

**IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO
CIVIL DIVISION**

TONJA SANDERS, et al.,	[]	CASE NO. 13CVH04-3983
	[]	
PLAINTIFFS,	[]	JUDGE CAIN
	[]	
vs.	[]	MAGISTRATE McCARTHY
	[]	
MINNIE MCGEE,	[]	
	[]	
DEFENDANT.	[]	

MAGISTRATE’S DECISION FOLLOWING DAMAGES HEARING

This action came on for a damages hearing on February 6, 2014. Following the hearing, the parties were granted additional time to prepare and submit to the magistrate their respective closing arguments in written format. That has now been accomplished and the matter is ripe for a decision.

By way of background, This case was referred to the magistrate following the entry of a default judgment taken against defendant, Minnie McGee.

Civ. R. 8(D) provides:

Averments in a pleading to which a responsive pleading is required, other than those to the amount of damage, are admitted when not denied in the responsive pleading. ***

It is the law that there generally is no necessity of taking proof of the liability of a defendant who has defaulted, since by virtue of her default the defendant is deemed to have admitted the truth of the well-pleaded allegations of the plaintiff's complaint. If the allegations of the plaintiff's complaint are sufficient on their face to make out a valid claim for the relief requested, the plaintiff, on the entry of a default against the defendant, need not offer evidence to support those pled

allegations. See, generally, Annot. 8 A.L.R. 3d 1070, Necessity of Taking Proof as to Liability Against Defaulting Defendant, Sec 3[a].

As a result of the entry of the default judgment, defendant McGee has admitted the allegations of the complaint. See, *Huffer v. Cicero* (1995), 107 Ohio App. 3d 65. In accordance with the referenced authorities, the magistrate must proceed upon the strong presumption that the allegations contained in the complaint are true.

This action concerns the plaintiff and her infant children. Plaintiff is a person of very limited financial means who sought a place to live with her children. She rented an apartment owned by defendant. Because plaintiff was unable to pay monthly rental payments, she obtained the financial assistance of the Columbus Metropolitan Housing Authority (CMHA).

Upon taking possession of the apartment, plaintiff discovered the presence of bugs. Upon further inquiry, the bugs were identified as creatures commonly known as bed bugs. By failing to timely respond to the complaint, defendant has admitted the circumstance that she knew there was a bed bug infestation at the property.

At the hearing, plaintiff testified about her dreadful experience for the approximately seven months she and her children lived at defendant's apartment. Shortly after taking possession, plaintiff found herself and her children not living in the bedrooms, but residing in the living room because of the bedbug infestation in the various bedrooms. Additionally, the bathroom was virtually unusable because of the strong urine scent and the rusted out condition of the tub. Bathing was

accomplished in a large plastic tote or storage crate. After moving in, defendant assured plaintiff that the tub would be reglazed, according to plaintiff's testimony. Also, plaintiff related that defendant attempted to correct some electrical wiring, but when finished, some electrical wires were left exposed.

Over the course of a few months of enduring the bug infestation and other discomforts, plaintiff continued to complain, but "nobody listened to me." It came to be that the bed bugs attacked plaintiff's daughter's head causing a small "bald spot" where the bugs ate away at the scalp. Photos identified and displayed at the hearing confirm numerous bug bites on the children and, indeed, destruction of scalp skin tissue.

Plaintiff testified that the children talked about circumstances in which they found themselves on a daily basis. The oldest child, a male, got angry at the situation in which the family existed. Plaintiff said she used "bug spray, alcohol and everything" in addition to the two professional extermination applications made by, Cook's Termite and Pest Control.¹ Plaintiff also related the circumstance of when she organized a birthday party for one of her children, the party lasted a mere 20 minutes because "no one wanted to be there" (in the context of being apprehensive because of the existence of the bug infestation).

¹ The evidence concerning Cook's Termite and Pest Control is unsettled. Plaintiff contends Cook's came out and treated on two occasions although Cook's said it would take three applications to solve the problem. Defendant testified that she personally arranged for Cook's to go to the apartment for the third application of chemicals. It was reported that Cook's never came out for the third application because it had received enough money from defendant to make only two applications. On the other hand, defendant takes the position that plaintiff and her children would not allow visitors (workmen) to enter the premises. One of plaintiff's daughters testified that sometimes unidentified persons would knock on the door and plaintiff would not answer the door.. The evidence on the issue of Cook's exact involvement is inconclusive.

After enduring the infestation for 6 – 7 months, plaintiff was forced to relocate to the home of a relative. Upon leaving, plaintiff was compelled to leave behind clothing, children's' toys, furniture, appliances, and other personalty that had the presence of bed bugs.

