NUMBER 13-15-00477-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

ESTEBAN BARAJAS, **Appellant,**

v.

LORELI FOODS, LLC, **Appellee.**

On appeal from the County Court at Law No. 7
of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Rodriguez and Benavides
Memorandum Opinion by Justice Rodriguez

This is a forcible detainer case. By four issues, which we have reorganized, appellant Esteban Barajas contends: (1) the trial court erred when it failed to consider his motion for new trial that was based on a constructive eviction claim; (2) the trial court erred when it relied on rule 752 of the Texas Rules of Civil Procedure as a basis for

denying his motion to set aside the October 13, 2015 order, given that rule 752 had been repealed; (3) the trial court erred when it ordered him to pay both rent and a cash bond; and (4) the trial court abused its discretion when it ordered him to deposit a cash bond pending the outcome of this appeal. We affirm.

I. BACKGROUND

It is undisputed that Barajas[1] became a tenant at sufferance when appellee Loreli Foods, LLC purchased Barajas's Tiffany Avenue property[2] at a foreclosure sale. Loreli Foods pursued eviction proceedings against Barajas when he did not move from the property following the foreclosure. The justice court granted a writ of possession in favor of Loreli Foods.[3] Barajas filed a de novo appeal to the county court at law.

On September 29, 2015, pending a ruling on Loreli Foods' writ of possession and upon Loreli Foods' motion for payment of rent, the county court ordered Barajas to tender to Loreli Foods $700 as rent, beginning on September 1, 2015 and continuing monthly until further order of the court. Then on October 1, 2015, after finding that Loreli Foods was entitled to a writ of possession and that Barajas had forcibly detained the Tiffany

[1] Loreli Foods named Esteban Barajas and all occupants of the Tiffany Avenue property, including Barajas's wife Francisca, as defendants in this case. Because Esteban is the only defendant who appealed, we will refer to him as a single defendant and appellant.

[2] The legal description of the Tiffany Avenue property follows:

> LOT 70, BASHAM SUBDIVISION NO. 24, AN ADDITION TO THE CITY OF MISSION, HIDALGO COUNTY, TEXAS, ACCORDING TO THE MAP OR PLAT THEREOF RECORDED IN VOLUME 26, PAGE 199, MAP RECORDS, HIDALGO COUNTY, TEXAS, generally known as 1711 Tiffany Ave., Mission, Texas 78572.

[3] The justice court set an appeal bond at $2,000.

Avenue property, the court ordered possession of the property to Loreli Foods. It further ordered Barajas to pay the following:

- Reasonable back rental payments of $1,400;
- Attorney's fees of $5,000;
- Court costs; and
- Post-judgment interest on the above sums at 5% per annum from the date of the judgment until the judgment was paid.

On that same day, October 1, 2015, Barajas filed a motion to set a $2,000 supersedeas bond in the county court.[4] Loreli Foods objected, arguing, among other things, that "the supersedeas bond filed by [Barajas] for the Court's consideration [was] insufficient because it d[id] not adequately cover the amount of the damages awarded in the judgment, court costs, interest, and the estimated rents for the estimated duration of the appeal." *See* TEX. R. APP. P. 24.2(a). Loreli Foods asked that the county court order Barajas to deposit $19,651.68 cash into the court's registry. This amount represented the following:

- $12,600 for rent or revenue from the anticipated eighteen-month pendency of this appeal;
- $1,400 for rent compensatory damages awarded;
- $5,000 for attorney's fees awarded;
- $116 for court costs awarded; and
- $535.68 for 5% interest on compensatory damages, attorney's fees and court costs for eighteen months.

[4] No reporter's record appears in the appellate record.

On October 13, 2015, after considering Barajas's motion and Loreli Foods' response, the trial court found the amounts requested by Loreli Foods to be sufficient and ordered Barajas to deposit $19,651.68 cash into the registry of the court.

