Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-15-00716-CV

Clark A. **TCHERNOWITZ**,
Appellant

v.

THE GARDENS AT CLEARWATER,
Appellee

From the County Court at Law, Kerr County, Texas
Trial Court No. 15542C
Honorable Susan Harris, Judge Presiding

Opinion by: Marialyn Barnard, Justice

Sitting: Karen Angelini, Justice
Marialyn Barnard, Justice
Rebeca C. Martinez, Justice

Delivered and Filed: October 26, 2016

AFFIRMED

This is an appeal from a judgment in a forcible detainer action. After a bench trial, the trial court found in favor of appellee The Gardens at Clearwater ("The Gardens"), granting it possession of an apartment occupied by appellant Clark A. Tchernowitz. We affirm the trial court's judgment.

BACKGROUND

A detailed rendition of the facts is unnecessary to our disposition. Accordingly, we provide a brief factual and procedural background for context.

The Gardens brought a detainer action in a Kerr County Justice Court seeking to evict Tchernowitz from one of its apartment units. The Gardens asserted Tchernowitz violated his lease by "having an unauthorized guest" residing in his apartment in violation of the terms of the lease. The Justice Court rendered judgment in favor of The Gardens, and Tchernowitz sought review in the county court. After a bench trial in county court, the court rendered judgment in favor of The Gardens, thereby granting the petition to evict and awarding possession of the premises to The Gardens. Tchernowitz then appealed to this court.

ANALYSIS

Before addressing the merits, we must first determine whether Tchernowitz has presented anything for our review. Texas appellate courts, including this court, have long held that an appellant's brief must contain clear and concise arguments with appropriate citations to authorities and the record. *See, e.g., In re Estate of Aguilar*, No. 04–13–00038–CV, 2014 WL 667516, at *8 (Tex. App.—San Antonio Feb. 19, 2014, pet. denied) (mem. op.); *Keyes Helium Co. v. Regency Gas. Servs., L.P.*, 393 S.W.3d 858, 861–62 (Tex. App.—Dallas 2012, no pet.); *Niera v. Frost Nat'l Bank*, No. 04–09–00224–CV, 2010 WL 816191, at *3 (Tex. App.—San Antonio Mar. 10, 2010, pet. denied) (mem. op.); *WorldPeace v. Comm'n for Lawyer Discipline*, 183 S.W.3d 451, 460 (Tex. App.—Houston [14th Dist.] 2005, pet. denied); *Citizens Nat'l Bank v. Allen Rae Invs., Inc.*, 142 S.W.3d 459, 489 (Tex. App.—Fort Worth 2004, no pet.); *see also* TEX. R. APP. P. 38.1(i). A reviewing court has no duty to properly brief the issues for the appellant or to search the appellate record for facts supporting an appellant's argument. *Torres v. Garcia*, No. 04–11–00822–CV, 2012 WL 3808593, at *4 (Tex. App.—San Antonio Aug. 31, 2012, no pet.) (mem.op.); *Rubsamen v. Wackman*, 322 S.W.3d 745, 746 (Tex. App.—El Paso 2010, no pet.); *Huey v. Huey*, 200 S.W.3d 851, 854 (Tex. App.—Dallas 2006, no pet.). In other words, it is the appellant's burden "to discuss [his] assertions of error, and we have no duty—or even right—to perform an independent review

of the record and applicable law to determine whether there was error." *Rubsamen*, 322 S.W.3d at 746. In sum, as stated by the Texas Supreme Court in 2012, "[t]he Texas Rules of Appellate Procedure require adequate briefing." *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 880 (Tex. 2010). When an appellant fails to cite applicable authority, fails to provide relevant citations to the record, or fails to provide substantive analysis for an issue presented in the brief, nothing is presented for our review. *See, e.g., Keyes Helium Co.*, 393 S.W.3d 861–62 (holding that failure to cite to relevant portions of record waives appellate review); *Huey*, 200 S.W.3d at 854 (holding that failure to cite applicable authority or provide substantive analysis waives issue on appeal); *Niera*, 2010 WL 816191, at *3 (holding that failure to provide appropriate citations or substantive analysis waived appellate issues); *WorldPeace*, 183 S.W.3d at 460 (holding that failure to offer argument, citations to record, or authority waives appellate review); *Citizens Nat'l Bank*, 142 S.W.3d at 489–90 (holding that appellant waived jury charge error by failing to include proper citation to record); *see also Fredonia State Bank v. Gen. Am. Life Ins. Co.*, 881 S.W.2d 279, 284 (Tex.1994) (holding appellate court may use its discretion to find issues waived due to inadequate briefing).

