

[Cite as *Jacobs v. Jones*, 2011-Ohio-3313.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Alexis Jacobs,	:	
	:	
Plaintiff-Appellee,	:	No. 10AP-930
v.	:	(C.P.C. No. 08CVH09-13622)
	:	
Vaughan Jones,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on June 30, 2011

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*Cooper & Elliott, LLC, and Jay F. McKirahan*, for appellee.

*Vaughan Jones*, pro se.

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APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Defendant-appellant, Vaughan Jones, appeals from a judgment of the Franklin County Court of Common Pleas entering judgment for plaintiff-appellee, Alexis Jacobs, in the amount of \$93,750 plus court costs and dismissing the claims in defendant's counterclaim. Because (1) the trial court erred in denying defendant's request for a continuance, (2) the trial court did not err in granting summary judgment to plaintiff on the issue of liability only on plaintiff's claim of destruction of the residence, and (3) this court lacks jurisdiction to consider whether the trial court properly granted summary

judgment to plaintiff on three other motions for summary judgment, we affirm in part and reverse in part.

### **I. Facts and Procedural History**

{¶2} Because the procedural posture of this case underlies the issues on appeal, we address it in some detail. On July 15, 2008, plaintiff filed a complaint in the Franklin County Municipal Court for forcible entry and detainer to evict defendant from plaintiff's property at 3711 Mann Road in Blacklick, Ohio ("the property"). Plaintiff's complaint alleged defendant had occupied the property under an oral month-to-month tenancy that expired on July 9, 2008.

{¶3} On August 4, 2008, defendant answered, included a jury demand, and asserted seven counterclaims. Due to the amount of damages sought in defendant's counterclaims, the Franklin County Municipal Court transferred the matter to the common pleas court. The common pleas court later granted plaintiff leave to amend her complaint to include a claim for damages stemming from defendant's failure to maintain the property. Plaintiff eventually filed various motions for summary judgment.

{¶4} Plaintiff initially moved for partial summary judgment as to the eviction action only. The trial court granted plaintiff's motion on November 18, 2008, concluding plaintiff met her Civ.R. 56 burden, but defendant did not meet his reciprocal burden under the rule. After denying defendant's motion for reconsideration, the trial court journalized its decision in a December 23, 2008 judgment entry.

{¶5} On January 9, 2009, defendant filed a timely appeal to this court from the trial court's judgment entry granting plaintiff's motion for partial summary judgment on plaintiff's eviction claim. By journal entry of February 25, 2009, this court dismissed as

moot defendant's appeal in case No. 09AP-07 because defendant vacated the premises subject of the appeal. Defendant did not pursue further appeal on the eviction.

{¶6} Plaintiff subsequently filed three motions for partial summary judgment regarding defendant's counterclaims. On May 27, 2009, the trial court granted plaintiff's motion for partial summary judgment on defendant's first, second, fourth, and fifth counterclaims seeking damages for two alleged instances of trespass, labor defendant allegedly performed, and necessary items defendant allegedly purchased to maintain the property. The trial court journalized its decision to dismiss those claims with prejudice in a judgment entry dated May 27, 2009 and indicated "no just cause for delay." Defendant did not appeal from the judgment entry.

{¶7} The trial court also granted plaintiff's motion for partial summary judgment on defendant's sixth and seventh counterclaims in which defendant sought damages that plaintiff's agents allegedly caused in trespassing on the property. The trial court journalized its decision in an April 29, 2010 decision and entry indicating "[t]here is no just cause for delay." Again, defendant did not appeal from the trial court's decision and entry.

{¶8} Lastly, plaintiff filed a motion for partial summary judgment as to liability only on plaintiff's claim for damage to the residence on the property for failure to maintain it. The trial court continued the trial date to allow defendant to respond to plaintiff's motion and to engage in any needed discovery. On March 1, 2010, defendant filed a motion to compel discovery and for sanctions. In a March 24, 2010 decision and entry, the trial court denied defendant's motion to compel and for sanctions, concluding plaintiff complied with defendant's discovery requests. Defendant filed a second motion to compel on April 15, 2010.

{¶9} On January 7, 2010, defendant filed a combined motion to strike plaintiff's motion for leave to plead, motion to strike two of plaintiff's motions for summary judgment, motion for sanctions, motion for leave to amend answer and to file a motion for summary judgment, and a motion for a continuance. The combined motion alleged plaintiff, plaintiff's counsel, or both, falsified certificates of service throughout the proceedings. The trial court issued an order on May 3, 2010 stating "all previous motions filed by plaintiff and defendant between January 7, 2010 and April 15, 2010 are MOOT." (May 3, 2010 Order, R. 177.) The same day, the trial court referred the matter for a bench trial before a magistrate on the scheduled trial date of July 9, 2010.

{¶10} In a May 20, 2010 entry, the trial court granted plaintiff's motion for partial summary judgment with respect to liability on plaintiff's claim concerning damage to the residence. Due to the trial court's rulings on the various summary judgments, the sole matters for trial on July 9, 2010 were the amount of damages, if any, to be awarded on plaintiff's claim that defendant damaged the residence and on defendant's third counterclaim alleging that plaintiff destroyed his hay crop.

