STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1707

681 Properties, LLP,
Appellant,

vs.

Numerianus Mulokozi,
Respondent,

John Doe, Jane Doe,
Defendants.

Filed August 14, 2023
Affirmed
Reilly, Judge

Hennepin County District Court
File No. 27-CV-HC-22-5445

Christopher T. Kalla, Douglass E. Turner, Hanbery & Turner, P.A., Minneapolis, Minnesota (for appellant)

Justin Prentice, Hennepin County Adult Representation Services, Minneapolis, Minnesota (for respondent)

Considered and decided by Reilly, Presiding Judge; Connolly, Judge; and Slieter, Judge.

NONPRECEDENTIAL OPINION

REILLY, Judge

Appealing from the dismissal of an eviction action, appellant-landlord argues the district court erred by (1) excluding a criminal complaint from evidence, (2) declining to

draw an adverse inference from respondent-tenant's invocation of his Fifth Amendment rights when questioned about allegedly criminal conduct in the apartment, and (3) determining landlord failed to meet its burden by proving the grounds for eviction by a preponderance of the evidence. Because landlord waived its evidentiary argument and the district court did not abuse its discretion in declining to draw an adverse inference against tenant, we affirm.

FACTS

Respondent-tenant Numerianus Mulokozi rented an apartment from appellant-landlord 681 Properties LLP in Brooklyn Park. In September 2022, landlord filed an expedited eviction complaint against tenant alleging that tenant committed a violent sexual assault against another person in his apartment on September 13. Landlord sought to evict tenant for violating the parties' residential lease agreement, which prohibited residents from engaging in criminal activity and acts or threats of violence on the premises. Landlord also asserted that tenant's alleged criminal conduct violated a Minnesota statute which sets forth a covenant between landlords and tenants in all lease agreements prohibiting both parties from committing particular acts against "a tenant or licensee or any authorized occupant." Minn. Stat. § 504B.171, subd. 1(b) (2022). Criminal sexual conduct is a prohibited act under this statute. Minn. Stat. § 504B.206, subd. 1(a)(2) (2022).

The district court held a bench trial before a referee.[1] Tenant raised a motion in limine to exclude from evidence landlord's trial exhibit, a complaint charging tenant with criminal sexual conduct, because landlord would not be calling any witnesses to testify to the contents of the complaint. Landlord explained that it did not know the identity of the victim and would not be calling any police officers to testify. The district court determined the complaint was inadmissible because its substance was hearsay and hearsay-within-hearsay. But the district court noted it would take judicial notice of the fact that charges were filed against tenant.

Landlord called tenant as its first witness. Tenant testified he lived at the apartment building in Brooklyn Park and that he was in his apartment on September 13 at 3:00 p.m. For the entire remaining questioning, tenant asserted his Fifth Amendment right against self-incrimination and refused to answer landlord's questions about the alleged criminal sexual conduct.

> Q: Did you sexually assault somebody that afternoon at your apartment, sir?
> A: I would prefer to remain silent.
> Q: Did you grab a victim – somebody's arm and try to pull their pants down?
> A: I prefer to exercise my right to remain silent.
>
> . . . .
>
> Q: At one point, did you touch a person's hand and force that person's hand onto your penis?
> A: I exercise my right to remain silent.

[1] Once the district court confirms a referee's findings, the findings become the order of the district court. Minn. Stat. § 484.70, subd. 7(c) (2022). We review such orders like any other district court order.

The property manager of the apartment building also testified. The property manager explained she was familiar with tenant based on a previous interaction about rent and testified she believed he was a "very combative" man. After her interaction with tenant about rent, tenant called the police about the property manager and sought a restraining order against her. The property manager testified that she did not have any firsthand knowledge of guests at tenant's apartment. Landlord rested and tenant did not call any witnesses. In its closing argument, landlord's counsel asked the district court to find that tenant engaged in criminal sexual conduct on September 13 at his apartment by a preponderance of the evidence based on an adverse inference taken from tenant's assertion of his right against self-incrimination and the property manager's opinion of tenant's character.

