Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00786-CV

Anthony **MOORE** and Joann Moore,
Appellants

v.

David **SUBIA**,
Appellee

From the County Court at Law No. 3, Bexar County, Texas
Trial Court No. 2016CV04165
Honorable David J. Rodriguez, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice

Delivered and Filed: May 16, 2018

AFFIRMED AS MODIFIED

David Subia brought a forcible detainer action against Anthony and Joann Moore ("the Moores"). The trial court rendered judgment of possession for Subia and awarded Subia attorney's fees. The Moores appealed, contending the trial court's judgment was not supported by sufficient evidence. We modify the judgment to delete the award of attorney's fees and otherwise affirm the remainder of the judgment.

BACKGROUND

On January 29, 2015, the Moores entered into a six-month lease with Subia to rent a parcel of real property owned by Subia that is adjacent to Subia's residence. At the end of the six-month term, the Moores became holdover tenants by remaining on the property without entering into a new lease. In the following months, the Moores continued to possess the property and pay monthly rent, which Subia accepted. In early February 2016, however, Subia informed Mr. Moore that he planned to move his parents onto the subject property, and that the Moores needed to move out by April 2016. The Moores did not surrender possession of the property.

On June 9, 2016, Subia filed a forcible detainer action in the justice court. On July 7, 2016, the justice court rendered judgment of possession for Subia and found the Moores owed Subia $400 in delinquent rent and $191 in court costs. The Moores appealed to the county court at law ("trial court") for a de novo trial. At trial, the jury heard testimony from Subia, Subia's wife, and Mr. Moore.

The jury found the Moores committed forcible detainer of the property and owed Subia $5,591 in attorney's fees. On December 1, 2016, the trial court signed a final judgment granting Subia possession of the property and awarding Subia $5,591 in attorney's fees. The Moores, acting pro se, filed this appeal. The Moores' pro se brief lists thirty-five "points of dispute." Upon reviewing these "points of dispute" and the argument section of their brief, we conclude the Moores have raised the following issues: (1) the evidence was legally and factually insufficient to support the trial court's judgment rendering possession of the property to Subia; (2) the evidence was legally and factually insufficient to support the trial court's judgment awarding Subia attorney's fees; (3) the evidence was legally and factually insufficient to support the justice court's judgment awarding rent arrearage to Subia; (4) the justice court erred by allowing alternate service

of citation; and (5) Subia's trial counsel should be sanctioned for displaying unprofessional and unethical conduct.

STANDARD OF REVIEW

In a legal sufficiency review, we consider the evidence in the light most favorable to the fact-finder's decision and indulge every reasonable inference in support of that decision. *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). "When a party attacks the legal sufficiency of an adverse finding on an issue on which it did not have the burden of proof, it must demonstrate on appeal that no evidence supports the adverse finding." *Graham Cent. Station, Inc. v. Pena*, 442 S.W.3d 261, 263 (Tex. 2014) (per curiam). Such a legal sufficiency challenge will be sustained when (1) "there is a complete absence of evidence of a vital fact," (2) "the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact," (3) "the evidence offered to prove a vital fact is no more than a mere scintilla," or (4) "the evidence conclusively establishes the opposite of the vital fact." *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). "More than a scintilla of evidence exists when the evidence 'rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.'" *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003) (quoting *Havner*, 953 S.W.2d at 711). However, "[e]vidence does not exceed a scintilla if it is 'so weak as to do no more than create a mere surmise or suspicion' that the fact exists." *Akin, Gump, Strauss, Hauer & Feld, LLP v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 115 (Tex. 2009) (citations omitted).

In a factual-sufficiency review, we examine the evidence both supporting and contrary to the judgment. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001); *Plas–Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 445 (Tex. 1989). "A factual sufficiency attack on an issue on which the appellant did not have the burden of proof requires the complaining party to demonstrate there is insufficient evidence to support the adverse finding." *Flying J Inc. v. Meda, Inc.*, 373

S.W.3d 680, 690–91 (Tex. App.—San Antonio 2012, no pet.). In reviewing a factual-sufficiency challenge, we consider and weigh all the evidence and will not reverse the judgment unless the evidence supporting the finding is so weak as to make the finding clearly wrong and manifestly unjust. *Lowry v. Tarbox*, ---S.W.3d--- No. 04-16-00416-CV, 2017 WL 4801677, at *2 (Tex. App.—San Antonio Oct. 25, 2017, pet. filed); *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam).