{¶11} On July 9, 2010, only plaintiff appeared for the bench trial before the magistrate. After plaintiff presented her first witness on her damages claim, the magistrate recessed the trial. During that recess, the magistrate received a telephone call from defendant. When the magistrate resumed the proceedings, the magistrate recited the substance of the conversation with defendant for the record, stating defendant indicated he fell, "smashed his knee" on June 30, 2010, and "said he had surgery the following day." (Trial Tr. 15.) Defendant added that "they think he suffered a small stroke and for a time he was unable to speak." (Tr. 15.) Defendant advised that, as of the day of the

hearing, he was at an inpatient assisted living and skilled nursing services facility. After relaying defendant's message, the magistrate noted defendant "didn't sound fully coherent, I don't know why, but I'm just making a record of it just for what it's worth." (Tr. 15.)

{¶12} The magistrate noted defendant indicated to the magistrate he wanted to orally request a continuance, and he asked the magistrate to put his request on the record. Plaintiff opposed the motion to continue the trial, asserting defendant could have requested the continuance sometime prior to the trial's commencing, "at least a day before." (Tr. 16.) The magistrate agreed with plaintiff and decided defendant "did have the opportunity, and frankly, the obligation to contact the Court as soon as he was able to make other arrangements or at least let [the court] know what was going on." (Tr. 16-17.) The magistrate also noted defendant is "a knowledgeable trial-type attorney and should know better about these things." (Tr. 17.)

{¶13} Having denied defendant's oral motion for a continuance, the magistrate concluded the bench trial. In a decision filed July 27, 2010, the magistrate again noted defendant's request for a continuance on the day of the trial but stated "the request was unreasonable in light of the circumstances and should have been made much sooner, it appearing defendant neglected to do what he could have done and should have done to address the matter in a proper and timely manner." (Magistrate's July 27, 2010 Decision, 2.) Defendant filed objections to the magistrate's decision on August 10, 2010. By judgment entry of September 1, 2010, the trial court adopted the magistrate's decision, entered judgment for plaintiff in the amount of \$93,750 plus court costs and dismissed defendant's third counterclaim.

## II. Assignments of Error

{¶14} Defendant appeals, assigning the following errors:

[1] The Trial Court Erred, to the prejudice of Defendant Appellant, by refusing to grant Defendant's Motion for a continuance of the Trial in this matter, held July 9, 2010, after the Court had been advised that 1) the Appellant had suffered a major injury and surgery 10 days before the trial date, and 2) that the Defendant had subsequently also suffered a small stroke, and 3) that from the date of the injury and continuing through the trial date Defendant had been and still was an inpatient resident in either Ohio State University Hospital or a skilled nursing facility.

[2] The Trial Court Erred, to the prejudice of Defendant Appellant, by ruling in this case, and awarding damages against Defendant, and finding against Defendant's counter claim, based on adopting a Magistrate's findings from an unopposed Bench Trial to the Magistrate; when Appellant had demanded a Jury Trial and had never thereafter waived his demand for a Jury Trial.

[3] The Trial Court Erred, to the prejudice of Defendant Appellant, by not ruling on six Motions of Defendant properly filed as a Combined Motion on January 7, 2010 which Motions were:

- 1) MOTION TO STRIKE PLAINTIFF'S MOTION FOR LEAVE TO PLEAD
- 2) MOTION TO STRIKE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON COUNTERCLAIMS 6 AND 7
- 3) MOTION TO STRIKE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON CLAIMS OF DESTRUCTION TO RESIDENCE
- 4) MOTION FOR SANCTIONS
- 5) MOTION FOR LEAVE TO PLEAD TO AMEND ANSWER AND TO FILE A MOTION FOR SUMMARY JUDGMENT
- 6) MOTION FOR A CONTINUANCE

[4] The Trial Court Erred, to the prejudice of Defendant Appellant, by Granting Plaintiff's Motion for Summary Judgment on Defendant's counter claims 6 and 7 which deal with Plaintiff's Agents coming onto the Leasehold of Defendant without notice to Defendant tenant; when Plaintiff's

Agents admit to coming onto the property at least 22 times without notice to the tenant.

[5] The Trial Court Erred, to the prejudice of Defendant Appellant, by Granting Plaintiff's Motion for Partial Summary Judgment, on Liability only, for damages to the residence, by refusing to Grant Defendant's prior Motion to Compel Discovery and Motion for a Continuance until Discovery was received.

[6] The Trial Court Erred, to the prejudice of Defendant Appellant, by Granting Plaintiff's Motion for Summary Judgment, on Defendant's Counterclaims 1, 2, 4, and 5, which deal with 1) Plaintiff entering Defendant's leasehold property, without notice, and dumping in excess of 20 dump truck loads of rubble on the property, 2) Plaintiff's dumping causing hand work and mower damage to Defendant. 4) Plaintiff's failure to repair a leaking roof, which is a non-transferable duty of a landlord under an oral lease, 5) Plaintiff's failure to repair heating, hot water, and electrical which are non-transferable duties of a landlord under an oral lease.

[7] The Trial Court Erred, to the prejudice of Defendant Appellant, by Granting Summary Judgment on Plaintiff's Forcible Entry and Detainer Action, which issue is not moot because allowing this erroneous decision to stand will preclude Defendant from bringing a counterclaim for wrongful eviction, because of the workings of res judicata. (Sic passim.)

