

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

FILED

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BARBARA A. WIEDENBEIN
CLERK OF COMMON PLEAS
CLERMONT COUNTY, OH

BRENDAN MCANDREWS :
Plaintiff : **CASE NO. 2015 CVH 00775**
vs. : **Judge McBride**
WILLIAM MCGEE : **DECISION/ENTRY**
Defendant :

Nieberding & Nieberding Co., L.P.A., James L. Nieberding, counsel for the plaintiff
Brendan McAndrews, 1117 Broadway Street, Second Floor, Cincinnati, Ohio 45202

Gary Knepp, counsel for the defendant William McGee, 65 North Second Street, Suite
200, Batavia, Ohio 45103

This cause came before the court for trial on June 27th and 29th of 2016. On
November 23, 2016, the court entered a decision finding that the defendant William
McGee contravened R.C. 5321.05 and breached his lease with the plaintiff Brendan
McAndrews. The court awarded the plaintiff \$2,117.38 plus attorney fees. On March
17, 2017, the court held an evidentiary hearing regarding attorney fees and heard oral
argument on the same. At the conclusion of the hearing the court took the matter under
advisement.

Upon consideration of the record of this case and the proceedings, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FINDINGS OF FACT AND PROCEDURAL BACKGROUND

The court incorporates the findings of fact as set forth in its November 23, 2016 trial decision. In the summary of the facts below, the court includes only the facts and procedural background necessary to the issue of attorney fees.

This case involves a dispute between a landlord and tenant regarding damages to a rental property. The plaintiff Brendan McAndrews owns the residential property at 4358 Beechmont Drive, Cincinnati, Ohio ("the Property"). The plaintiff leased the Property to the defendant William McGee.

On June 16, 2015, the plaintiff filed a complaint against the defendant claiming that the defendant failed to keep the Property in good and sanitary condition and repair and failed to surrender the Property to the plaintiff in as good a state and condition as at the commencement of the lease. The plaintiff requested damages for lost rent and the cost of repair and remediation, including for damages caused by a waterline break.

On July 10, 2015, the defendant brought a counterclaim against the plaintiff. The counterclaim asserted that the plaintiff failed to properly maintain the property, which consequently caused water damage to the defendant's personal property.

On June 27th and 29th of 2016, the court held a bench trial regarding this matter. On November 23, 2016, the court entered a decision finding that the defendant

contravened R.C. 5321.05 and breached his lease with the plaintiff. The court found that the defendant had failed to satisfy his duties under R.C. 5321.05 and under his lease with the plaintiff. R.C. 5321.05 required the defendant to keep the Property "in a clean, safe and sanitary manner," and required him to refrain from "intentionally or negligently destroying, defacing, damaging, or removing any fixture, appliance, or other part of the premises * * *."¹ The court concluded that the Property contained extensive damage that was separate and apart from damage the waterline break caused.²

The court also found that the defendant was not responsible for any of the three waterline breaks because the court could not conclude that the defendant more likely than not caused the break in the waterlines. As such, the defendant was not held responsible for the repairs to the plumbing or those repairs necessitated strictly by water damage. Lastly, the court did not find for the defendant on his counterclaim against the plaintiff for the damage allegedly caused to the defendant's property by water damage. After offsetting the damages by the amount the plaintiff received in insurance proceeds, the court awarded the plaintiff \$2,117.38 plus attorney fees.³

¹ R.C. 5321.05(A)(1), (6).

² The Property was returned with broken doors, doors that had been removed from their hinges, holes in the walls, poorly repaired holes in the walls, numerous stains in the carpet, door frames that appeared to have been torn and chewed on by a dog, broken door jams, broken kitchen cabinets, and there were no longer any HVAC filters in the Property. Throughout the Property there was extensive garbage and filth, including clothing, numerous large pieces of furniture, décor, tools, linens, random pieces of metal and wire, toys, personal effects, bags of garbage, loose garbage, and other debris, including a fridge full of spoiled food. Outdoors, leaves had accumulated and abandoned Christmas décor was strewn about the yard. The garage was also filled with abandoned property and garbage.