SUBIA WAS ENTITLED TO POSSESSION

The Moores contend the evidence is legally and factually insufficient to support the trial court's judgment of possession for Subia because Subia failed to show he complied with the notice requirements under the Texas Property Code.

Nature of the Moores' Tenancy

Lease agreements often provide that in the event the tenant holds over after the expiration of the lease, the tenancy will automatically convert to a month-to-month tenancy. *See, e.g.*, *Shields Ltd. P'ship v. Bradberry*, 526 S.W.3d 471, 475 (Tex. 2017); *Gym-N-I Playgrounds, Inc. v. Snider*, 220 S.W.3d 905, 908 (Tex. 2007). But where, as here, the lease does not contain such a holdover provision and the parties do not enter into a new lease agreement, the parties' conduct will determine the nature of the holdover tenancy. *Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 916 (Tex. 2013).

In *Coinmach Corp. v. Aspenwood Apartment Corp.*, the Texas Supreme Court explained the law regarding the status of a tenant who remains in possession of leased premises after the expiration of the lease term where the lease does not contain a holdover provision:

> "Under the common law holdover rule, a landlord may elect to treat a tenant holding over as either a trespasser"—that is, a tenant at sufferance—"or as a tenant holding under the terms of the original lease"—that is, a tenant at will. Thus, an implied agreement to create a new lease using the terms of the prior lease may arise if both parties engage in conduct that manifests such intent. If the tenant remains in

> possession and continues to pay rent, and the landlord, having knowledge of the tenant's possession, continues to accept the rent without objection to the continued possession, **the tenant is a tenant at will**, and the terms of the prior lease will continue to govern the new arrangement absent an agreement to the contrary.

Coinmach Corp., 417 S.W.3d at 916 (citations omitted) (emphasis added).

In this case, the record reflects that after the six-month lease expired on July 29, 2015, the Moores continued to pay monthly rent, which Subia accepted. Thus, under the common law holdover rule as expressed by the supreme court in *Coinmach*, the Moores and Subia had an implied agreement to create a new lease using the terms of the prior lease as a tenancy at will. *See id.*; *Pointe W. Ctr., LLC v. It's Alive, Inc.*, 476 S.W.3d 141, 151 (Tex. App.—Houston [1st Dist.] 2015, pet. denied) (month-to-month tenancy for an indefinite period is referred to as a tenancy at will). Because the Moores continued to possess the property as tenants at will, Subia was entitled to seek possession of the property. *See* TEX. PROP. CODE ANN. § 24.002(a) (West 2014).

Forcible Detainer Requirements

A forcible detainer action "is intended to be a speedy, simple, and inexpensive means to regain possession of property." *Salaymeh v. Plaza Centro, LLC*, 264 S.W.3d 431, 437 (Tex. App.—Houston [14th Dist.] 2008, no pet.). "The only issue in an action for forcible detainer is the right to actual and immediate possession." *Id.* at 435.

To obtain a judgment for forcible detainer, the plaintiff must show the defendant refused to surrender possession of the property on demand and that the defendant: "(1) is a tenant or a subtenant wilfully and without force holding over after the termination of the tenant's right of possession; [or] (2) is a tenant at will or by sufferance . . ." TEX. PROP. CODE ANN. § 24.002(a).

Before bringing a forcible detainer action against a tenant who holds over, a plaintiff must comply with two notice requirements—a notice to terminate the tenancy at will and a notice to vacate. *Id.* at § 24.005(a) (West Supp. 2017); § 91.001 (West 2014). "A landlord who files a

forcible detainer suit on grounds that the tenant is holding over beyond the end of the rental term or renewal period must . . . comply with the tenancy termination requirements of Section 91.001." *Id.* at § 24.005(a). Section 91.001 provides a landlord or tenant may terminate a month-to-month tenancy by giving notice of termination to the other. *Id.* at § 91.001(a). If notice is given under subsection (a) and if the rent-paying period is at least one month, the tenancy terminates on the later of "(1) the day given in the notice for termination; or (2) one month after the day on which the notice is given." *Id.* at § 91.001(b).

Additionally, "demand for possession must be made in writing by a person entitled to possession of the property and must comply with the requirements for notice to vacate under Section 24.005." *Id.* at § 24.002(b).

Section 24.005 provides:

> If the occupant is a tenant under a written lease or oral rental agreement, the landlord must give a tenant who . . . holds over beyond the end of the rental term or renewal period at least three days' written notice to vacate the premises before the landlord files a forcible detainer suit, unless the parties have contracted for a shorter or longer notice period in a written lease or agreement.