For ease of discussion, we combine for analysis defendant's fourth and sixth assignments of error.

### **III. First Assignment of Error – Motion for Continuance**

{¶15} Defendant's first assignment of error asserts the trial court erred in refusing to grant his motion for a continuance made the day of the bench trial before the magistrate.

{¶16} Whether to grant or deny a continuance lies within the sound discretion of the trial court, and we will not reverse the decision on appeal absent an abuse of that

discretion. *In re I.R.*, 10th Dist. No. 04AP-1296, 2005-Ohio-6622, ¶7, citing *State v. Unger* (1981), 67 Ohio St.2d 65, 67. "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Unger* at 67, quoting *Ungar v. Sarafite* (1964), 376 U.S. 575, 589, 84 S.Ct. 841, 849.

{¶17} In *Unger*, the Supreme Court of Ohio prescribed certain factors a trial court should consider when deciding whether to grant a continuance, including (1) "the length of the delay requested," (2) "whether other continuances have been requested and received," (3) "the inconvenience to litigants, witnesses, opposing counsel and the court," (4) "whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived," (5) "whether the defendant contributed to the circumstance which gives rise to the request for a continuance," and (6) "other relevant factors, depending on the unique facts of each case." *Id.* at 67-68. In reviewing a trial court's exercise of discretion, an appellate court must weigh any potential prejudice to the defendant against a court's right to control its own docket and the public's interest in the prompt and efficient dispatch of justice. *Id.* at 67.

{¶18} Here, plaintiff asserts the magistrate properly denied the continuance because defendant could and should have moved for a continuance sometime prior to the day of the trial, defendant failed to indicate the length of delay he would require, and plaintiff already had examined one of its two witnesses. Defendant responds by pointing out that his medical condition in the days leading up to and on the morning of trial left him unable to attend or meaningfully participate in the trial. According to defendant, the

magistrate's acknowledging defendant was somewhat incoherent is enough to make the court's decision denying the continuance unreasonable and an abuse of discretion under these circumstances. The issue resolves to whether defendant's medical condition, when combined with the magistrate's statement about defendant's incoherence, supports defendant's contention that the trial court abused its discretion in denying defendant's motion for a continuance.

{¶19} Ohio courts often conclude a party's uncorroborated allegation of medical issues, standing alone, is not enough to render a decision denying a continuance an abuse of discretion. See, e.g., *Calvary SPV I, L.L.C. v. Furtado*, 10th Dist. No. 05AP-361, 2005-Ohio-6884, ¶¶8, 12 (determining the trial court did not abuse its discretion or commit plain error in not granting a continuance where defendant left a telephone message for the court on the day before trial advising she would not be able to attend as a result of health issues, including spine problems, but did not provide "affidavits in support" or any "medical evidence" that "would have been helpful \* \* \* in persuading the trial court of the merits of defendant's contentions"); *State v. Naypaver*, 11th Dist. No. 2008-T-0102, 2009-Ohio-4620, ¶¶28-31 (deciding trial court did not abuse its discretion in denying various motions for continuance where the defendants, three members of a family, moved for a continuance on the uncorroborated statement that none of the family members could attend a hearing due to the father's medical condition stemming from "follow-up care and rehabilitation following his hip replacement" out of state); *Hudson v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 04AP-562, 2004-Ohio-7203 (concluding trial court did not abuse its discretion in denying plaintiff's motion for a continuance, made the morning of the trial, based on her "medical problems," where medical records plaintiff provided to the court did

not support her contention that she could not have sought a continuance prior to the morning of the trial at which the defendant's witnesses were present and ready to testify).

{¶20} Although defendant's medical condition is one of the factors to be weighed in the *Unger* analysis, some of the other factors appear to be adverse to defendant. See *Herman v. State Medical Bd.* (Nov. 28, 2000), 10th Dist. No. 99AP-967 (concluding no abuse of discretion even though appellant's medical condition weighed in his favor, where not only did four of five *Unger* factors support denying the motion for continuance but appellant "failed to medically document his medical disability" for the court). As plaintiff notes, defendant did not indicate the length of time he sought for the continuance, and plaintiff had examined her first of two witnesses when defendant made his request. Even so, no one factor in the *Unger* analysis is determinative; rather, the court must consider the unique circumstances of each case. See *Schill v. Schill*, 11th Dist. No. 2002-G-2465, 2004-Ohio-5114, ¶38 (stating "[t]here are no mechanical tests to determine whether a continuance should be granted, and the facts of every case are determinative").

{¶21} Under the circumstances here, defendant's medical issues implicate the other *Unger* factors. Defendant requested a continuance because he was in an inpatient nursing home and had suffered a stroke. The magistrate noted on the record, consistent with plaintiff's contentions, that defendant "didn't sound fully coherent." (Tr. 15.) Defendant's lack of coherence, in turn, may explain his failure to indicate the length of delay he sought. Moreover, although plaintiff and her witnesses would experience some degree of inconvenience since plaintiff already had examined one of her witnesses, nothing in the record suggested plaintiff would have any difficulty appearing again at a later date with both witnesses. See *In re J.W.*, 9th Dist. No. 24924, 2009-Ohio-6957, ¶18

(concluding the trial court erred in denying the mother's request for a continuance made the morning of her child's permanent custody hearing based on the mother's allegations of health issues, in part because the record lacked "evidence of potential inconvenience or difficulty for" the opposing party and witnesses who appeared for the hearing).