³ The court calculated damages as follows: the defendant is entitled to \$8,117.06 for the costs of hired services for repairs and cleaning, \$5,328.58 for the costs of materials needed for the repairs, \$1,980 for his own labor contributions, and \$3,075 for the cost of lost rent during the remediation process, for a total of \$18,500.64, plus attorney fees. The defendant received a total of \$15,883.26 from his insurance company, after he paid a \$1,000 deductible for the water damage claim and a \$1,000 deductible for the vandalism claim. As discussed, the defendant is not liable for the water damage to the home. He is, however, liable for the vandalism.

Once the court set the attorney fee issue for hearing, the plaintiff submitted a trial brief on March 13, 2017. The plaintiff attached two exhibits showing that his counsel expended a total of 60.5 hours on this case, which resulted in \$9,882.50 in attorney fees.⁴ The defendant did not file any briefing or exhibits on this issue.

On March 17, 2017, the court held an evidentiary hearing regarding attorney fees. At the hearing, the plaintiff and his counsel testified regarding the legal services that counsel provided to the plaintiff. The plaintiff presented an exhibit showing the billing records from his counsel for this case.⁵ The defendant did not call any witnesses or present any evidence. At the end of the hearing, both parties presented oral argument regarding attorney fees. At the conclusion of the hearing, the court took the issues under advisement.

LEGAL ANALYSIS

The Ohio Landlords and Tenants Act, codified in Chapter 5321, imposes duties on tenants. "R.C. 5321.05 identifies a lengthy list of the obligations tenants owe landlords."⁶ Excepting the obligation to not violate Ohio Revised Code Chapters 2925 and 3719, if a tenant violates an obligation under R.C. 5321.05, then "the landlord may

Accounting for the \$1,000 vandalism deductible, the court will offset the plaintiff's award by \$14,883.26. Moreover, the court will further offset the award by the amount of the defendant's security deposit, which the plaintiff has not remitted, for a deduction of \$1,500. Accordingly, the plaintiff is entitled to \$2,117.38, plus attorney fees.

⁴ Pls. Exs. 1 and 2 to Pls. Brief.

⁵ Pls. Ex. 1 to Hearing.

⁶ *Snyder v. Waldron*, 4th Dist. Athens No. 12CA9, 2013-Ohio-3416, ¶¶ 28, citing *Kelley v. Johnston*, 4th Dist. No. 01 CA5, 2001 WL 1479243 (Nov. 14, 2001). See *Zilka v. Asberry*, 6th Dist. Huron No. H-04-022, 2005-Ohio-1881, ¶ 9 (explaining that a landlord can generally recover damages from a tenant for violations of R.C. 5321.05, which provides a long list of obligations for tenants).

seek to recover any actual damages that result from the violation together with reasonable attorney's fee."⁷ The landlord may recover attorney fees in addition to any remedies that may be available to the landlord under the lease.⁸ Accordingly, the award of attorney fees is only authorized under R.C 5321.05 for time relative to the recovery of the landlord's damages; attorney fees related to the tenant's counterclaims are not available under R.C. 5321.05(C).⁹

"Where a court is empowered to award attorney fees by statute, the amount of the award is within the sound discretion of the court."¹⁰ "[W]hat is reasonable, for purposes of calculating attorney fees, is a question of fact * * *."¹¹ "The Supreme Court of Ohio has held that a trial court 'can easily determine, either in a hearing or by reviewing affidavits, the reasonableness of fees to be awarded."¹²

In *Nithiananthan v. Toriac*, 12th Dist. Warren Nos. CA2014-02-021, CA2014-02-028, CA2014-08-114, 2015-Ohio-1416, the Twelfth District Court of Appeals explained that trial courts are "guided by a two-step determination" when calculating the amount of

⁷ R.C. 5321.05(C)(1). Chapters 2925 and 3719 deal with drug offenses and controlled substances. Of note, appellate courts disagree as to whether the award of attorney fees for a breach of the tenant's obligations under R.C. 5321.05 is discretionary or mandatory. The Eleventh District Court of Appeals held in *Fiffick v. Showe Mgt.*, 11th Dist. Portage No. 2005-P-0011, 2005-Ohio-7057, ¶¶ 17-18, that the award of attorney fees is discretionary based upon the use of the language "may" in the statute. By contrast, the Third District Court of Appeals held in *Kinn v. Showe Management Corp.*, 3d Dist. Hancock Np. 5-01-46, 2002 WL 462859, *4 (Mar. 27, 2002), that an award of attorney fees under R.C. 5321.05(C)(1) is not discretionary when a tenant violates R.C. 5321.05. There is no precedent from the Twelfth District Court of Appeals resolving this issue.

