely because of those oral pronouncements that the counterclaim lacked merit.

{¶ 26} The third assignment of error is overruled. Having sustained the second assignment of error, we will remand the case to the trial court for further proceedings consistent with this opinion.

FROELICH, J. and WOLFF, J., concur.

(Hon. William H. Wolff, Jr., retired from the Second Appellate District, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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