{¶22} In addition to the other factors, defendant was representing himself. "When a case has been assigned to a particular attorney who becomes unexpectedly ill on the morning of the trial," the court abuses its discretion if it denies "a motion for continuance" and "require[s] another member of that law firm who is totally unfamiliar with the case to proceed immediately to trial." *State v. Packer*, 188 Ohio App.3d 162, 2010-Ohio-2627, ¶25, citing *Columbus v. Dalton* (Jan. 30, 1979), 10th Dist. No. 78AP-522. In *Packer*, the appellant was acting pro se, so the Sixth District concluded appellant "was entitled to the same consideration regarding his illness as a licensed attorney would have been given." *Id.* at ¶26. As *Packer* emphasized, "[n]ot only did appellant indicate that he was ill and unable to adequately conduct his own defense, he provided documentation that he had seen a physician who had prescribed medications for him" and he "exhibited signs that the medications were, in fact, affecting his ability to stay awake and to adequately conduct his own defense." *Id.* The *Packer* court noted that "[i]n the absence of evidence to the contrary, a court must presume the validity of a documented physician's diagnosis and treatment" because "[a] defendant should not be forced to choose between accepting treatment of prescribed medications and defending himself at trial." *Id.* at ¶27.

{¶23} Similar to *Packer*, defendant here also was acting pro se. Unlike in *Packer*, when defendant contacted the court by telephone on the morning of July 9, 2010, defendant did not contemporaneously provide any medical documentation of his condition

or an affidavit to support his oral motion, a task defendant's living arrangements and incoherence made more problematic. After the magistrate refused the continuance, however, defendant filed objections to the magistrate's decision and included one photocopied page of two partial documents. One document entitled "RECAPITULATION OF STAY" reflects that the skilled nursing facility discharged defendant to his home on July 24, 2010. The other document is an invoice from the Ohio State University Medical Center for defendant with dates of service between June 30, 2010 and July 6, 2010. Although the invoice does not provide the specific date for each service rendered, it does indicate that, during the timeframe, defendant received "OR SERVICES" and a "CT SCAN/HEAD." (Objections to Magistrate's Decision, R. 201.)

{¶24} Lastly, plaintiff asserted, and the magistrate agreed, that defendant should have contacted the court sometime prior to the morning of the trial, or at least prior to plaintiff's examining her first witness, to request a continuance. Although defendant's timing is less than optimal, defendant's account of his medical problems creates some difficulty in discerning when defendant could have contacted the court any earlier. According to defendant's account of the events leading up to his motion for a continuance, defendant's accident occurred June 30, 2010, at which time he was admitted to the Ohio State University Hospital. Defendant underwent surgery on July 1, 2010, was given prescription narcotics for pain, and then suffered a stroke at some time on July 2, 2010. On July 6, 2010, he was transferred to a skilled nursing facility where he had no recollection of the pending trial until the evening of July 8, 2010. Defendant states he called the court as soon as he was allowed access to a phone at the skilled nursing facility on the morning of July 9, 2010 to request the continuance. The medical

documentation defendant provided in his objections to the magistrate's decision, though lacking in detail, supports his account of his medical problems during the timeframe at issue.

{¶25} Moreover, unlike a scheduled procedure where a known date allows a litigant to advise the court in advance of difficulties with the trial date, defendant's medical condition arose as a result of an accident, giving him no advance notice to tell the court he was unavailable. Further, nothing either in the transcript of the proceedings or in the magistrate's decision indicates the magistrate did not believe defendant's account of his health issues, but rather tended to corroborate it with his own conclusion about defendant's incoherence. Under specific facts present here, defendant appears to have made his request for the continuance as soon as was practicable. See *In re J.W.* at ¶18 (concluding the trial court erred in denying the mother's request for a continuance made the morning of her child's permanent custody hearing where the mother had been hospitalized in the days leading up to the hearing, so that "there was little practical opportunity to alert the court and all the parties in order to avoid inconvenience to those who did appear at court" the morning of the hearing). In the absence of evidence contradicting defendant's reasons for his delayed request for a continuance, the trial court abused its discretion in denying defendant's motion for a continuance.

{¶26} Defendant's first assignment of error is sustained.

#### **IV. Second Assignment of Error – Jury Trial**

{¶27} Defendant's second assignment of error asserts the trial court erred in conducting a bench trial when he included a jury demand in his answer and never waived his right to a jury trial.

{¶28} Our resolution of defendant's first assignment of error renders moot his second assignment of error. On remand, defendant presumably will be present at trial to reassert his jury demand.

#### **V. Third Assignment of Error – Failure to Rule on Motions**

{¶29} Defendant's third assignment of error asserts the trial court erred in failing to rule on the six motions defendant included in his January 7, 2010 combined motion. Defendant does not advance any argument as to the merits of those motions, nor does he indicate any resulting prejudice from the trial court's alleged failure to rule. Plaintiff responds that defendant did not raise in the trial court the trial court's alleged failure to rule on these motions.