On October 27, 2015, Barajas filed a motion to set aside the October 13, 2015 order and a plea to the jurisdiction asserting that "the court d[id] not have authority to require a cash bond." Barajas also filed a motion for new trial based on a new claim of constructive eviction where he alleged that Loreli Foods "shut off the Counter-Plaintiffs' water and . . . threatened to cut off the electricity" in violation of section 92.008 of the Texas Property Code. *See* TEX. PROP. CODE ANN. § 92.008(a) (West, Westlaw through 2015 R.S.) ("A landlord or a landlord's agent may not interrupt or cause the interruption of utility service paid for directly to the utility company by a tenant unless the interruption results from bona fide repairs, construction, or an emergency."). In his motion Barajas argued that this constructive eviction constituted a change in facts that made it incumbent upon the county court to "set aside all orders and grant a new trial." Barajas prayed "that a new trial be ordered and that the court grant relief . . . as ordered and mandated by [section] 92.008 of the Texas Property Code." *See id.*

After receiving evidence and hearing arguments of counsel, the county court denied Barajas's motion to set aside and plea to the jurisdiction and his motion for new trial. This appeal followed.

II. MOTION FOR NEW TRIAL

By his first issue, Barajas contends that the trial court erred when it denied his motion for new trial without considering his constructive eviction cause of action—a claim

he brought as the basis for his motion for new trial. Barajas asserts that the trial court erred by not granting a hearing on the issue of constructive eviction and by using an improper basis for denying his motion for new trial.

A. Standard of Review

We review a trial court's denial of a motion for new trial for abuse of discretion. *See Waffle House*, *Inc. v. Williams,* 313 S.W.3d 796, 813 (Tex. 2010). Under this standard, we may reverse the trial court's ruling only if the trial court acted without reference to any guiding rules and principles, such that its ruling was arbitrary or unreasonable. *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007). Further, we make every reasonable presumption in favor of a trial court's order refusing a new trial. *See Aldous v. Brass*, 405 S.W.3d 847, 856 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

B. Motion Heard

Barajas first argues that the county court denied him due process when it did not grant him a hearing. However, on November 6, 2015, when the county court denied Barajas's motion for new trial, its order specifically set out that "[o]n November 5, 2015, the [c]ourt heard the 'Motion for New Trial[.]'" Further, the order clearly provided that "[a]fter receiving the evidence and arguments of [c]ounsel and the [p]arties, the [c]ourt . . . denies the [m]otion for [n]ew [t]rial."[5] Barajas has directed us to nothing in the record

[5] Although a docket-sheet entry ordinarily forms no part of the record that may be considered; rather, it is a memorandum made for the trial court and clerk's convenience, the county court's docket sheet appears in the appellate record, and Barajas includes it in the appendix of his appellate brief. *See Barnes v. Deadrick*, 464 S.W.3d 48, 53 (Tex. App.—Houston [1st Dist.] 2015, no pet.); *In re Bill Heard Chevrolet, Ltd*., 209 S.W.3d 311, 315 (Tex. App.—Houston [1st Dist.] 2006) (orig. proceeding). And, in this case, the docket sheet shows that the county court held a hearing on Barajas's motion for new trial and counterclaim at 8:30 a.m. on November 5, 2015.

that supports his argument that the trial court did not hear his motion. We conclude that the county court did not deny Barajas his rights to due process in this regard.[6]

C. Grounds for Denial

Barajas also argues that the trial court abused its discretion because it based its denial on an improper argument raised by Loreli Foods in response to Barajas's motion for new trial. We agree that Loreli Foods included an improper responsive argument based on rule of civil procedure 574a—a rule that had been repealed. *See D'Tel Commc'ns v. Roadway Package Serv., Inc.*, 987 S.W.2d 213, 214 (Tex. App.—Eastland 1999, no pet.) (setting out that before rule 574a was repealed in 2013, it provided that no defendant could set up a counterclaim that he had not pleaded in the court below). Nonetheless, Loreli Foods also responded with the following argument:

> [Barajas bases his] Motion for New Trial . . . on [his] alleged change in facts (i.e. new claim for recovery); however, [he has] not presented any other evidence or arguments to support [his] request. [Barajas's] motion for new trial asserts no error necessitating a new trial; therefore, no good cause exists to grant a new trial.

We agree with Loreli Foods' contention, and we conclude that this argument provided a proper basis for the court's denial.

In general, the "object of a motion for new trial is to point out the rulings complained of, and call them to the attention of the trial judge, so that he may have an opportunity to review his decisions, and, if need be, correct them." *Stillman v. Hirsch*, 128 Tex. 359,

[6] This same analysis applies to Barajas's contention that the trial court abused its discretion when it did not hear his plea to the jurisdiction. The court's November 6, 2015 order denied Barajas's plea. And, as noted above, it set out that on November 5, 2015, it heard Barajas's plea to the jurisdiction after receiving evidence and arguments of counsel and the parties. Because Barajas directs us to nothing in the record that establishes otherwise and does not develop this contention further, we conclude that the trial court heard his plea on November 5, 2015 and, thus, did not abuse its discretion in this regard.

