

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

CYC, INC.,	:	APPEAL NO. C-090781
	:	TRIAL NO. 09CV-16903
Plaintiff-Appellant,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
MARK LOMACK, d.b.a. LOMACK'S	:	
QUICK SHOP,	:	
Defendant-Appellee.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

CYC, Inc., appeals the trial court's entry that granted summary judgment to Mark Lomack on CYC's claims and that granted judgment in favor of Lomack on his counterclaim. We affirm the judgment of the trial court.

CYC filed a forcible-entry-and-detainer action against Lomack, seeking to remove him from property owned by CYC. CYC alleged that Lomack was occupying the property unlawfully. Lomack filed an answer in which he asserted a defense of res judicata, contending that the issue of possession had been decided in an earlier proceeding. In that proceeding, in the case numbered 07CV-34128, CYC had sought to evict Lomack from the property. Following a jury trial, the trial court had entered a judgment that Cedric Stone, the principal of CYC, Inc., was not entitled to evict Lomack, and that Lomack was not liable to CYC for trespass. This court recently

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

affirmed the trial court's judgment in that case.² In addition to his answer in the present case, Lomack asserted a counterclaim for reimbursement of money that he had paid for water at the property.

CYC filed a motion for partial summary judgment on its claim for eviction, and Lomack filed a motion for summary judgment on all of CYC's claims. The trial court concluded that the issue of possession had been fully litigated in the earlier proceeding and granted summary judgment to Lomack on CYC's claims. The trial court held a hearing on Lomack's counterclaim and found in favor of Lomack. The court ordered CYC to pay \$3,400.79 to Lomack in reimbursement for the amount that he had paid for a water bill.

We consider CYC's first, second, and third assignments of error together.³ In the first, CYC asserts that the trial court erred when it refused to grant its motion for partial summary judgment. In the second, it asserts that the trial court committed plain error when it considered the jury instructions that had been given in the earlier case. And in the third, CYC contends that the trial court erred when it granted summary judgment to Lomack.

In essence, CYC claims that Lomack was, at best, a month-to-month tenant of CYC due to an illegal sublease between Lomack and CYC's lessee, Arden, Inc. CYC argues that a default judgment granted to CYC on its claims against Arden necessarily leads to the conclusion that Lomack was a holdover tenant, subject to eviction on 30 days' notice. But Arden is not a party to this suit. And in the case in which CYC and Lomack were both parties, the jury clearly found that Lomack was a lawful tenant occupying the property under a valid lease. Res judicata "applies where an issue is litigated that has been 'actually and necessarily litigated and determined in a prior action.'"⁴ We conclude that the trial court did not err in

² *CYC, Inc. v. Lomack* (May 12, 2010), 1st Dist. No. C-090359.

³ Lomack has not filed an appellate brief.

⁴ *Ameigh v. Baycliffs Corp.*, 81 Ohio St.3d 247, 249, 1998-Ohio-467, 690 N.E.2d 872, citing *Krahn v. Kinney* (1989), 43 Ohio St.3d 103, 107, 538 N.E.2d 1058.

considering the jury instructions in the earlier proceedings to determine which issues had been litigated. Nor did the trial court err when it determined that the issue of the validity of Lomack's tenancy was res judicata because of the earlier judgment. The first, second, and third assignments of error are not well taken.

In a related assignment of error, the fifth, CYC asserts that the trial court erred when it stated in its judgment that Lomack had "sole and exclusive tenancy rights as described in the lease[.]" CYC contends that the trial court did not have the authority to determine Lomack's tenancy rights. But the court was merely stating what had been decided in the earlier trial—that Lomack was not subject to eviction and that he was occupying the property pursuant to a valid lease that did not expire until January 2011. The fifth assignment of error is overruled.

CYC's fourth assignment of error is that the trial court erred when it found in favor of Lomack on his counterclaim. According to Lomack, his sublease for the property provided that he would be responsible to pay for his actual usage of water for the property. In addition, Lomack would pay \$50 every quarter for the water bill. CYC would pay the water department and then bill Lomack for his actual usage. But when the water department turned off the water service due to nonpayment of a \$3,400.79 balance, Lomack paid the entire amount. Lomack testified that his normal water bill was \$60 to \$70 for a three-month period, that he had not used \$3,400.79 worth of water for the period in question, and that the property's other tenant had also used water in a hair-salon business. Stone testified that the bill was high because Lomack had allowed a toilet on the property to run for six months. The trial court found in Lomack's favor. Having reviewed the record, we are unable to conclude that this finding was against the weight of the evidence.⁵ The fourth assignment of error is not well taken. But we do note that while the transcript and the amount awarded by the trial court make clear that the court found in favor of

⁵ See *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578.

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Lomack on the counterclaim, the judgment entry mistakenly states that the “Plaintiff” prevailed. We therefore modify the judgment entry to reflect that the defendant, Lomack, was awarded \$3,400.79 on his counterclaim.

The judgment, as modified, is affirmed.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., SUNDERMANN and HENDON, JJ.

To the Clerk:

Enter upon the Journal of the Court on July 14, 2010

per order of the Court _____.
Presiding Judge