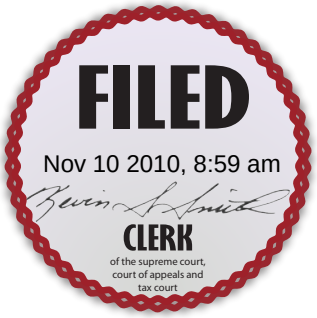

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IN THE
COURT OF APPEALS OF INDIANA

JEAN D. SCHOKNECHT,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 49A04-0912-CV-745
	)	
SUSAN E. DUNLAP,	)	
f/k/a SCRIBNER, f/k/a HASEMEIER,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Thomas J. Carroll, Judge
Cause No. 49D06-9812-CP-4072

November 10, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Jean D. Schoknecht ("Landlord"), *pro se*, appeals the dismissal of her claims against Susan E. Dunlap (formerly Susan E. Hasemeier) ("Tenant"). Landlord raises two issues, which we revise and restate as:

I. Whether the trial court abused its discretion in dismissing Landlord's claim; and

II. Whether the trial court properly denied Landlord's request for a jury trial.

We reverse and remand.

The relevant facts follow. This case arises from a residential lease which was entered into over fifteen years ago. See Schoknect v. Hasemeier, 735 N.E.2d 299, 300 (Ind. Ct. App. 2000). In August 1995, Landlord entered into a lease agreement with Tenant for residential property located in Indianapolis for a lease term of one year, and Tenant paid Landlord a security deposit in the amount of $750.[1] Id. Following the expiration of the initial one-year lease term, Tenant continued to lease the property from Landlord on a month-to-month basis. Id.

In April 1997, Landlord filed suit against Tenant in the Marion County Small Claims Court alleging waste and failing to make lease payments when due, and Landlord obtained a judgment against Tenant which entitled Landlord to possession of the property. Id. at 301. The court set the matter for hearing on damages. Id. After Tenant requested the return of her security deposit and Landlord sent a letter to Tenant itemizing damages and an estimated cost

[1] The lease agreement also provided that Tenant would reimburse Landlord for loss or damage to the property due to the negligence or other act of Tenant or Tenant's guest. Schoknect, 735 N.E.2d at 300-301.

of repair, Landlord dismissed her claim against Tenant without prejudice in November 1997. Id.

On May 8, 1998, Tenant filed suit against Landlord for her security deposit in the Wayne Township Division of the Marion County Small Claims Court. Id. On July 27, 1998, Landlord filed a counterclaim. On August 4, 1998, on the date the small claims court had set the matter for hearing, Landlord instituted a separate action against Tenant by filing a Complaint for Damages and Demand for Jury Trial in the Marion County Superior Court alleging breach of the lease agreement and damages to the property. Id. The proceedings in the Wayne Township Division were transferred to the Marion Superior Court No. 10 and the two actions were consolidated. Id. On October 13, 1998, Tenant filed an Answer and Counterclaim in the Superior Court. In February 2000, the court granted summary judgment in favor of Tenant and against Landlord on the grounds that Landlord failed to comply with notice requirements related to security deposits as set forth by Indiana statutes. Id. Landlord appealed, and on September 20, 2000, a panel of this court held that Landlord had complied with the statutory notice requirement and reversed and "remand[ed] to the trial court to determine the amount of damages Landlord is entitled to, if any, and whether Tenant is entitled to reimbursement of any portion of her security deposit." Id. at 302-303.

On remand, the parties continued to litigate the case for almost nine years, which included numerous continuance motions, at least two motions to dismiss under Trial Rule 41(E), unsuccessful mediation, numerous pre-trial conferences, change of counsel several times by both parties, a motion for order to appear filed by Tenant, a motion to remove

Tenant's counsel filed by Landlord, a court order for Landlord to personally appear for her deposition, several motions for change of judge by Landlord, and various other filings with Marion Superior Court No. 10.