Plaintiff additionally testify that she suffered emotionally as well.² She stated she took medications to help her cope, found it difficult to look at her children, and felt physically drained. She stated that she was helpless in that “there was nothing I could do” as she watched her children suffer. She additionally testified that she never personally checked into retaining her own exterminator. Plaintiff also related that the month following her move-in she contacted CMHA to get approval to move to another location.

Defendant's tortious misconduct entitles plaintiff to civil damages. The fundamental rule of the law of damages is that the injured party should receive compensation for all of the injuries sustained. *Allison v. McCune* (1846), 15 Ohio 726; *Loeser v. Humphrey* (1884), 41 Ohio St. 378; *Brady v. Stafford* (1926), 115 Ohio St. 67; and *Pryor v. Webber* (1970), 23 Ohio St.2d 104. Compensatory damages are intended to make whole the plaintiff for the wrong done to her by the defendant. *Lake Shore & Michigan S. Ry. Co. v. Hutchins* (1881), 37 Ohio St. 282, 294. Compensatory damages are defined as those which measure the actual loss, and are allowed as amends therefor. *Fantozzi v. Sandusky Cement Products Co.* (1992), 64 Ohio St. 3d 601.

² It should be noted, once again, that defendant has admitted to the truth of the well plead allegations in the complaint. In addition to admitting plaintiff suffered extreme emotional distress as a result of her conduct, defendant also admitted she was in breach of contract, committed statutory violations and common law violations, committed fraud, and was negligent.

In determining damages to be awarded, the magistrate must decide by the greater weight of the evidence an amount of money that will reasonably compensate plaintiffs for the actual injury and damage proximately caused by the wrongful conduct of defendant. In deciding this amount, the magistrate must consider the nature and extent of the injury; the effect upon physical health; the serious emotional distress suffered and the pain and suffering experienced. Upon such consideration, the magistrate finds compensable damage to be in the amount of \$39,000. This is comprised of \$4,000 for personal property,³ \$5,000 incidental expenses including the loss of the value of a voucher, monetary expense of enduring and coping with the infestation problem, moving expenses and the like, \$30,000 for physical and emotional pain and suffering for the involved individuals.

Additionally, in an action to recover damages for a tort which involves actual malice, battery or insult, a finder of fact may go beyond the rule of mere compensation to the party aggrieved, and award exemplary or punitive damages. *Roberts v. Mason* (1859), 10 Ohio St. 277; see also, *Smithhisler v. Dutter* (1952), 157 Ohio St. 454. In determining an appropriate amount to be assessed as and for punitive damages, one should be mindful of, *inter alia*, three considerations that have been articulated to determine the reasonableness of such an award. These guideposts for determining whether a punitive damages award is so excessive to violate due process are: the degree of reprehensibility of the defendant's conduct, the disparity between the harm or potential harm suffered by the plaintiff and the

³ This is a lower sum than that determined by plaintiff in calculating her tangible losses. The magistrate found plaintiff's estimates of damage in this regard to be very high and not supported by credible evidence.

amount of the punitive damages award, and the difference between the amount of punitive damages awarded and the civil or criminal sanctions available to be imposed for similar misconduct. See, *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559, 568.

Further, with respect to plaintiff's punitive damages claims, R.C § 2315.21 provides:

. . . punitive or exemplary damages are not recoverable from a defendant in question in a tort action unless both of the following apply:

(1) The actions or omissions of that defendant demonstrate malice or aggravated or egregious fraud, or that defendant as principal or master knowingly authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate.

(2) The trier of fact has returned a verdict or has made a determination pursuant to division (B)(2) or (3) of this section of the total compensatory damages recoverable by the plaintiff from that defendant.

It has been held that to sustain a punitive damages claim, a plaintiff must prove, by clear and convincing evidence, that the defendant acted with actual malice. R.C. 2315.21(D)(4). See *Cabe v. Lunich* (1994), 70 Ohio St.3d 598, 601. "Clear and convincing evidence is that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

Actual malice constitutes: (1) that state of mind under which a person's conduct is characterized by hatred, ill will, or a spirit of revenge; **or** (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm. See, e.g., *Preston v. Murty* (1987), 32 Ohio St.3d 334; *Rice v. CertainTeed Corp.* (1999), 84 Ohio St.3d 417, 422. "Something more than mere negligence is always required before an award of punitive damages may be made." The concept requires a finding that the probability of harm occurring is great and that the harm will be substantial.' *Preston*, 32 Ohio St.3d at 335-336, 512 N.E.2d at 1176." *Cabe*, 70 Ohio St.3d at 602; *Wright v. Suzuki Motor Corp.*, 2005 Ohio 3494, 2005 Ohio App. LEXIS 3240 (Ohio Ct. App., Meigs County, June 27, 2005).