*A. Motion to Strike Plaintiff's Motion for Leave to Plead; Motion to Strike Plaintiff's Motion for Summary Judgment on Defendant's Sixth and Seventh Counterclaims; Motion to Strike Plaintiff's Motion for Summary Judgment on Claim of Destruction to Residence; and Motion for Sanctions*

{¶30} Defendant's four motions relate to defendant's allegation that plaintiff's counsel either failed to serve defendant or issued fraudulent certificates of service. Although the trial court did not issue individual rulings on the motions, the trial court noted plaintiff's motions to strike in both its April 29, 2010 decision granting plaintiff's motion for summary judgment on plaintiff's claim that defendant damaged the residence and in its April 29, 2010 decision and entry granting plaintiff's motion for summary judgment on defendant's sixth and seventh counterclaims.

{¶31} When the trial court enters judgment "without expressly determining a pending motion, the motion impliedly is denied." *Polivka v. Cox*, 10th Dist. No. 02AP-1364, 2003-Ohio-4371, ¶23, citing *Fernandez v. Anheuser-Busch, Inc.*, 10th Dist. No. 01AP-1279, 2002-Ohio-3355, ¶19, appeal not allowed, 98 Ohio St.3d 1411. In granting

plaintiff's motions for summary judgment and noting defendant's motions to strike in response, the trial court necessarily overruled defendant's motions to strike. Similarly, the trial court impliedly denied defendant's motion to strike plaintiff's motion for leave to plead when it rendered plaintiff partial summary judgment on plaintiff's additional claim.

{¶32} Because the court denied defendant's motions that were based upon allegations of misconduct of plaintiff or plaintiff's counsel, defendant presented the trial court with no basis to issue sanctions. The trial court further clarified its intent to deny these motions when it purported to dispose of all of defendant's outstanding motions, including those made part of defendant's combined motion, in an order filed May 3, 2010. The trial court stated that "all previous motions filed by plaintiff and defendant between January 7, 2010 and April 15, 2010 are MOOT." (May 3, 2010 Order, R. 177.)

{¶33} Defendant's assignment of error with respect to the four noted motions lacks merit.

*B. Motion for a Continuance*

{¶34} In a January 11, 2010 order, the trial court continued the scheduled trial date to May 3, 2010. (Jan. 11, 2010 Order, R. 147.) Although the trial court did not expressly state it was ordering a continuance in response to defendant's motion, the trial court impliedly granted defendant's motion for a continuance. Defendant's assignment of error concerning his motion is without merit.

*C. Motion for Leave to Plead to Amend Answer and to File a Motion for Summary Judgment*

{¶35} The trial court apparently never addressed defendant's motion for leave to amend his answer and to file a motion for summary judgment on the additional

counterclaim he planned to add, unless the trial court's May 3, 2010 order determining all of defendant's previous motions were moot addressed those motions as well.

{¶36} Because, however, this case will be remanded to the trial court, the court will have the opportunity to address the motions, if it did not do so. Accordingly, defendant's third assignment of error is, in part, moot. See *Karnofel v. Girard Police Dept.*, 11th Dist. No. 2006-T-0063, 2007-Ohio-7114, ¶16 (concluding that where "the trial court will be issuing a new judgment entry" on remand, the assignments of error challenging the trial court's actions in relation to that judgment entry are moot), citing App.R. 12(A)(1)(c).

{¶37} Accordingly, defendant's third assignment of error is overruled in part and is moot in part.

#### **VI. Fourth and Sixth Assignments of Error – Motions for Summary Judgment on Defendant's Counterclaims**

{¶38} Defendant's fourth and sixth assignments of error assert the trial court erred in granting two of plaintiff's motions for summary judgment. Defendant's fourth assignment of error relates to the trial court's decision and entry rendered April 29, 2010 regarding defendant's sixth and seventh counterclaims. Defendant's sixth assignment of error relates to the trial court's judgment entry filed May 27, 2009 regarding defendant's first, second, fourth, and fifth counterclaims.

{¶39} As a threshold matter, we must determine when each of these decisions of the trial court became final, appealable orders. Generally, pursuant to Section 3(B)(2), Article IV, Ohio Constitution and R.C. 2505.03, appellate courts have jurisdiction to review only final orders, judgments, or decrees. "[T]he entire concept of 'final orders' is based upon the rationale that the court making an order which is not final is thereby retaining

jurisdiction for further proceedings. A final order, therefore, is one disposing of the whole case or some separate and distinct branch thereof." *Browder v. Shea*, 10th Dist. No. 04AP-1217, 2005-Ohio-4782, ¶10, quoting *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 94, quoting *Lantsberry v. Tilley Lamp Co.* (1971), 27 Ohio St.2d 303, 306. Conversely, "[a] judgment that leaves issues unresolved and contemplates that further action must be taken is not a final appealable order." *Id.*, quoting *State ex rel. Keith v. McMonagle*, 103 Ohio St.3d 430, 2004-Ohio-5580, ¶4, quoting *Bell v. Horton*, 142 Ohio App.3d 694, 696, 2001-Ohio-2593.