The district court dismissed the eviction action, declining to draw an adverse inference against tenant and reasoning that landlord did not meet its burden to prove the grounds for eviction because landlord "did not present any witness testimony or admissible exhibits that identified tenant as having committed criminal sexual conduct or any other criminal activity."

Landlord appeals.

DECISION

I. Landlord waived its evidentiary arguments on the admissibility of the criminal complaint by raising them for the first time on appeal.

Landlord argues that the district court erroneously refused to admit the criminal complaint under the business record hearsay exception, Minn. R. Evid. 803(6), and as a

self-authenticating document, Minn. R. Evid. 901. The district court has "broad discretion" to rule on evidentiary matters, and we generally will not reverse "absent an abuse of that discretion." *Doe 136 v. Liebsch*, 872 N.W.2d 875, 879 (Minn. 2015). But we need not decide whether the district court abused its discretion as this issue is not properly before this court. Landlord raises these evidentiary arguments for the first time on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) ("A reviewing court must generally consider only the issues that the record shows were presented and considered" by the fact-finder "in deciding the matter before it."). Before trial, tenant made a motion in limine to exclude the criminal complaint arguing that it contained hearsay and hearsay-within-hearsay. In response, landlord argued the district court should determine the criminal complaint was admissible because the document "provide[d] some context for the case" and a "good faith basis for the questions" landlord planned to ask tenant. Landlord did not argue that any hearsay exceptions, like the business records exception, or other evidentiary rules applied to render the complaint admissible. Because these arguments were not presented to and considered by the district court, we decline to consider them.[2] *See id.*

[2] Landlord also argues the district court erroneously failed to grant summary judgment for landlord because tenant's refusal to answer landlord's questions did not amount to a denial of the allegations against him and "leaves the court with no genuine dispute as to the allegations of the eviction complaint." This argument contains multiple flaws. First, landlord never moved the district court for summary judgment and the district court did not consider this argument. *See Thiele*, 425 N.W.2d at 582. Second, tenant denied the allegation he committed criminal sexual conduct in his apartment two times—at his first appearance and in his answer to the eviction complaint. We are unconvinced that summary judgment was warranted, sua sponte or otherwise, when a genuine issue of material fact remained concerning whether tenant engaged in the alleged criminal activity. *See* Minn. R. Civ. P. 56.01 ("The court shall grant summary judgment if the movant shows that there

II. The district court did not abuse its discretion by declining to draw an adverse inference against tenant and did not err by determining landlord failed to meet its burden of proof.

Landlord argues that tenant's assertion of his right against self-incrimination and failure to deny the allegations against him warranted an adverse inference. Landlord asserts that, had the district court not failed to draw an adverse inference, the district court would have concluded as a matter of law that tenant committed the alleged criminal act in violation of his lease agreement and Minnesota law. As a result, we undertake a two-step analysis. First, we consider the district court's decision to not draw an adverse inference against tenant. Second, we consider whether the district court erred in determining landlord failed to meet its burden to prove the grounds for eviction by a preponderance of the evidence. *Nationwide Hous. Corp. v. Skoglund*, 906 N.W.2d 900, 904 (Minn. App. 2018), *rev. denied* (Minn. Mar. 28, 2018).

Adverse Inference

The Fifth Amendment right against self-incrimination may be invoked if the testimony or information sought would tend to incriminate the witness. *Minn. State Bar Ass'n v. Divorce Assistance Ass'n, Inc.*, 248 N.W.2d 733, 737 (Minn. 1976). This right can be invoked in civil as well as criminal proceedings. *Parker v. Hennepin Cnty. Dist. Court, Fourth Judicial Dist.*, 285 N.W.2d 81, 82-83 (Minn. 1979). In a civil case, a factfinder *may* draw an adverse inference from a party or witness's invocation of the right. *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 111 n.1 (Minn. 1992); *see also*

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is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.").