Id. at § 24.005(a). Section 24.005 contains the following requirements regarding the delivery of the written notice to vacate:

> [T]he notice to vacate shall be given in person or by mail at the premises in question. Notice in person may be by personal delivery . . . to the premises and affixing the notice to the inside of the main entry door. . . .

Id. at § 24.005(f).

The written "notice to vacate is not a step for terminating the lease"; it is "a separate notice required for obtaining possession of the premises via forcible detainer once the lease has been terminated." *Briones v. Brazos Bend Villa Apartments*, 438 S.W.3d 808, 812 (Tex. App.—Houston [14th Dist.] 2014, no pet.). "Because forcible detainer is a statutory cause of action, a landlord

must strictly comply with its requirements." *Kennedy v. Andover Place Apartments*, 203 S.W.3d 495, 497 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

Subia Complied with Notice Requirements

After the expiration of the lease, the Moores continued to possess the property as holdover tenants and continued to pay rent on a monthly basis. Thus, before filing a forcible detainer suit, Subia was required to provide the Moores at least one month's notice of termination and three days' written notice to vacate. *See* TEX. PROP. CODE ANN. at §§ 24.002(b); 24.005(a); 91.001(a), (b).

Subia gave the Moores notice of termination when he told Mr. Moore he had other plans for the property and that the Moores needed to move off the property by April 2016. The parties do not dispute that in the first week of February 2016, Subia told Mr. Moore he wanted the Moores to move off the property by April 2016. Unlike the notice to vacate, the Property Code does not require a landlord give a holdover tenant written notice of his intention to terminate the lease or a month-to-month tenancy. *Compare id.* at § 24.005(a) (requiring that the notice to vacate be written) *with id.* at § 91.001(a) (containing no requirement that the notice of termination be written). Thus, based on the undisputed testimony of the parties, a reasonable jury could have found Subia satisfied the notice of termination requirement when he told Mr. Moore in early February 2016 that he wanted the Moores to move off the property by April 2016, more than thirty days later. *Id.* at §§ 24.005(a); 91.001(a), (b).

To show he gave the Moores written notice to vacate, Subia testified that on April 29, 2016, he affixed a document entitled "30 Day Notice to Vacate," on the inside of the Moores' front gate, with the notice facing inward. The notice demanded Mr. and Mrs. Moore to vacate the property by May 31, 2016. Subia testified he took a photo of the affixed notice and he introduced the photo into evidence. Although the photo does not show the contents of the notice, Subia explained that

on the day he posted the notice, there was a lock on the Moores' gate for which he did not have a key. Subia's wife, Elaine, testified she was with her husband when he affixed the written notice to vacate to the Moores' front gate and confirmed that on that day, there was a lock on the gate for which she did not have a key. Because the gate was locked, Subia was unable to take a photo at an angle that would reveal the contents of the notice, given that Subia had to affix the notice to the inside of the gate. *See* TEX. PROP. CODE ANN. § 24.005(f) (written notice to vacate may be affixed to the inside of the main entry door). Subia, who lives next door to the Moores, testified that later that afternoon, the notice was no longer on the gate. The only evidence that conflicted with Subia and his wife's testimony was Mr. Moore's assertion he never saw the notice to vacate posted to his front gate.

Although Mr. Moore testified he never saw the notice to vacate posted to the front gate, the jury, as the judge of the witnesses' credibility, could have reasonably chosen to disbelieve Mr. Moore and resolve the conflict in favor of Subia. *See City of Keller*, 168 S.W.3d at 819 ("Jurors are the sole judges of the credibility of the witnesses . . . They may choose to believe one witness and disbelieve another."). A reasonable jury could have concluded the Moores' front gate constituted the "main entry door" of the premises. *See id*. § 24.0061(a) (West Supp. 2017) (defining "premises" as "the unit that is occupied or rented and any outside area or facility that the tenant is entitled to use under a written lease"). Thus, a reasonable jury could have found by a preponderance of the evidence that Subia complied with the statutory requirement to provide the Moores three days' written notice to vacate. *See* §§ 24.002(b); 24.005(a), (f) (landlord may deliver written notice to vacate by personal delivery to the premises and affixing the notice to the inside of the main entry door); *Allen-Mercer v. Roscoe Properties*, No. 03-15-00674-CV, 2016 WL 4506294, at *6 (Tex. App.—Austin Aug. 25, 2016, no pet.) (mem. op.) (concluding the trial court could reasonably conclude landlord complied with § 24.005(f) by posting the notice to vacate to

the inside of the front door to the apartment, where tenant leased a single room in the multi-room apartment yet had access to the shared kitchen under the lease).