{¶40} To be a final, appealable order, a judgment entry must meet the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B). See *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 21. Civ.R. 54(B) "permits both the separation of claims for purposes of appeal and the early appeal of such claims." *Id.* at 21, quoting *Alexander v. Buckeye Pipe Line Co.* (1977), 49 Ohio St.2d 158, 159. In multiple-claim actions, "if the court enters judgment as to some, but not all, of the claims \* \* \*, the judgment is a final, appealable order only upon the express determination that there is no just reason for delay." *Eng. Excellence Inc. v. Northland Assoc. L.L.C.*, 10th Dist. No. 10AP-402, 2010-Ohio-6535, ¶10, citing *Gen. Acc. Ins. Co.* at 22; Civ.R. 54(B).

{¶41} An appellate court engages in a two-step analysis to determine whether a judgment or order is final and appealable. *Id.* at ¶11. We must determine (1) whether the order is final within the requirements of R.C. 2505.02, and, if it is, (2) whether Civ.R. 54(B) applies and, if so, whether the order contains a certification that there is no just reason for delay. *Id.*, citing *Gen. Acc. Ins. Co.* at 21. The mere fact that an order contains the Civ.R. 54(B) certification does not, itself, make the order final and appealable; rather, the trial

court's order first must be a final order under R.C. 2505.02. *Id.*, citing *Douthitt v. Garrison* (1981), 3 Ohio App.3d 254, 255.

{¶42} As relevant here, R.C. 2505.02(B)(1) provides that an order is final when it "affects a substantial right in an action that in effect determines the action and prevents a judgment." The trial court's May 27, 2009 judgment entry disposed of defendant's first, second, fourth, and fifth counterclaims for trespass, compensation for labor performed, and compensation for items purchased to maintain the property. The trial court's April 29, 2010 decision and entry disposed of defendant's sixth and seventh counterclaims for separate allegations of plaintiff's violation of landlord duties. The trial court determined in both entries that plaintiff was entitled to judgment as a matter of law on each of defendant's distinct counterclaims subject of plaintiff's motions for partial summary judgment. Defendant's only remaining counterclaim, his third claim for relief seeking damages for destruction of his hay crop, depends on facts entirely separate from the six counterclaims resolved in the trial court's decision granting plaintiff's motions for partial summary judgment.

{¶43} The trial court's entries in effect determine defendant's six counterclaims and prevent a judgment. Moreover, each of the six counterclaims requires proof of different facts, involves separate legal issues, and allows for differing recoveries. As a result, both the May 27, 2009 judgment entry and the April 29, 2010 decision and entry satisfy the requirements of R.C. 2505.02. See *Price v. Jillisky*, 10th Dist. No. 03AP-801, 2004-Ohio-1221, ¶12, citing *Ferraro v. B.F. Goodrich Co.*, 149 Ohio App.3d 301, 2002-Ohio-4398, ¶18 (noting that because two dismissed claims required proof of different facts, involved separate legal issues, and provided for different relief than the third

remaining claim, the order dismissing the two claims completely resolved and prevented a judgment on those claims and was final); *Ruszkiewicz v. Toledo Gastroenterology Assocs., Inc.* (Mar. 5, 1996), 6th Dist. No. L-95-245 (order dismissing one count relating to a shareholder claim but not addressing other counts relating to various other claims in connection with the operation and break-up of a company was final because nothing further was to be decided in connection with that claim and it thus determined the action and prevented a judgment in the shareholder claim).

{¶44} Because the trial court's decisions satisfy R.C. 2505.02, the issue is whether the trial court appropriately included the Civ.R. 54(B) certification. In deciding whether to include the Civ.R. 54(B) certification, "the trial court must make a factual determination as to whether or not an interlocutory appeal is consistent with the interests of sound judicial administration." *Dywidag Sys. Internatl., USA, Inc. v. Ohio Dept. of Transp.*, 10th Dist. No. 10AP-270, 2010-Ohio-3211, ¶27, citing *Wisintainer v. Elcen Power Strut Co.*, 67 Ohio St.3d 352, 1993-Ohio-120, paragraph one of the syllabus. The court's decision to include the Civ.R. 54(B) certification "is entitled to the same presumption of correctness that is accorded regarding other factual findings. An appellate court should not substitute its judgment for that of the trial court where some competent and credible evidence supports the trial court's factual findings." *Id.*, quoting *Wisintainer* at 355, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77. "Where the record indicates that the interests of sound judicial administration could be served by a finding of 'no just reason for delay,' the trial court's certification determination must stand." *Wisintainer* at paragraph two of the syllabus. "Furthermore, an appellate court need not find that the trial court's certification is the most likely route to judicial economy, but simply

that it is one route which might lead there." *Dywidag Sys. Internatl.* at ¶27, citing *Wisintainer* at 355.

{¶45} As long as the record supports adding the Civ.R. 54(B) language to an interlocutory order, a trial court is not required to give reasons for its decision to so include the language. *Id.* at ¶29, citing *Shore v. Consol. Rail Corp.* (June 21, 1991), 6th Dist. No. 90-OT-019. The presumption of correctness does not apply, however, where the judgment entry suggests the trial court acted reflexively and used the language simply as boilerplate. *Id.*, citing *Mackey v. Pilarczyk* (Sept. 27, 1995), 1st Dist. No. C-940845.

{¶46} The trial court's May 27, 2009 judgment entry, the subject of defendant's sixth assignment of error, stated it considered all memoranda each party filed before the court decided no genuine issue of material fact was disputed regarding the noted counterclaims and plaintiff was entitled to judgment as a matter of law on each of those counterclaims. The trial court stated those counterclaims "are hereby dismissed with prejudice" and "[t]here is no just cause for delay." (May 27, 2009 Judgment Entry, R. 113.) In so doing, the trial court specifically noted it was issuing a final entry regarding the noted counterclaims, but defendant had other counterclaims pending.