On June 19, 2009, Tenant filed a Jury Waiver with the court in which Tenant waived trial by jury and requested the court to set the matter for a bench trial. An entry in the CCS dated June 26, 2009, states: "[Tenant's] motion to waive jury trial is set for hearing on July 21, 2009." Appellant's Appendix at 21. Landlord filed a response to Tenant's jury waiver, which was file-stamped on July 5, 2009, and alleged in part: "[Tenant's] waiver of jury trial . . . is meaningless as I do not waive my right to the jury trial that I have demanded and to which I have an absolute constitutional right." Id. at 51. Landlord's response also objected to a hearing on waiver "as being a complete waste of time as [Landlord has] not and will not ever waive [her] right to have a jury decide this case." Id. at 52. An entry in the CCS dated July 14, 2009, indicates that the court denied Landlord's request to vacate the hearing set on jury waiver. The court held a hearing on July 21, 2009, at which the court stated that "once you try something in small claims court, my position is that's it you've waived your right to trial by jury," see Transcript at 11, and gave the parties additional time to submit additional arguments prior to a ruling.

On August 10, 2009, Tenant filed a Brief in which she argued that Landlord waived her right to a jury trial and that Landlord's complaint should be dismissed with prejudice. On August 24, 2009, Landlord filed a Plaintiff's Brief in Support of Her Objection To Defendant's Motion For Bench Trial and Response To Defendant's Undenominated and

Untimely Motion to Dismiss Under Trial Rule 12(B)(6). On September 28, 2009, Landlord filed a notice to the Clerk that Judge Caroll has failed to either rule on a motion, set it for hearing, or obtain an extension to rule; or has delayed in ruling on a motion; and request that this case be transferred to the Supreme Court. On October 30, 2009, the court issued a written order in which it dismissed this case in its entirety, including the complaint and counterclaim, with prejudice and determined that Landlord was not entitled to a jury trial.

I.

The first issue is whether the trial court abused its discretion in dismissing Landlord's claim. We review a trial court's order on a motion to dismiss for an abuse of discretion. Baker Mach., Inc. v. Superior Canopy Corp., 883 N.E.2d 818, 821 (Ind. Ct. App. 2008) (reviewing a motion to dismiss under Trial Rule 41(E) for an abuse of discretion), trans. denied; Shelton v. Wick, 715 N.E.2d 890, 893 (Ind. Ct. App. 1999) (reviewing a motion to dismiss under Trial Rule 12 for abuse of discretion), trans. denied. We will find an abuse of discretion if the trial court's decision is "clearly against the logic and effect of the facts and circumstances before the court, or where the trial court has misinterpreted the law. Shelton, 715 N.E.2d at 893.

In its October 30, 2009 order, the trial court stated that, on its own motion, it dismissed this case "based upon its determination that all of the issues in this case arose out of the same transaction and, therefore, should have been litigated in the original proceedings, more than a dozen years ago, in the Wayne small claims court." Appellant's Appendix at 26. The court also stated that "[t]he failure of the parties to litigate their claims in the original

action has resulted in excessive costs to the parties and, more importantly, the community" and that "[i]t is in the interest of judicial efficiency for this court to dismiss this action [in] its entirety." Id. at 26-27. Accordingly, the court ordered that "this cause be dismissed in its entirety, both as to the Complaint and Counterclaim, all with prejudice." Id. at 27.

Landlord argues that "[t]he trial court was duty-bound to hold a trial as ordered by this Court of Appeals, and erred when it took it upon itself to dismiss it, with prejudice, under some undenominated 'former litigation' approach." Appellant's Brief at 6. Landlord further argues that the court "erred when [it] took it upon [itself] to dismiss the entire case . . . as [it] seems to have sided with the [Tenant] and decided the case based upon a phantom affirmative defense" and that "[d]efenses which are not raised are waived." Id. at 4-5. Landlord also argues that the "[t]rial [c]ourt committed inexplicable and plain error when it dismissed this case with prejudice and [its] decision should be reversed and this case remanded for trial . . . ." Id. at 5.[2]