⁸ R.C. 5321.05(C)(1).

⁹ *Snyder*, 2013-Ohio-3416 at ¶¶ 37-38.

¹⁰ *Wehrelly v. Sunchase American, Ltd.*, 12th Dist. Butler No. CA99-11-191, 2001 WL 88202, *5 (Jan. 29, 2001), citing *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St.3d 143, 146, 569 N.E.2d 464 (1991).

¹¹ *Wrinch v. Miller*, 183 Ohio App.3d 445, 2009-Ohio-3862, 917 N.E.2d 348, ¶ 38 (9th Dist. 2009), quoting *Hall v. Nazario*, 9th Dist. No. 07CA009131, 2007-Ohio-6401, ¶ 17.

¹² *Lamar Advantage GP Co. v. Patel*, 12th Dist. Warren No. CA2011-10-105, 2012-Ohio-3319, ¶ 52, quoting *Klein v. Moutz*, 118 Ohio St.3d 256, 2008-Ohio-2329, 888 N.E.2d 404, ¶ 14.

attorney fees.¹³ In the first step, the court calculates the “lodestar” amount by multiplying the number of hours reasonably expended by a reasonable hourly rate * * *.¹⁴ Second, the court determines “whether to adjust that amount based on the factors listed in Prof.Cond.R. 1.5(a).”¹⁵ The factors listed in Prof.Cond.R. 1.5(a) include: “the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly, the amount involved and the results obtained, the experience, reputation, and ability of the lawyer or lawyers performing the services, and whether the fee is fixed or contingent.”¹⁶

The defendant contended in oral argument that the analysis in *Nithiananthan* is inapplicable to the present case because *Nithiananthan* involved an award of attorney fees as a sanction. However, courts apply the lodestar method of determining reasonable attorney fees, as used in *Nithiananthan*, to determine attorney fee awards, including awards in cases involving the Ohio Landlords and Tenants Act.¹⁷

The first step to determining reasonable attorney fees in the case at bar is to ascertain the lodestar amount by multiplying the number of hours reasonably expended by a reasonable hourly rate.¹⁸ The plaintiff has requested \$9,982.50 for 60.5 hours of work at a rate of \$165 an hour. The parties stipulated that the plaintiff’s counsel’s rate

¹³ *Nithiananthan v. Toriac*, 12th Dist. Warren Nos. CA2014-02-021, CA2014-02-028, CA2014-08-114, 2015-Ohio-1416, ¶¶ 77, citing *Patel*, 2012-Ohio-3319 at ¶¶ 46.

¹⁴ *Nithiananthan*, 2015-Ohio-1416 at ¶¶ 77, quoting *Patel*, 2012-Ohio-3319 at ¶¶ 46. See *Ohio Valley Associated Bldrs. & Constrs. v. Rapier Elec., Inc.*, 12th Dist. Butler Nos. CA2013-07-110, CA2013-07-121, 2014-Ohio-1477, ¶ 59, citing *Patel*, 2012-Ohio-3319 at ¶¶ 46 (holding same).

¹⁵ *Nithiananthan*, 2015-Ohio-1416 at ¶¶ 77, quoting *Patel*, 2012-Ohio-3319 at ¶¶ 46.

¹⁶ *Nithiananthan*, 2015-Ohio-1416 at ¶¶ 77, citing *Rapier Elec., Inc.*, 2014-Ohio-1477 at ¶ 59; Prof.Cond.R. 1.5(a).

¹⁷ See *Timoneri v. NorthSteppe Realty, Inc.*, 71 N.E.3d 630, 2016-Ohio-5901, ¶ 52 (10th Dist.), citing *Bittner*, 58 Ohio St.3d at 146 (applying the lodestar method to determine reasonable attorney fees in an Ohio Landlords and Tenants Act case).

¹⁸ *Nithiananthan*, 2015-Ohio-1416 at ¶¶ 77, quoting *Patel*, 2012-Ohio-3319 at ¶¶ 46.

of \$165 an hour is reasonable. However, they disagree as to how many hours the plaintiff should be compensated for.

