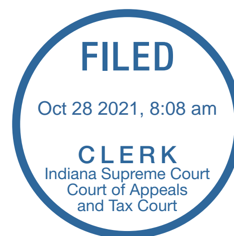
MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE

Zolo A. Azania
Gary, Indiana

IN THE

COURT OF APPEALS OF INDIANA

Zolo A. Azania,

Appellant-Petitioner/Counter-Respondent,

v.

Kenneth R. Edwards, Tracy Edwards, and Krete Properties, LLC,

Appellees-Respondents/Counter-Petitioners

October 28, 2021

Court of Appeals Case No. 20A-PL-2142

Appeal from the Lake Superior Court

The Honorable Kristina C. Kantar, Judge

Trial Court Cause No. 45D04-2001-PL-46

Crone, Judge.

Case Summary

[1] Zolo A. Azania (Tenant), pro se, appeals an order of eviction and immediate possession entered in favor of his landlords, Kenneth R. Edwards, Tracy Edwards, and Krete Properties, LLC (collectively Landlords), for nonpayment of rent. We affirm.

Facts and Procedural History

[2] In March 2017, Tenant and Landlords entered into a residential lease agreement for a three-level townhouse. The written agreement set rent at $650 per month and specified that after one year, the tenancy automatically continued on a month-to-month basis, subject to a thirty-day notice-of - termination clause. The parties verbally agreed that Tenant could use the basement level of the premises for an art studio. During 2017, Tenant began to notice water seeping into the basement during heavy rainfall. He notified Landlords concerning the issue but did not move out at the end of the one-year lease term. Thus, per the lease, he became a month-to-month tenant as of March 2018.

[3] On September 29, 2019, Landlords sent Tenant and all other tenants in the building a letter notifying them that the rent would be increased to $700, effective November 1, 2019. Tenant did not respond to the letter and continued to occupy the premises. On November 2, 2019, Tenant made a partial rent payment of $200. Landlords sent him a letter, dated November 15, 2019, requesting that he submit a payment plan for his outstanding balance within

forty-eight hours, expressing the importance of communication, and reminding him that his current lease was merely month to month, which provided him "flexibility to do whatever is in [his] best interest." Appellees' Ex. 3. Tenant did not opt to vacate but continued to occupy the premises. In December 2019, the parties conducted a phone review of his outstanding balance, and Tenant agreed to pay a minimum of $450 each Friday until the balance was current. Landlords "didn't want to charge him with any late fees as long as he honored his word and made the payment arrangements." Tr. Vol. 2 at 17. He did not make the payments as arranged. Between January and March 2020, Landlords sent letters notifying Tenant of his default on the lease and payment plan and notification agreement and informing him about his accumulating rent arrearage and accrued late fees. Tenant made a $300 payment in mid February, continued to occupy the premises, and made no payments thereafter. On March 6, 2020, Landlords sent another default letter, listing his outstanding rent and accrued late fees and notifying him that his "lease agreement has been terminated." *Id.*

[4] Meanwhile, on January 17, 2020, Tenant filed a complaint and jury demand against Landlords in cause number 45D04-2001-PL-46 (Cause PL-46), seeking damages for water incursion into the basement of the leased premises. In March 2020, Landlords filed a small claims action in cause number 45D12-2003-SC-1751 (Cause SC-1751) for eviction and immediate possession due to Tenant's nonpayment of rent. The actions were consolidated under Cause PL-

46 in October 2020, and the trial court granted Tenant's motion for judicial notice of Tenant's counterclaims and jury trial demand.

[5] On November 10, 2020, the trial court conducted a hearing solely on the issue of eviction/immediate possession. During the hearing, the trial court admitted Landlords' letters to Tenant concerning nonpayment, as well as a spreadsheet laying out all rent arrearages. Landlords' Exs. 3, 4. Landlord Tracy Edwards testified concerning Tenant's nonpayment of rent, Landlords' attempts to work with him, and his failure to abide by even the more lenient payment schedules they offered. When asked if he paid his rent, Tenant answered, "No, I did not." Tr. Vol. 2 at 22. When asked why not, he responded, "[I]t's because of a protest." *Id*. at 23. On November 12, 2020, the court issued an order evicting Tenant for nonpayment of rent and granting Landlords' motion for immediate possession. On November 16, 2020, the sheriff's office issued an eviction notice, specifying that Tenant had forty-eight hours to vacate the premises or be forcibly removed. Tenant vacated the premises.

[6] Tenant appealed the trial court's eviction/immediate possession order. Landlords filed a motion to dismiss the appeal for lack of service and as moot and untimely. The motions panel of this Court dismissed the appeal, and Tenant petitioned for rehearing. The motions panel reinstated the appeal, and we now address it on the merits.