Tenant argues that Landlord's "tactical avoidance of the statutory requirements prevented Court from having particular subject matter jurisdiction" and that the "[t]rial [c]ourt has authority to reconsider previous denial of TR 41(E) motion any time before final judgment." Appellee's Brief at 9, 11. Tenant argues that "[w]hile the Trial Court did not specifically state the reason for the dismissal," a "reasonable interpretation of the Court's findings would be that the Court believes dismissal is warranted under either Trial Rule 12

[2] Tenant filed an appellee's brief by mail on June 21, 2010, and Landlord filed a reply brief on July 15, 2010. Thus, Landlord's reply brief was untimely. See Indiana Appellate Rule 45(B)(3) ("Any appellant's reply brief shall be filed no later than fifteen (15) days after service of the appellee's brief.").

(B)(8) or by reconsidering the previous Trial Rule 41(E) motions." Id. at 11. Tenant also argues that the trial court's "decision to 'reconsider' or 'modify' [its] previous denial of a dismissal pursuant to Trial Rule 41(E) is appropriate and should not be overturned on appeal." Id. at 16.

We initially note that the court's October 30, 2009 order or dismissal does not cite to or rely upon any Trial Rule or statute as a basis for dismissal. We will address Tenant's arguments related to dismissal under Trial Rule 41(E),[3] Trial Rule 12(B)(8), and on jurisdictional grounds separately.

A. Trial Rule 41(E)

Tenant argues that a "reasonable interpretation of the Court's findings would be that the Court believes dismissal is warranted . . . by reconsidering the previous Trial Rule 41(E) motions" and that "[i]n essence the continued pursuit of this case by [Landlord] had become frivolous and justified the [t]rial [c]ourt reconsidering its prior denial of [Tenant's] Trial Rule 41(E) motions." Appellee's Brief at 11, 15.

Trial Rule 41(E) provides in part:

Whenever there has been a failure to comply with these rules or when no

[3] We note that Trial Rule 41 relates to the dismissal of actions. Subsection (A) of Rule 41 relates to voluntary dismissal as stipulated by the plaintiff and signed by all parties who have appeared in the action. Subsection (B) relates to involuntary dismissal by the court at a bench trial after the party with the burden of proof upon an issue has completed the presentation of evidence on that issue and the opposing party moves for dismissal on the ground that upon the weight of the evidence and the law there has been shown no right to relief. Trial Rule 41(B); see also I.L.E. Trial § 158 ("Weight and sufficiency of evidence—Motion for involuntary dismissal"). Subsection (C) relates to the dismissal of counterclaim, cross-claim, or third-party claim by a claimant. Trial Rule 41(D) relates to the payment of costs where a plaintiff dismissed an action and later commences an action based upon or including the same claim against the same defendant, and Trial Rule 41(F) relates to reinstatement following dismissal. Tenant does not argue or point to the record to show that dismissal was requested or proper under subsections (A), (B), (C), or (D) of Trial Rule 41.

> action has been taken in a civil case for a period of sixty [60] days, the court, on motion of a party or on its own motion shall order a hearing for the purpose of dismissing such case.

We note that the record and CCS do not show that the court ordered a hearing or notified the parties or their counsel of any hearing for the purpose of dismissing the case under Trial Rule 41(E) in connection with the October 30, 2009 order and that the CCS shows that at least some action was taken by the parties during the period leading up to the court's October 30, 2009 order, including the filing of a brief by Landlord on August 24, 2009 and a notice by Landlord on September 28, 2009. The record does not show that the requirements for dismissal for failure to prosecute as set forth in Rule 41(E) were satisfied, and we conclude that any dismissal pursuant to that subsection was improper under the circumstances. See Am. Family Ins. Co. ex rel. Shafer v. Beazer Homes Ind., LLP, 929 N.E.2d 853, 857 (Ind. Ct. App. 2010) (reversing a trial court's order of dismissal and discussing Trial Rule 41(E) and noting the rule's purpose, the requirements of the rule related to the period of inactivity and a hearing, and the factors when determining whether a trial court abused its discretion in dismissing a case for failure to prosecute).