Recommendation for Discharge of Kelvie, 384 N.W.2d 901, 906 (Minn. App. 1986) ("Drawing adverse inferences from [respondent's] refusal to testify in a civil matter is permitted but not mandatory."). Given the discretionary nature of the district court's decision whether to draw an adverse inference, we review the district court's exercise of discretion for abuse. *See Wartnick*, 490 N.W.2d at 111 n.1.

An adverse inference based on an individual's refusal to testify cannot by itself establish that a party committed an offense. *Comm'r of Revenue v. Fort*, 479 N.W.2d 43, 50 (Minn. 1992) (holding that adverse use of a party's Fifth Amendment invocation "would penalize her for an exercise of her constitutional right" when the invocation was the only basis for concluding she committed an offense). Independent probative evidence must exist of a fact beyond a party's refusal to answer for an adverse inference to be proper. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) ("[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.").

On this record, landlord did not set forth independent probative evidence that tenant engaged in criminal sexual conduct in his apartment to warrant an adverse inference. The criminal complaint was excluded from evidence and the district court only took judicial notice that tenant was charged. Neither the victim nor any law enforcement officer testified about the criminal charges or their underlying circumstances. The property manager only testified that she believed tenant to be a "combative" man and she felt uncomfortable in his presence. As observed by the district court, the property manager's testimony "does not make it more or less likely that [t]enant sexually assaulted someone else." We agree with

the district court's further determination that the record lacked any probative "witness testimony or admissible exhibits that identified [t]enant as having committed criminal sexual conduct or any other criminal activity."

Landlord cites to *Peak v. Handicabs Intern., Inc.* for the proposition that the mere existence of a criminal complaint is sufficient independent evidence to permit the district court to draw an adverse inference against tenant. No. C4-01-114, 2001 WL 881215, at *2 (Minn. App. Aug. 7, 2001). *Peak* is a nonprecedential opinion and is "not binding authority." Minn. R. Civ. App. P. 136.01, subd. 1. Further, landlord misconstrues its holding. In *Peak*, this court determined there was no basis for drawing an adverse inference after the assertion of the right against self-incrimination when the "record [was] devoid of evidence bearing on whether Peak actually committed the act with which he was charged." *Peak*, 2001 WL 881215, at *2. Listing the many ways in which the record was deficient, this court observed

> the record contains no testimony from or affidavit of the arresting officer, any witness, or the victim of the alleged assault. And . . . there is in the record no copy of the criminal complaint, of a police report, or of any other document relevant to the charge against Peak. Therefore, there was no basis for drawing an adverse inference against Peak because there was no evidence offered against him.

Id. Contrary to landlord's assertion, *Peak* does not hold the existence of a criminal complaint is independent evidence that supports an adverse inference against tenant. In fact, *Peak* supports the district court's decision not to draw an adverse inference in this case, given the lack of independent probative evidence to suggest tenant committed the alleged criminal sexual conduct in his apartment. We conclude the district court did not

abuse its discretion in declining to draw an adverse inference from tenant's refusal to answer questions about the allegations and his assertion of his right against self-incrimination.

Burden of Proof

We turn to whether the district court erred by determining landlord failed to meet its burden of proof and dismissing the eviction action. We review the district court's factual findings for clear error, *Cimarron Vill. v. Washington*, 659 N.W.2d 811, 817 (Minn. App. 2003), and legal conclusions de novo, *Skoglund*, 906 N.W.2d at 907. Here too, we agree with the district court's conclusion that landlord did not advance any probative evidence that tenant committed the alleged criminal sexual conduct in his apartment in violation of the lease agreement and Minn. Stat. § 504B.171, subd. 1(b). *See Vermillion State Bank v. Tennis Sanitation, LLC*, 969 N.W.2d 610, 626 (Minn. 2022) (noting "it must be more probable that the fact exists than that the contrary exists" to satisfy the preponderance-of-the-evidence standard). The only evidence of tenant's conduct offered by landlord was the testimony of the property manager. The property manager's testimony that tenant was "combative" during a rent dispute was not probative of landlord's allegations. Thus, the district court did not err in concluding landlord failed to prove its stated grounds for eviction by a preponderance of the evidence.

Affirmed.