Viewing the evidence in the light most favorable to the verdict, we conclude the evidence was legally sufficient to support a finding that Subia complied with the statutory requirements to provide the Moores thirty days' notice of termination and three days' written notice to vacate. *See City of Keller*, 168 S.W.3d at 822. Likewise, viewing all the evidence, including any disputed or conflicting evidence, we conclude the evidence supporting the finding is not so weak as to make the verdict clearly wrong and manifestly unjust. *See Cain*, 709 S.W.2d at 176.

ATTORNEY'S FEES

The Moores contend the evidence is legally and factually insufficient to support the trial court's judgment awarding Subia $5,591 in attorney's fees.

In his brief, Subia does not contest the issue of attorney's fees, stating, "Subia no longer wishes to recover attorney's fees . . . and asks the Court to remove [that portion] of the judgment and otherwise affirm." We grant Subia's request to remove the award of attorney's fees from the trial court's judgment.

REMAINING ISSUES

The Moores contend the evidence is insufficient to support the justice court's verdict awarding Subia $400 in rent arrearage. The justice court's verdict was appealed de novo to the county court at law, which did not award any rent arrearage for Subia. *See* TEX. R. CIV. P. 510.9. Because the county court tried the case de novo, the county court's judgment superseded that of the justice court. *See id.* at 510.10(c). Thus, the justice court's judgment awarding Subia $400 in rent arrearage is no longer in effect and is not a proper subject for review before this court.

The Moores also contend the justice court erred by allowing alternate service of citation under TEX. R. CIV. P. 510.4. "When a petition is filed [in an eviction case], the court must

immediately issue citation directed to each defendant." *Id.* at 510.4(a). The citation must be delivered to the defendant or someone over the age of sixteen at defendant's residence at least six days before trial. *Id.* at 510.4(b). Citation may be served by delivery to the premises if delivery under 510.4(b) is unsuccessful and the individual authorized to serve citation "files a sworn statement that [he] has made diligent efforts to serve such citation on at least two occasions at all addresses of the defendant in the county where the premises is located, stating the times and places of attempted service." *Id.* at 510.4(c)(1).

The Moores argue the justice court erred by allowing the deputy constable to serve the citation by delivery to the premises because the deputy constable's affidavit shows only one attempt at service by personal delivery to the Moores. The record shows the Moores filed a plea in abatement in the justice court and participated in the justice court trial. "A plea in abatement constitutes an answer and appearing in court waives any complaints concerning defective service." *Alcala v. Williams*, 908 S.W.2d 54, 56 (Tex. App.—San Antonio 1995, no writ). Because the Moores filed a plea in abatement and appeared at trial, the Moores have waived their complaint regarding any defect in the service of citation. *See id.*

The Moores further contend Subia's trial counsel "abused his power as an Officer of the Court displaying unprofessional and unethical conduct," and request that this court sanction Subia's trial counsel and a process server hired by trial counsel. The Texas Rules of Appellate Procedure state appellate briefs "must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i). The Moores do not cite to any legal authority that would permit this court to sanction Subia's trial counsel and the process server. Moreover, the Moores' argument regarding this issue does not contain any appropriate citations to the record. Therefore, the Moores have waived this complaint. *See id.*

The Moores raise additional issues in their brief under the headings, "Points of Dispute Between the Two Parties" and "Other Points of Dispute." However, these issues do not comply with Rule 38.1. because they do not contain any appropriate citations to legal authority, they do not contain any appropriate citations to the record, and the brief does not contain any clear and concise argument relating to those "points of dispute." *See id.*; s*ee also Thomas v. Park at Sutton Oaks*, No. 04-17-00267-CV, 2018 WL 340133, at *2 (Tex. App.—San Antonio Jan. 10, 2018, no pet.) (appellant's complaints were waived because they did not include citations to the record, any actual legal analysis, or any explanation as to why the trial court erred). Therefore, the Moores have presented nothing for our review and have waived these issues.

CONCLUSION

For the foregoing reasons, we modify the judgment against the Moores to delete the award of attorney's fees and affirm the trial court's judgment as modified.

Irene Rios, Justice