B. Trial Rule 12(B)(8)

Tenant also cites to Trial Rule 12(B)(8), which allows a party to move for dismissal on the grounds that "[t]he same action is pending in another state court of this state." Further, Trial Rule 12(B) provides that "[a] motion making any of these defenses shall be made before pleading if a further pleading is permitted or within twenty [20] days after service of the prior pleading if none is required" and that "[i]f a pleading sets forth a claim for relief to

which the adverse party is not required to serve a responsive pleading, . . . the defenses in section [(B)(8)] is waived to the extent constitutionally permissible unless made in a motion within twenty [20] days after service of the prior pleading."

Here, Tenant does not point to the record or CCS to show that it ever filed a motion to dismiss pursuant to Trial Rule 12(B)(8) or a response pleading asserting a defense to that effect or argue that its failure to do so did not result in waiver under Trial Rule 12(B). Further, we note that the record shows that the same action was not "pending in another state court" at the time of the October 30, 2009 order of dismissal because the small claims suit filed by Tenant in the Wayne Township Division was transferred to the Marion County Superior Court in August 1998 and consolidated with the separate suit filed by Landlord in the Superior Court in September 1998. Accordingly, any dismissal under Trial Rule 12(B)(8) was improper.

C. Jurisdiction of Superior Court

Tenant argues that "[i]t was improper for the Superior Court to take jurisdiction away from the Small claims court" and that "[s]ubject matter jurisdiction cannot be waived or conferred by agreement." Appellee's Brief at 10 (citation omitted). The trial court ruled that "the issues in this case . . . should have been litigated in the original proceeding . . . in the Wayne small claims court." Appellant's Appendix at 26.

A superior court and a small claims court have "original and concurrent jurisdiction" in cases related to security deposits in landlord-tenant relations and Tenant has not cited to any relevant statute or other authority expressly providing that the small claims court had

exclusive jurisdiction of the claims raised in this case. See Ind. Code § 32-31-3-11(a) ("The following courts have original and concurrent jurisdiction in cases arising under this chapter: (1) A circuit court. (2) A superior court. (3) A county court. (4) A municipal court. (5) A small claims court."); Wilhelm v. Madison Vill., MHC, LLC, 864 N.E.2d 379, 380-382 (Ind. Ct. App. 2007) (holding that a county circuit court had jurisdiction over a landlord's action to evict even though the small claims court had concurrent jurisdiction and noting that the legislature did not expressly provide exclusive jurisdiction over small claims to the small claims division and thus that the courts had concurrent jurisdiction over small claims actions), reh'g denied, trans. denied; Buckmaster v. Platter, 426 N.E.2d 148, 150 (Ind. Ct. App. 1981) (noting that a defendant in a small claims action may choose to file a counterclaim in the small claims division or may file a separate cause of action either in the small claims division or in the regular civil docket of the superior court).[4] Thus, we conclude that dismissal upon a lack of subject matter jurisdiction was improper.

In sum, our review of the record does not reveal a basis for the court's October 30, 2009 order or dismissal, including any dismissal under Trial Rules 12(B)(8) or 41(E), or upon the basis of subject matter jurisdiction. Based upon our review of the record, we conclude that the trial court abused its discretion when it dismissed this case on the basis that the

[4] In support of her argument, Tenant cites to Ind. Code § 33-34-3-11, which relates to proceedings in Marion County Small Claims Courts and states in part that "[a] defendant in a small claims case waives the right to trial by jury unless the defendant requests a jury trial at least three (3) calendar days before the trial date that appears on the complaint" and that "[u]pon the filing of a jury trial request, the small claims court shall transfer the claim to the superior court of the county." We observe that this statute does not address whether a superior court has subject matter jurisdiction and that Tenant indeed acknowledges that she "does not dispute that Marion Superior Courts have 'general subject matter jurisdiction.'" Appellee's Brief at 10.

claims should have been litigated in small claims court. See Am. Family Ins. Co. ex rel. Shafer, 929 N.E.2d at 857 (holding that the court's order of dismissal under Trial Rule 41(E) was an abuse of discretion).