The defendant argues that the plaintiff should not be compensated for time his counsel spent working on claims of water damage and damage to the water pipes. The defendant maintains that time spent on water pipe related damages should not be awarded because the court found that the defendant was not responsible for the water pipes bursting or for the subsequent water damage.

As discussed, an award of attorney fees is only authorized under R.C 5321.05 for time spent on the recovery of the landlord's damages.¹⁹ Because the defendant did not damage the plaintiff by causing the water line breaks, the court finds that the plaintiff should not receive compensation for time spent related to the water and pipe damages. In his testimony, the counsel for plaintiff could not clearly separate out how much time was spent in pursuing water damages. After reviewing the case file, claims, trial, and hearing testimony, the court finds that it will exclude 20 hours of time in the lodestar calculation as time related to damage caused to the water lines and damage caused by the water.

Furthermore, as explained, attorney fees related to the tenant's counterclaims are not available under R.C. 5321.05(C).²⁰ The defendant had brought a counterclaim alleging that the plaintiff was liable for the damage to the defendant's personal property caused by the water. Counsel for the plaintiff spent an hour related to the defendant's counterclaim on July 14th and July 15th of 2015. The defendant's counterclaim involved scant evidence, was given little space in the plaintiff's trial brief (one sentence),

¹⁹ *Snyder*, 2013-Ohio-3416 at ¶¶ 37-38.

²⁰ *Id.*

and occupied little of the trial. As such, the court will only exclude one more hour for time counsel for the plaintiff spent working on the defendant's counterclaim. In sum, the court will exclude a total of two hours in the lodestar calculation as time related to the defendant's counterclaim. Accounting for the 20 hours deducted as time spent regarding water damages, and the two hours deducted related to the counterclaim, the court concludes that the plaintiff should receive reasonable attorney fees for 38.5 hours. At a rate of \$165 per hour, the plaintiff's lodestar amount is \$6,352.50.

Now the court will determine whether it should adjust the lodestar amount based on the factors listed in Prof.Cond.R. 1.5(a).²¹ These factors include: "the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly, the amount involved and the results obtained, the experience, reputation, and ability of the lawyer or lawyers performing the services, and whether the fee is fixed or contingent."²²

First, the time and labor that counsel for the plaintiff spent on the defendant's meritorious claims, 38.5 hours, is reasonable given that counsel prepared for and represented his client during a two-day trial. As counsel for the plaintiff testified, this case was not a particularly novel case, although it presented several nuanced issues. Those issues included whether to discount the plaintiff's damages by the insurance proceeds he previously received and whether the plaintiff could be compensated for the labor his family and friends expended on rehabbing the Property. In consideration of those legal issues, the case demanded that the plaintiff's counsel have at least average skills to pursue the trial properly.

²¹ *Nithiananthan*, 2015-Ohio-1416 at ¶ 77, quoting *Patel*, 2012-Ohio-3319 at ¶ 46.

²² *Nithiananthan*, 2015-Ohio-1416 at ¶ 77, citing *Rapier Elec., Inc.*, 2014-Ohio-1477 at ¶ 59; Prof.Cond.R. 1.5(a).


The plaintiff had originally sought \$20,890 in damages to the Property. He was awarded only \$2,117.38. However, because the court had to adjust the award to account for the insurance proceeds, the plaintiff actually showed that he had incurred \$18,500.64 in damages to the Property. Given this, the court finds that it need not further reduce the attorney fees due to the "results obtained." In examining the ability of the plaintiff's counsel, the court believes him to be skilled and highly competent. Finally, this is not a case involved a fixed or contingent fee. On the whole, after examining all the factors in Prof.Cond.R. 1.5(a), the court concludes that it need not adjust the amount of attorney fees. Under R.C. 5321.05(C), the plaintiff is entitled to \$6,352.50 in attorney fees.

CONCLUSION

For the foregoing reasons, the court finds the plaintiff is entitled to \$6,352.50 in attorney fees.

IT IS SO ORDERED.

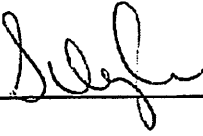
DATED: 8-18-2017



Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Decision/Entry were sent on this 18th day of August 2017 by e-mail to James L. Nieberding, attorney for the plaintiff, at jlneberding1117@gmail.com, and to Gary L. Knepp, attorney for the defendant, at garylnepp@gmail.com.



Judicial Assistant to Judge McBride