369, 99 S.W.2d 270, 275 (1936); *see also In re VSDH Vaquero Venture, Ltd*., No. 05-15-00113-CV, 2016 WL 2621073, at *7 (Tex. App.—Dallas May 6, 2016, orig. proceeding) (mem. op.) (same). Barajas filed his motion for new trial based solely on the ground that he had a new cause of action—constructive eviction. Barajas asserted a "change in facts," but he produced no evidence that this alleged change in facts related to any legal error or defect at trial. Instead, Barajas's new claim appears to relate to alleged events that occurred after the rendition of the eviction judgment. Even if taken as true, this change in facts does not undermine the validity of the judgment or the adjudicative process which led to it.

Barajas asserted no other legal basis for his motion for new trial. Moreover, even were we to construe the basis of Barajas's motion for new trial to be newly discovered evidence, the only new documents Barajas filed in support of his claim were a September 2015 water usage bill and a partial October electric bill for the Tiffany Avenue property. First, this evidence does not support Barajas's constructive eviction claim; neither document establishes that Loreli Foods, or anyone else, turned off the utilities or was going to turn them off. In addition, this evidence alone does not support a newly-discovered-evidence claim. A party seeking a new trial on this basis must demonstrate to the trial court that (1) the evidence has come to its knowledge since the trial, (2) its failure to discover the evidence sooner was not due to lack of diligence, (3) the evidence is not cumulative, and (4) the evidence is so material it would probably produce a different result if a new trial were granted. *See Waffle House*, 313 S.W.3d at 813. Barajas's evidence relates only to Loreli Food's alleged actions. It did not relate to Barajas's

underlying right to possession of the property or any other aspect of the county court's trial of the detainer action. This evidence does not demonstrate, for example, that the evidence is so material that it would probably produce "a different result if a new trial were granted." *Id.*

Finally, Barajas did not develop any equitable grounds argument in support of his motion—another potential basis for a new trial. *See Craddock v. Sunshine Bus Lines, Inc*., 134 Tex. 388, 393, 133 S.W.2d 124, 126 (Comm'n App.1939) (explaining that in the absence of error, a party may assert equitable grounds in a motion for new trial); *see also In re VSDH Vaquero Venture*, 2016 WL 2621073, at *7.

We cannot conclude that the trial court acted without reference to any guiding rules and principles, such that its ruling was arbitrary or unreasonable. *See Low*, 221 S.W.3d at 614. Barajas based his motion for new trial solely on a new claim, and Loreli Foods argued that Barajas's motion asserted "no error necessitating a new trial; therefore, no good cause exists to grant a new trial." The county court's order denying Barajas's motion for new trial could have been based on Loreli Food's legal theory that the motion asserted no error necessitating a new trial, and we must uphold it on that basis. *See Miramar Petroleum, Inc. v. Cimarron Eng'g, LLC*, 484 S.W.3d 214, 216 n.2 (Tex. App.—Corpus Christi 2016, pet. denied) (quoting *Guar. Cnty. Mut. Ins. Co. v. Reyna*, 709 S.W.2d 647, 648 (Tex. 1986) (per curiam) ("'We must uphold a correct lower court judgment on any legal theory before it, even if the court gives an incorrect reason for its judgment.'")). Therefore, making every reasonable presumption in favor of a trial court's order refusing a new trial, *see Aldous*, 405 S.W.3d at 856, we conclude that the county court did not

abuse its discretion when it denied Barajas's motion for new trial. *See Waffle House*, 313 S.W.3d at 813.

C. Summary

Having concluded the trial court heard and considered Barajas's motion but nonetheless denied it on a proper basis, we overrule this first issue.

III. MOTION TO SET ASIDE OCTOBER 13, 2015 ORDER

By his second issue, Barajas asserts that the trial court erred when it relied on rule of civil procedure 752 as support for denying Barajas's motion to set aside the October 13, 2015 order. That October 13 order required Barajas to deposit $19,651.68 into the registry of the court.