Discussion and Decision

[7] Tenant raises seven issues for review, most of which pertain to matters not at issue in the eviction hearing and appealed order of immediate possession. We address only those that pertain to eviction for nonpayment of rent. At the outset, we note that Tenant chose to proceed pro se both below and on appeal. It is well settled that pro se litigants are held to the same legal standards as licensed attorneys. *Winters v. Pike*, 171 N.E.3d 690, 695-96 (Ind. Ct. App. 2021). Tenant is afforded no inherent leniency simply by virtue of being self-represented. *Zavodnik v. Harper*, 17 N.E.3d 259, 266 (Ind. 2014).

[8] The hearing transcript reflects Tenant's persistent attempts to litigate claims not pertinent to the issue at hand: eviction and immediate possession for nonpayment of rent, i.e., those originally filed in Cause SC-1751. Time and again, the trial court took reasonable steps to prevent Tenant from being placed at an unfair disadvantage by reminding him that certain exhibits or testimony would be addressed later, when the issues included in Tenant's original complaint in Cause PL-46 would be heard and resolved.[1] Now, in his appellate brief, Tenant alleges that the trial court "connived" and acted as an "advocate" for Landlords during the proceedings below. Appellant's Br. at 13, 17. We find this tone unnecessarily hostile and emphasize that "[a] brief cannot 'be used as

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[1] On appeal, Tenant alleges that the trial court's failure to compel discovery, divulgence of a certain ex parte motion pertaining to his damages claims, and refusal to admit a thumb drive with water damage footage, as well as Landlords' alleged backdating of certain discovery responses. These all pertain to matters relevant to the original Cause PL-46 and are irrelevant to the matter of eviction and immediate possession.

a vehicle for the conveyance of hatred, contempt, insult, disrespect, or profession[al] discourtesy of any nature for the court of review, trial judge, or opposing counsel.'" *Basic v. Amouri*, 58 N.E.3d 980, 985 (Ind. Ct. App. 2016). In short, most of Tenant's allegations of error stem from his misunderstanding of procedural and substantive law, which was a risk he incurred by choosing self-representation. *See Smith v. Donahue*, 907 N.E.2d 553, 555 (Ind. Ct. App. 2009) ("One of the risks that a defendant takes when he decides to proceed pro se is that he will not know how to accomplish all of the things that an attorney would know how to accomplish."), *trans. denied*, *cert. dismissed*.[2]

[9] That said, we also note that Landlords have failed to file an appellees' brief. When an appellee fails to submit a brief, we will not undertake the burden of developing his arguments. *Winters*, 171 N.E.3d at 698. Rather, we apply a less stringent standard of review and will reverse if the appellant establishes prima facie error. *Id*. "Prima facie error is error 'at first sight, on first appearance, or on the face of it.'" *Id*. (quoting *Solms v. Solms*, 982 N.E.2d 1, 2 (Ind. Ct. App. 2012)).

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[2] Examples of Tenant's confusion concerning procedural rules include his inability to distinguish between a properly filed counterclaim in one action and an affirmative defense in another action and his inability to discern when he was improperly offering unsworn testimony versus acting as his own attorney.

Section 1 – Landlords' equitable action for eviction and immediate possession was properly triable by the trial court.

[10] Tenant contends that he was denied his right to a jury trial when the trial court resolved the eviction claim via a bench hearing. Article 1, Section 20 of the Indiana Constitution provides, "In all civil cases, the right of trial by jury shall remain inviolate." Indiana Trial Rule 38(A) states:

> **Causes Triable by Court and by Jury.** Issues of law and issues of fact in causes that prior to the eighteenth day of June, 1852, were of exclusive equitable jurisdiction shall be tried by the court; issues of fact in all other causes shall be triable as the same are now triable. In case of the joinder of causes of action or defenses which, prior to said date, were of exclusive equitable jurisdiction with causes of action or defenses which, prior to said date, were designated as actions at law and triable by jury—the former shall be triable by the court, and the latter by a jury, unless waived; the trial of both may be at the same time or at different times, as the court may direct.

[11] An equitable remedy is "a nonmonetary one such as an injunction or specific performance, obtained when available legal remedies, usu[ally] monetary damages, cannot adequately redress the injury." *Equitable Remedy*, BLACK'S LAW DICTIONARY (11th ed. 2019). Eviction is "[t]he act or process of legally dispossessing a person of land or rental property." *Eviction*, BLACK'S LAW DICTIONARY (11th ed. 2019). Actual eviction is the "physical expulsion of a person from land or rental property." *Actual Eviction*, BLACK'S LAW DICTIONARY (11th ed. 2019). It is basic and well understood that eviction falls within the category of an equitable action, and Tenant has not included any

argument in his brief to persuade us otherwise. Nor has he even acknowledged Trial Rule 38(A).