{¶47} The trial court's April 29, 2010 decision and entry also stated the court considered all memoranda the parties filed, no genuine issues of material fact remained, and plaintiff was entitled to judgment as a matter of law on these counterclaims. The trial court again included language stating "[t]here is no just cause for delay." (Apr. 29, 2010 Decision and Entry, R. 170.)

{¶48} Nothing in the record suggests the trial court included the Civ.R. 54(B) certification language simply as boilerplate. To the contrary, the trial court noted the

counterclaims were distinct, and plaintiff was entitled to judgment as a matter of law on those claims. Further, in its May 20, 2010 entry granting plaintiff's motion for partial summary judgment as to liability only for plaintiff's claim for destruction of the residence, the trial court specifically noted the order "is not a final [e]ntry" and did not include the Civ.R. 54(B) language. (May 20, 2010 Entry, R. 179.) Comparison of the various entries indicates the trial court consciously decided whether to include the Civ.R. 54(B) language in the May 27, 2009 judgment entry and the April 29, 2010 decision and entry. See, e.g., *Dywidag Sys. Internatl.* at ¶30 (noting the trial court "did not just mechanically sign a boilerplate summary judgment entry, but instead considered the arguments of both sides and reached a decision which could lead to judicial economy").

{¶49} Accordingly, both the May 27, 2009 judgment entry and the April 29, 2010 decision and entry are final, appealable orders. Defendant's fourth and sixth assignments of error thus suffer the same infirmity. Pursuant to App.R. 4(A), "[a] party shall file [a] notice of appeal \* \* \* within thirty days of the \* \* \* entry of judgment or order appealed." Failure to comply with App.R. 4(A) is a jurisdictional defect which is fatal to any appeal. *In re H.F.*, 120 Ohio St.3d 499, 2008-Ohio-6810, ¶17; *Bond v. Canal Winchester*, 10th Dist. No. 07AP-556, 2008-Ohio-945, ¶11. Defendant did not file his notice of appeal until September 29, 2010, long after the 30-day time period expired for each entry. As a result, we lack jurisdiction to consider defendant's fourth and sixth assignments of error. *Smith v. Williams*, 10th Dist. No. 09AP-732, 2010-Ohio-1381, ¶28, citing *State v. Myers*, 9th Dist. No. 08CA0041, 2009-Ohio-2082 (dismissing for lack of jurisdiction because the appeal was untimely).

## VII. Fifth Assignment of Error – Summary Judgment on Plaintiff's Destruction of the Residence Claim

{¶50} Defendant's fifth assignment of error asserts the trial court erred in granting plaintiff's motion for partial summary judgment on liability only for plaintiff's claim of destruction of the residence.

{¶51} An appellate court reviews summary judgment under a de novo standard. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41; *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588. Summary judgment is appropriate only when the moving party demonstrates: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and the conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183, 1997-Ohio-221.

{¶52} Pursuant to Civ.R. 56(C), the moving party bears the burden of informing the trial court of the basis for the motion and identifying those portions of the record demonstrating the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. The moving party, however, cannot discharge its initial burden under this rule with a conclusory assertion that the non-moving party has no evidence to prove its case; the moving party must specifically point to evidence of a type listed in Civ.R. 56(C), affirmatively demonstrating that the non-moving party has no evidence to support the non-moving party's claims. *Id.*; *Vahila v. Hall*, 77 Ohio St.3d 421, 1997-Ohio-259. Once the moving party discharges its initial burden, summary judgment is appropriate if the non-moving party does not respond, by affidavit or as otherwise

provided in Civ.R. 56, with specific facts showing that a genuine issue exists for trial. *Dresher* at 293; *Vahila* at 430; Civ.R. 56(E).

{¶53} Civ.R. 56(C) delineates the types of evidence a party may use to support a summary judgment motion. Plaintiff's summary judgment motion presented the affidavits of an independent contractor and a building inspector plaintiff hired to inspect the residence on the property to determine whether it could be renovated or whether the damage was so severe as to require it to be razed. Plaintiff also referenced defendant's deposition and the transcript of proceedings before the magistrate regarding defendant's maintenance obligations under the oral lease. Thus, plaintiff satisfied her Civ.R. 56(C) burden.

{¶54} In response to plaintiff's motion for summary judgment, defendant responded only with a motion to strike plaintiff's motion due to lack of service. Defendant did not dispute plaintiff's allegations and did not present any evidence under Civ.R. 56 to demonstrate a genuine issue of material fact remains for trial. Thus, defendant failed to meet his reciprocal burden under Civ.R. 56(E).

{¶55} On appeal, defendant asserts he could not adequately respond to plaintiff's motion for summary judgment because plaintiff did not comply with discovery requests. Defendant asserts the trial court erred in denying his motion to compel discovery and in denying defendant an extension of time to respond to plaintiff's motion for summary judgment. We review the trial court's resolution of discovery matters under an abuse of discretion standard. *State ex rel. Keller v. Columbus*, 164 Ohio App.3d 648, 2005-Ohio-6500, ¶39, citing *State ex rel. The V Cos. v. Marshall* (1998), 81 Ohio St.3d 467, 469.