We recognize Tchernowitz is representing himself on appeal, i.e., is appearing pro se. However, pro se litigants are generally held to the same standards as licensed attorneys and must comply with all applicable rules, including the rules governing appellate briefs. *See e.g., Serrano v. Pellicano Park, L.L.C.*, 441 S.W.3d 517, 520 (Tex. App.—El Paso 2014, pet. dism'd w.o.j.); *Kindle v. United Servs. Auto. Ass'n*, 357 S.W.3d 377, 380 (Tex. App.—Texarkana 2011, pet. denied); *Decker v. Dunbar*, 200 S.W.3d 807, 809 (Tex. App.—Texarkana 2006, pet. denied); *Strange v. Cont'l Cas. Co.*, 126 S.W.3d 676, 677–78 (Tex. App.—Dallas 2004, pet. denied). As the supreme court stated in *Mansfield State Bank v. Cohn*:

> There cannot be two sets of procedural rules, one for litigants with counsel and the other for litigants representing themselves. Litigants who represent themselves must comply with the applicable procedures rules, or else they would be given an unfair advantage over litigants represented by counsel.

573 S.W.2d 181, 184–85 (Tex. 1978); *see Wheeler v. Green*, 157 S.W.3d 439, 444 (Tex. 2005) (stating the pro se litigants are not exempt from rules of procedure and that "[h]aving two sets of rules—a strict set for attorneys and a lenient set for pro se parties—might encourage litigants to discard their valuable right to the advice and assistance of counsel").

Tchernowitz's brief is deficient, failing to comply both procedurally and substantively with the rules governing appellate briefing. *See* TEX. R. APP. P. 38.1. First, the brief is procedurally deficient in that it fails to include the identity of parties and counsel, a proper statement of the case, a proper statement of facts, a summary of the argument, or an appendix. *Id.* R. 38.1(a) (stating brief must give complete list of all parties to judgment and names and addresses of all trial and appellate counsel); *id.* R. 38.1(c) (stating brief must include index of authorities arranged alphabetically and indicating pages of brief where authorities are cited); *id.* R. 38.1(d) (stating brief must concisely state nature of case, course of proceedings, and disposition; statement should be supported by record references); *id.* R. 38.1(g) (stating brief must concisely and without argument state facts pertinent to issues presented); *id.* R. 38.1(h) (stating brief must contain succinct, clear, and argument statement of argument made in body of brief); *id.* R. 38.1(k) (stating brief must include appendix containing copy of judgment, jury charge and verdict if any, findings of fact and conclusions of law if any, and text of any rule, regulation, etc. on which argument is based, and text of any contract or other document that is central to argument).

Second, and more importantly, the brief fails to comply substantively with Rule 38.1, lacking proper appellate issues or points of error. *Id.* R. 38.1(f) (stating brief must concisely state issues or points presented for review). The brief is also devoid of any actual legal argument, and

there are no citations to authority and scant citations to the appellate record. *Id.* R. 38.1(i) (stating brief must contain clear and concise argument for contentions made with appropriate citations to authorities and to appellate record). We begin by looking at Tchernowitz's six "points of error," which we hold are merely vague assertions about: (1) the misnumbering of an exhibit; (2) alleged overpayment of rent; (3) an alleged imposter witness presented by The Gardens; (4) the proper expiration date of the lease; (5) The Gardens' failure to have a "Letter of Good Standing"; and (6) the "unintelligible" nature of the lease terms. None of these "complaints" allege error by the trial court, nor do they relate to the actual basis for the trial court's judgment — eviction based on violation of the lease terms by having an unauthorized resident in the apartment unit. And, if Tchernowitz's "points of error" could be interpreted to allege some error by the trial court, none were preserved by a proper objection. *See id.* R. 33.1(a).

As noted, the brief contains few record citations — five to be exact — and it is impossible to discern from the citations themselves whether they are to the clerk's record or the reporter's record. The record consists of a 306-page clerk's record and a three-volume reporter's record, which has 119 pages of testimony and four exhibits. With regard to citation of authority, the brief does not include a single citation. As previously stated, an appellate brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record, or the issues may be deemed waived. *See, e.g., Keyes Helium Co.*, 393 S.W.3d at 861–62; *Niera*, 2010 WL 816191, at *3; *WorldPeace*, 183 S.W.3d at 460; *Citizens Nat'l Bank*, 142 S.W.3d at 489. And, we are not required to search the appellate record, with no guidance from the briefing party, to determine if the record supports the party's argument. *Keyes Helium Co.*, 393 S.W.3d at 861–62; *Rubsamen*, 322 S.W.3d at 746; *Citizens Nat'l*, 142 S.W.3d at 489.