II.

The next issue is whether the trial court properly denied Landlord's request for a jury trial. We review a trial court's denial of a request for jury trial for an abuse of discretion. Martin v. Eggman, 776 N.E.2d 928, 930 (Ind. Ct. App. 2002). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. Allen v. State, 791 N.E.2d 748, 756 (Ind. Ct. App. 2003), trans. denied.

Landlord argues that "[n]o matter the procedural history of these events in the small claims court, the parties separately demanded trial by jury . . . and then the parties[']lawyers' [sic] agreed to it in a proposed Case Management Plan . . . , which was entered as an order of the Court . . . and a stand-alone order setting jury trial." Appellant's Brief at 7. Landlord argues that Tenant's "too-little, way-too-late effort at eliminating a jury should be rejected." Id. at 8. Tenant argues that Landlord originally filed her claim in small claims court and that she later dismissed that complaint without prejudice. Tenant cites to Ind. Code 33-34-3-11(a) and argues that when Tenant sued Landlord in small claims court, Landlord "responded with her own counterclaim in the small claims venue" and that "[w]hen a party files a complaint in small claims court they are waiving their right to jury." Appellee's Brief at 16. Tenant further cites to Ind. Code 33-34-3-11(b) and argues that Landlord was "required to file a jury

trial request in the case [Tenant] filed against her at least three (3) days before the small claims trial date or it is waived." Id. Tenant also argues that "[i]t appears that either [Landlord] or her attorney missed the deadline and attempted to outsmart the system by filing a new claim in Superior Court." Id.

Trial Rule 38 governs the right to trial by jury. Trial Rule 38(B) pertains to a demand for a jury trial and provides in part:

> Any party may demand a trial by jury . . . by filing with the court and serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than ten (10) days after the first responsive pleading to the complaint . . . . Such demand is sufficient if indorsed upon a pleading of a party filed within such time.

"A jury trial demand is the invocation of a constitutional right which, once timely invoked, survives and need not be refiled." Hamlin v. Sourwine, 666 N.E.2d 404, 408 (Ind. Ct. App. 1996).

We first observe that the lawsuit filed by Landlord in April 1997 was dismissed without prejudice in November 1997. See Schoknect, 735 N.E.2d at 301. Tenant initiated an action in the small claims court in May 1998, and after Landlord filed her complaint in the superior court, the small claim proceedings were transferred to superior court and the two actions were consolidated. The superior court ordered that the claim of Tenant was "to be reple[d] in its entirety," Appellant's Appendix at 2, and Tenant did so. Both Landlord and Tenant timely demanded a jury trial under Trial Rule 38(B) in the superior court, which was granted.

Tenant does not point to the record to show, and our review of the record does not

disclose, that Tenant timely objected to or otherwise challenged the transfer of her claim from the small claims court division, the consolidation of the two actions in the superior court, or the fact that Landlord did not file a request in the small claims court three days prior to the scheduled hearing date. Consequently, Tenant has waived these arguments on appeal. See Newland Resources, LLC v. Branham Corp., 918 N.E.2d 763, 770 (Ind. Ct. App. 2009) ("As a general rule, a party cannot argue on appeal an issue that was not properly presented to the trial court.").

Based upon our review of the record, we conclude that the trial court erred in denying Landlord's jury trial demand. See Martin, 776 N.E.2d at 930-932 (holding that the trial court abused its discretion in denying the appellant's request for a jury trial where the appellant's jury trial demand was timely under Trial Rule 38(B) after the case was repled in the Marion Superior Court after appeal from the small claims court and acknowledging that the outcome circumvents the small claims court time limit for requesting a jury trial); Builders Square v. Haines, 696 N.E.2d 453, 455 (Ind. Ct. App. 1998) (holding that the trial court erred by denying a written demand for a jury trial where the demand was included in a party's appearance and CCS entry form), trans. denied.

For the foregoing reasons, we reverse the trial court's order of dismissal and denial of Landlord's request for a jury trial.

Reversed and remanded.

DARDEN, J., and BARNES, J., concur.