{¶56} Plaintiff filed her motion for partial summary judgment on her destruction of the residence claim on December 29, 2009. The trial court then amended the trial schedule to allow defendant time to oppose the motion. Defendant filed his motion to compel discovery on March 1, 2010 and on the same day moved for a continuance in order to file his memorandum opposing plaintiff's motion for summary judgment. In a decision and entry dated March 24, 2010, the trial court determined defendant's motion to compel discovery was moot, as plaintiff complied with the discovery request on March 9, 2010.

{¶57} Defendant then filed a second motion to compel discovery on April 15, 2010, arguing plaintiff did not fully comply with his earlier discovery requests. Defendant again asked the court for additional time to respond to plaintiff's motion for summary judgment. The trial court granted plaintiff's motion for summary judgment on April 29, 2010. Although defendant twice asked the trial court for more time to respond to plaintiff's motion due to plaintiff's alleged refusal to comply with discovery requests, defendant never provided the trial court with an affidavit under Civ.R. 56(F) indicating he could not adequately respond to the summary judgment motion.

{¶58} Civ.R. 56(F) provides that "[s]hould it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated" in the affidavit "present \* \* \* facts essential to justify the party's opposition," the court either "may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just." Civ.R. 56(F) thus provides the remedy for a party who seeks a continuance on a motion for summary judgment in order to conduct discovery relevant to the motion. *Hahn*

*v. Groveport*, 10th Dist. No. 07AP-27, 2007-Ohio-5559, ¶30, citing *Gates Mills Invest. Co. v. Pepper Pike* (1978), 59 Ohio App.2d 155, 168. Civ.R. 56(F) expressly requires the party opposing the summary judgment motion to submit affidavits with sufficient reasons stating why it cannot present sufficient facts by affidavit to justify its opposition. *Id.*, citing *Gates Mills Invest. Co.* at 169. "Mere allegations requesting a continuance for the purpose of discovery are not sufficient reasons why a party cannot present affidavits in opposition to the motion for summary judgment." *Id.*

{¶59} A trial court does not abuse its discretion in denying a request for a continuance in order to respond to a motion for summary judgment where the party seeking the continuance "did not sustain [its] burden of demonstrating that a continuance was warranted for further discovery." *Id.* at ¶37 (concluding trial court did not err in denying the plaintiff's Civ.R. 56(F) motion where the plaintiff did not file an affidavit with that motion stating sufficient reasons why plaintiff could not currently respond and that further discovery was warranted).

{¶60} Although defendant alleged plaintiff deliberately withheld documents during the course of the proceedings, defendant never provided the trial court with an affidavit to that effect. Furthermore, the trial court determined plaintiff complied with defendant's earlier discovery request, and the trial court already extended the time for defendant to respond to plaintiff's motion for summary judgment. Under these circumstances, the trial court did not abuse its discretion in ruling on plaintiff's motion for summary judgment without granting defendant's motion to compel discovery or granting defendant additional time to respond.

{¶61} Because plaintiff satisfied her Civ.R. 56 burden and defendant failed to satisfy his reciprocal burden, the trial court did not err in granting plaintiff's motion for summary judgment as to liability only on plaintiff's claim for destruction of the residence. Accordingly, defendant's fifth assignment of error is overruled.

#### **VIII. Seventh Assignment of Error – Motion for Summary Judgment on Eviction Claim**

{¶62} In his seventh assignment of error, defendant asserts the trial court erred in granting plaintiff's motion for summary judgment in the eviction action. This assignment of error relates to the trial court's judgment entry filed December 23, 2008 concerning defendant's eviction from the property.

{¶63} On January 9, 2009, defendant filed a timely appeal from the trial court's December 23, 2008 judgment entry granting plaintiff's motion for summary judgment on the eviction claim. By journal entry of dismissal on February 25, 2009, this court dismissed defendant's appeal as moot in case No. 09AP-07 because defendant vacated the premises subject of the appeal; defendant did not appeal to the Ohio Supreme Court. Defendant cannot now attempt to argue the trial court wrongly granted plaintiff's motion for summary judgment in the eviction matter. See *Wiest v. Wiegele*, 170 Ohio App.3d 700, 2006-Ohio-5348, ¶16 (holding that where an appellate court dismisses an appeal as moot, and the aggrieved party does not appeal to the Ohio Supreme Court, "[t]he case [is] over," and courts lack jurisdiction to consider further arguments regarding that same case).

{¶64} We thus lack jurisdiction to consider defendant's seventh assignment of error.

**IX. Disposition**

{¶65} Accordingly, (1) the trial court abused its discretion in denying defendant's request for a continuance, so we sustain defendant's first assignment of error rendering moot defendant's second assignment of error and part of defendant's third assignment of error, (2) we overrule part of defendant's third assignment of error and his fifth assignment of error, and (3) we lack jurisdiction over defendant's fourth, sixth, and seventh assignments of error. We thus affirm in part and reverse in part the judgment of the trial court and remand this matter to the trial court for further proceedings consistent with this decision.

*Judgment affirmed in part and  
reversed in part; cause remanded.*

KLATT and SADLER, JJ., concur.

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