The element of malice may be inferred from the defendant's conduct. *Paul v. First National Bank of Cincinnati* (1976), 52 Ohio Misc. 77. Imputed malice is that state of mind under which a person does a wrongful act purposely, without a reasonable or lawful excuse, to the injury of another. See *Steinbeck v. Philip Stenger Sons* (1975), 46 Ohio App. 2d 22; *Paul v. First National Bank of Cincinnati, supra*. Intentional, reckless, wanton, willful and gross acts which cause injuries to person or property may be sufficient to evidence that degree of malice required to support an award of punitive damages in tort actions. There must be sufficient evidence of malice, however, before a question of punitive damages may be submitted to the finder of fact. *Robinson v. Parker-Hannifin Corp.*, 4 Ohio Misc. 2d 6, 4 Ohio B. 257, 1982 Ohio Misc. LEXIS 118 (Ohio C.P. 1982)

Here, the evidence was that CMHA informed defendant of the condition of the premises in question. The problems were not abated for the several months plaintiff resided there. Defendant was aware of the unfit and uninhabitable condition of the property, including that the property was infested with bed bugs. This was admitted to by defendant and such a conclusion is also supported by the evidence.

On the other hand, the evidence is not clear on the issue of whether or not plaintiff refused entry to persons who may have gone to the apartment to remedy the problems. There was testimony, including from plaintiff's daughter, that there were times plaintiff refused to permit entry to persons not made know during the hearing. Duffy Patterson, manager of the property at issue, testified that she experienced problems with workmen being refused entry to perform their maintenance work at plaintiff's apartment. Because the evidence is equivocal on this issue the magistrate is unable to make an award of punitive damages in this case. Malice was not demonstrated by clear and convincing evidence.

This decision points out and applies the legal effect of default admissions, however, the matter of punitive damages must be closely examined because of constitutional and public policy considerations. As mentioned, there must be sufficient evidence of malice before a question of punitive damages may be submitted to the finder of fact. *Robinson*, supra. In contrast to certain admissions made by defendant as noted herein, defendant did **not** admit to acting maliciously. Compare, *Doepker v. Willo Sec., Inc.*, 2008 Ohio 2008, 2008 Ohio App. LEXIS

1711 (Ohio Ct. App., Stark County Apr. 7, 2008), where specific admissions were made tantamount to admitting the existence of malice.

Here, defendant has admitted that she was aware of the bed bug infestation and that the property was in an unfit and uninhabitable condition and that the bed bugs were likely to cause some harm. Defendant additionally admitted that her conduct was shocking and exceeded the bounds of decency. However, the evidence was that the bedbugs were not placed in the abode by defendant or that defendant created a condition that made likely the appearance of bed bugs. The evidence was that defendant took immediate action to remedy the problem. Cook's Termite and Pest Control was called out very soon after the bugs were reported. It is also the case that Cook's made a second application of pesticide at the appropriate time and at defendant's expense. Why it came to be that Cook's did not make a third application (defendant testified that she made the necessary arrangements for it) is simply a matter of conjecture, based upon the current record.

In view of the evidence presented at the hearing, including the circumstance that it was known defendant at times would not permit entry to persons requesting permission to enter, and that at least to a point, reasonable measures were taken by defendant to remedy the problem with the bugs, the magistrate is unable to find the evidence necessary to make a finding of the existence of the malice necessary to support an award of punitive damages.

Counsel for plaintiff shall prepare the appropriate judgment entry for the court's consideration of approval of this decision within twenty days of the filing of

this decision. This decision contains the magistrate's findings of fact and conclusions of law. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law, unless the party timely and specifically objects in writing to that factual finding or legal conclusion within fourteen days of the filing of this decision.

Magistrate Timothy P. McCarthy

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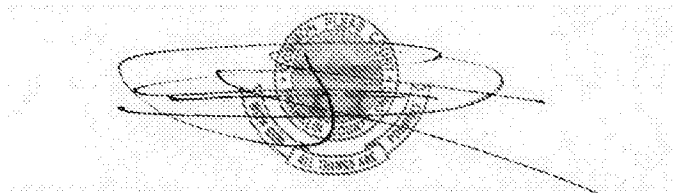
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Franklin County Court of Common Pleas

Date: 04-03-2014
Case Title: TONJA SANDERS ET AL -VS- MINNIE MCGEE
Case Number: 13CV003983
Type: MAGISTRATE DECISION

So Ordered



/s/ Magistrate Timothy P McCarthy