

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT JUN 29 PM 3:04

Olympic Realty,

:

CLERK OF COURTS

Plaintiff-Appellee,

:

No. 11AP-668

v.

:

(M.C. No. 2011-CVG-23170)

Voytek Zaleski,

:

(REGULAR CALENDAR)

Defendant-Appellant.

:

MEMORANDUM DECISION

Rendered on June 29, 2012

Christopher L. Lardiere and Colleen L. Maloney, for appellee.

Bricker & Eckler LLP, Anne Marie Sferra and Maggie M. Abbulone, for appellant.

ON APPLICATION FOR RECONSIDERATION

DORRIAN, J.

{¶ 1} This court, by journal entry of dismissal filed on December 29, 2011, dismissed as moot defendant-appellant Voytek Zaleski's ("Zaleski") appeal. Zaleski has filed an App.R 26 application for reconsideration. For the reasons that follow, we grant Zaleski's application.

{¶ 2} This landlord-tenant case originated on June 21, 2011 in the Franklin County Municipal Court when plaintiff-appellee, Olympic Realty ("Olympic"), filed a complaint in forcible entry and detainer ("FED") naming tenant Zaleski as defendant. The complaint alleged that Zaleski was in violation of the lease. Attached to the complaint was a copy of an eviction notice alleging that Zaleski had repeatedly interfered with the right of adjacent tenants to peaceably enjoy their premises. Olympic specifically alleged that Zaleski had engaged in conduct including stomping on the floor, incessantly pacing

the floor, standing outside a neighbor's door, and listening to a neighbor's conversations by standing next to the neighbor's apartment windows and car. Olympic further alleged that Zaleski had violated the lease by failing to maintain a clean apartment.

{¶ 3} The matter was tried before a magistrate, who filed a decision on August 4, 2011, finding that Zaleski had engaged in harassing conduct that amounted to a material breach of the lease. Accordingly, the magistrate awarded restitution of the premises to Olympic. On August 8, 2011, the court adopted the magistrate's decision and entered judgment for Olympic. Zaleski timely appealed and both parties filed briefs in this court.

{¶ 4} On August 17, 2011, this court entered a stay of the trial court's August 8, 2011 decision conditioned upon Zaleski posting a supersedeas bond to cover his portion¹ of past-due rent, which Olympic had refused to accept, and upon Zaleski paying future rent into an escrow account. Court records reflect that Zaleski did not satisfy the conditions the court had deemed requisite to the continuation of the stay.

{¶ 5} On November 28, 2011, Olympic filed a pleading captioned "Notice of Mootness" requesting dismissal of the appeal. Olympic represented that Zaleski had moved out of the leased apartment on November 23, 2011 and turned in his keys. Olympic noted that the municipal court FED action sought only possession of the premises and that the court had not entered a judgment for monetary damages. Olympic asserted that the appeal was therefore moot.

{¶ 6} Zaleski filed a response on December 9, 2011, asserting that exceptions to the mootness doctrine exist to preserve an appeal in an FED case where the tenant is no longer in possession of the premises, citing *Sokol v. Redeemed Christian Church of God*, 10th Dist. No. 06AP-296, 2006-Ohio 5873, ¶ 6, and *Agler Green Co-op. v. Rivers*, 10th Dist. No. 87AP-915 (Dec. 23, 1987). He argued that any of three circumstances warranted our finding that his appeal fell within an exception to the mootness doctrine. Zaleski first argued that he retained an ongoing interest in the eviction proceedings because an eviction judgment for cause would negatively affect his chances of obtaining housing assistance in the future. He further asserted that he had not voluntarily vacated the premises but, rather, vacated the premises only because a physical eviction by Olympic

¹ In granting the bond we noted that \$304 of Zaleski's monthly \$350 rent was paid by the Columbus Metropolitan Housing Authority.

was imminent. Finally, he asserted that he had not permanently relocated but was instead staying with friends during the pendency of the appeal.

{¶ 7} On December 29, 2011, this court dismissed the appeal as moot. The dismissal entry noted that Zaleski had voluntarily vacated the premises and cited *Sokol* and *C & W Invest. Co. v. Midwest Vending, Inc.*, 10th Dist. No. 03AP-40, 2003-Ohio-4688.

{¶ 8} The test generally applied in considering an App.R. 26 motion for reconsideration is "whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for reconsideration that either was not considered or was not fully considered when it should have been." *Matthews v. Matthews*, 5 Ohio App.3d 140, 143 (10th Dist.1981). Zaleski asserts in his App.R. 26(A) application that the court should reconsider its dismissal of the appeal for two reasons: (1) the court committed an obvious error in finding that Zaleski voluntarily vacated the premises, and (2) it did not appear from the court's decision that we had considered exceptions to the mootness doctrine.

{¶ 9} *Sokol* stands for the general proposition that "[i]f immediate possession is no longer an issue because the tenant vacated the premises, then the FED appeal is unnecessary because further relief generally cannot be granted." *Id.* at ¶ 6. Zaleski is correct that *Sokol* referred to exceptions to that general rule. "Among the three most common exceptions are instances 'where the appellant retains an ongoing interest in the subject on appeal, where there are other persons similarly situated who would benefit from the resolution of the issue on appeal, or where the question appealed is one of great public importance.'" *Id.*, quoting *Sandefur Mgt. Co. v. Minor*, 10th Dist. No. 84AP-220 (Apr. 18, 1985).

{¶ 10} Zaleski argues that he has an ongoing interest in the subject of this appeal because he receives housing assistance from the Columbus Metropolitan Housing Authority ("CMHA"), and an eviction judgment will negatively affect his ability to obtain continued housing assistance. The record supports his assertion that he received such assistance as it contains evidence that CMHA subsidized Zaleski's rent.

{¶ 11} In the companion to this case, *Olympic Realty v. Zaleski*, 10th Dist. No. 11AP-971 (June 28, 2012), we noted that, in *Sandefur Mgt. Co.*, this court refused to

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dismiss, as moot, an appeal from a restitution order, despite the fact that the defendant vacated the premises after she was unable to post a bond for a stay. We stated as follows:

In the present case, defendant has a continuing interest in the outcome of the appeal. She was once eligible for federal housing assistance payments, and an unfavorable court proceeding may affect her continuing eligibility for such payments. Moreover, other tenants are similarly situated and would benefit from the court's resolution of the issue which is raised in this appeal.

Id. See also *Agler Green Co-op.* (question of stay pending appeal was moot where tenant had vacated the premises, but that reasoning did not require dismissal of appeal).

{¶ 12} Consistent with *Sandefur Mgt. Co.* and with our ruling in the companion case cited above, *Olympic Realty v. Zaleski*, 10th Dist. No. 11AP-971, we conclude that Zaleski maintains an ongoing interest in the subject of this appeal, such that we may decide the appeal on its merits, despite the general rule that the appeal is moot. We note, as well, that actions such as this are likely to otherwise evade review, as tenants who rely on housing assistance will likely be unable to post a bond in order to preserve their issues for appeal.

{¶ 13} For the foregoing reasons, Zaleski's application for reconsideration is granted.

Application granted.

SADLER and TYACK, JJ., concur.