[12] Rather, Tenant simply predicates his claim on the language of Article 1 Section 20, the jury demand that he made in Cause PL-46, and the fact that the trial court judicially noticed the jury demand at his request after that cause was consolidated with Cause SC-1751 (Landlords' eviction action). However, "[t]he right to a jury trial in civil cases is guaranteed only in those actions which were triable by jury at common law prior to June 18, 1852." *Cardinal Health Ventures, Inc. v. Scanameo*, 85 N.E.3d 637, 640 (Ind. Ct. App. 2017) (quoting *Midwest Fertilizer Co. v. Ag-Chem Equip. Co.*, 510 N.E.2d 232, 233 (Ind. Ct. App. 1987)), *trans. denied* (2018). Trial Rule 38(A) specifies that when causes are joined, those involving equitable issues are triable by the court, either at the same time as legal issues or separately. Here, the trial court decided to resolve the legal and equitable issues on different dates and resolved the equitable issue of eviction by bench trial, as specified in Trial Rule 38(A). During the eviction hearing, the court repeatedly emphasized to Tenant that the hearing was limited in scope and would not include evidence pertaining to damages flowing from the alleged water incursion, which would be tried on a different date. Tr. Vol. 2 at 6-8.[3] Jury request notwithstanding, Tenant was not entitled to have a jury

[3] Tenant's attempt to characterize his counterclaim in Cause PL-46 as a counterclaim in the eviction action lacks merit. The trial court reviewed the documents and concluded that there was no properly filed counterclaim in the eviction action. We agree.

resolve Landlords' equitable action for eviction and immediate possession, and the trial court did not err in resolving it via a bench hearing.

Section 2 – Tenant waived review of his claim that his eviction was not permitted due to the COVID-19 eviction moratorium.

[13] Tenant also asserts that his eviction violated the Center for Disease Control's COVID-19 eviction moratorium, which temporarily halted residential evictions, starting in March 2020. He failed to raise this issue in the trial court. *See First Chicago Ins. Co. v. Collins*, 141 N.E.3d 54, 61 (Ind. Ct. App. 2020) (appellant may not present argument not presented to trial court). As such, he has failed to preserve it for our review. *See Showalter v. Town of Thorntown*, 902 N.E.2d 338, 343 (Ind. Ct. App. 2009) (arguments raised for first time on appeal are waived for appellate review).

Section 3 – Tenant was subject to eviction for nonpayment of rent in violation of his lease.

[14] Tenant contends that the trial court erred in ordering eviction and immediate possession for nonpayment of rent.[4] Leases are contractual in nature. *Vill. Commons, LLC v. Marion Cnty. Prosecutor's Off.*, 882 N.E.2d 210, 215 (Ind. Ct. App. 2008), *trans. denied*. The interpretation of a contract is a question of law, which we review de novo. *Scott-LaRosa v. Lewis*, 44 N.E.3d 89, 94 (Ind. Ct.

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[4] Although Tenant's argument lacks cogency as required by Indiana Appellate Rule 46(A)(8) and relies largely on a nonexistent counterclaim, we choose to discuss it on the merits.

App. 2015). In conducting our review, we examine the contract as a whole, ascertaining the parties' intent, and making every attempt to construe the contract's language 'so as not to render any words, phrases, or terms ineffective or meaningless.'" *Brill v. Regent Commc'ns, Inc.*, 12 N.E.3d 299, 306 (Ind. Ct. App. 2014) (quoting *JKL Components Corp. v. Insul-Reps, Inc.*, 596 N.E.2d 945, 950 (Ind. Ct. App. 1992), *trans. denied*), *trans. denied*.

[15] Here, Landlords introduced the March 2017 lease agreement, which provided for a one-year term at $650 per month, with a provision specifying that the lease would continue on a month-to-month basis for any tenant not vacating at the end of the lease term. During 2017, Tenant noticed water seepage in the basement of the premises and notified Landlords. Nevertheless, he remained on the premises, did not vacate at the end of the one-year term, and went month to month as of March 2018. In September 2019, Landlords sent all tenants a notice of a $50 rent increase, to be effective November 1, 2019. Landlords' Ex. 2. In October 2019, Tenant started to get behind in his rent. He made partial payments for a couple months thereafter, and Landlord Tracy Edwards conducted a phone conference with him to set up a payment schedule to address both arrearages and rent currently due. She testified that Landlords were willing to forgo late fees as long as Tenant kept his word and stuck to the agreed adjusted payment schedule. When Tenant failed to do so, yet remained on the premises, Landlords sent notices informing him of his arrearages and late fees. Tenant made a partial payment on February 14, 2020, and made no further rent payments. He admitted as much nine months later during the

eviction hearing. Although he stated that he had ceased paying rent out of protest, he admits that he never expressed his protest to Landlords in writing, and he never vacated the premises. *See* Tr. Vol. 2 at 32 (trial court's rhetorical summation: "[I]n 2020, you just stopped paying rent because of the flooding that you knew about since 2017?"). The record establishes Tenant's nonpayment of rent in violation of his lease agreement. Thus, the trial court properly ordered Tenant's eviction and immediate possession by Landlords. Accordingly, we affirm.

[16] Affirmed.

Bailey, J., and Pyle, J., concur.