Barajas correctly argues that rule 752 was repealed on August 31, 2013. That rule provided "[o]n the trial of the cause in the county court, the appellant or appellee shall be permitted to plead, prove and recover his damages, if any, suffered for withholding or defending possession of the premises during the pendency of appeal." *See* TEX. R. CIV. P. 752, repealed by Texas Supreme Court, Misc. Docket No. 13–9049, effective August 31, 2013. However, when the supreme court repealed rule 752, it replaced the rule with Texas Rule of Civil Procedure 510.11. TEX. R. CIV. P. 510.11. And rule 510.11 sets out, in relevant part, the following language: "On the trial of the case in the county court the appellant or appellee will be permitted to plead, prove and recover his damages, if any, suffered for withholding or defending possession of the premises during the pendency of the appeal." *Id.* In other words, under either version, the prevailing party

may recover certain damages that resulted from maintaining or obtaining possession of a property and that the party incurred during the pendency of the appeal.

Although the county court's reasoning appears to have been based on the repealed rule number and not the current rule number, its order was based on a correct legal theory, and we must uphold it. *See Guar. County Mut. Ins. Co.*, 709 S.W.2d at 648; *Miramar Petroleum*, 484 S.W.3d at 216 n.2. We are not persuaded by Barajas's argument. We overrule Barajas's second issue.

IV. NO DOUBLE RECOVERY

By his third issue, Barajas argues that the trial court abused its discretion when it ordered double recovery of rent, first by its September 29, 2015 order and then by its October 13, 2015 order. Barajas argues that the two orders resulted in "double the amounts for rent in that in one hand, the court orders payment of rent monthly, and in the other, [the rent is] to be paid in a lump sum. This is excessive." Loreli Foods responds that the county court neither intended nor ordered a double recovery. We agree with Loreli Foods.

On September 29, 2015, the trial court ordered Barajas to pay Loreli Foods monthly rent of $700 beginning September 1, 2015 and continuing monthly until further order of the court. On October 1, 2015, the court entered a final judgment—a further order—ordering that Loreli Foods have possession of the Tiffany Avenue property and that a judgment be assessed against Barajas for, among other things, unpaid rent (September and October 2015 rents) in the amount of $1,400. Thereafter, on October 13, 2015, the county court set a $19,651.68 cash bond for Barajas's appeal. *See*

Hanna v. Goodwin, 876 S.W.2d 454, 456 n.3 (Tex. App.—El Paso 1994, no writ) (providing that filing security (1) assures the appellee that it will be able to collect the judgment if the case is affirmed on appeal and (2) abates the remedies for collecting the judgment during the appeal). The amount of the cash bond represented, among other things, $12,600 for rent or revenue from the property for the pendency of the appeal estimated to be eighteen months and $1,400 for rent compensatory damages awarded on October 1, 2015. *See* TEX. R. APP. P. 24.1(e) ("The trial court may make any order necessary to adequately protect the judgment creditor against loss or damage that the appeal might cause."); 24.2(a)(2) ("When the judgment is for the recovery of an interest in real . . . property, the trial court will determine the type of security that the judgment debtor must post. The amount of that security must be at least . . . the value of the property interest's rent or revenue . . . ."); *see also* TEX. PROP. CODE ANN. § 24.007 (West, Westlaw through 2015 R.S.) ("In setting the supersedeas bond the county court shall provide protection for the appellee to the same extent as in any other appeal, taking into consideration the value of rents likely to accrue during appeal, damages which may occur as a result of the stay during appeal, and other damages or amounts as the court may deem appropriate.").

It is clear from our review of the record that the county court's October 1, 2015 order was a further order of the court—an order contemplated by the September 29 order. Pursuant to the October 1 order, Loreli Foods, not Barajas, was to have possession of the Tiffany Avenue property, and Barajas was to pay past-due rents. The county court did not order Barajas to pay future rent: he was no longer to be in possession of the

property. But should Barajas remain at the property and not pay rent during the pendency of his appeal, Loreli Foods would be protected by the cash bond ordered in the October 13, 2015 order. We cannot conclude that double recovery in the form of double payment of rent was ever intended or ordered. We overrule Barajas's third issue.[7]

V. CONCLUSION

We affirm the judgment of the county court.

NELDA V. RODRIGUEZ
Justice

Delivered and filed the
13th day of October, 2016.

[7] We offer no opinion regarding the amount of the cash bond. Having affirmed the judgment of the trial court, Barajas's fourth issue that complains that the trial court abused its discretion when it ordered him to deposit a $19,651.68 cash bond is now moot, and we need not address it. *See* TEX. R. APP. P. 47.1.