Finally, Tchernowitz fails to present an actual, substantive legal argument in his brief. Rather, he provides only his "points of error," which are really nothing more than vague complaints

about the behavior of The Gardens with respect to this matter. There is no legal argument raising errors allegedly committed by the trial court and no argument directed to the actual judgment of eviction and writ of possession. Tchernowitz does not seem to even contest The Gardens' basis for eviction, complaining instead about general mistreatment by the complex owners and management.

Accordingly, based on the foregoing, we hold Tchernowitz's brief is inadequate, presenting nothing for our review. However, even if we could interpret any portion of Tchernowitz's brief as challenging the judgment of eviction and writ of possession, we would hold such challenge is moot.

The record reflects the trial court signed the judgment of eviction on November 5, 2015. In that judgment, the trial court granted The Gardens a writ of possession and ordered the writ to issue on November 10, 2015. The record further reflects that on November 18, 2015, a writ of possession issued to the Constable of Precinct 2, Kerr County, commanding that he enter Tchernowitz's apartment, remove Tchernowitz and his belongings, and deliver possession of the unit to The Gardens.[1] The record includes the constable's return showing that on December 8, 2015, Tchernowitz was evicted and his property removed from the apartment.

The supreme court has held that a tenant's action in giving up possession of the property in question does not moot a tenant's appeal from the judgment of eviction "so long as appellate relief was not futile[.]" *Marshall v. Housing Auth. of San Antonio*, 198 S.W.3d 782, 787 (Tex. 2006). The court explained relief was not futile as long as the tenant "held and asserted a potentially meritorious claim of right to *current, actual possession* of the [property]." *Id.*

[1] The writ of possession originally issued on November 10, 2015, pursuant to the trial court's judgment. However, the Kerr County Sheriff's Office returned the writ to the court advising that it should be issued, as set out in the trial court's judgment, to the constable in whose precinct the property was located.

(emphasis added). However, when a tenant's lease expires and the tenant presents no basis for claiming a right to possession after the date the lease expired, the court held there is no longer a live controversy between the parties "as to the right of current possession." *Id.* If there is no live controversy between the parties at the time the appeal is to be decided, the appeal is moot. *Id.* (citing *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001)).

Here, Tchernowitz filed his notice of appeal before he was removed from the apartment. In light of his timely and clear expression of an intent to appeal, his action in being removed from the property did not moot the appeal unless appellate relief is futile. *See id.* We hold that it is. It is undisputed that the lease between Tchernowitz and The Gardens expired on July 31, 2015, several months before Tchernowitz was actually removed — the evidence shows Tchernowitz stayed in the apartment without a lease and without payment for several months. Tchernowitz has not presented any basis for claiming a right to possession after July 31, 2015. Accordingly, the issue of possession, the only issue in a detainer action,[2] is moot — no controversy currently exists between the parties with regard to possession of the apartment unit. *See id.* Moreover, we do not find that either exception to the mootness doctrine is applicable. *See Gen. Land Office of State of Tex. v. OXY U.S.A., Inc.*, 789 S.W.2d 569, (Tex. 1990) (recognizing two exceptions to mootness doctrine: (1) collateral consequences exception, which applies when court recognizes that prejudicial events have occurred and effects therefrom will continue to stigmatize helpless or hated individuals long after unconstitutional judgment ceases to operate; and (2) capable of repetition yet evading review exception, which applies if challenged act is of such short duration that appellant cannot obtain review before issue become moot — applicable only to challenge

[2] A forcible detainer action is intended as a simply, speedy, and inexpensive way to obtain immediate possession of property. *Marshall*, 198 S.W.3d at 787. A judgment of possession in such an action is not a final determination as to whether the eviction is wrongful, but merely a determination of the right to immediate possession. *Id.*

unconstitutional acts performed by government). Accordingly, even if Tchernowitz had properly briefed the matter and raised issues for our review, we would find the appeal is moot.

CONCLUSION

We hold Tchernowitz has waived appellate review by failing to properly brief this matter. Even if he had presented some reviewable issue, we would find the appeal is moot given there is no longer a live controversy between the parties "as to the right of current possession." *See Marshall*, 198 S.W.3d at 787.

Marialyn Barnard, Justice