

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 20, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP2217

Cir. Ct. No. 2016SC4276

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

CHERYL DUFFRIN,

PLAINTIFF-RESPONDENT,

V.

SPENCER HUTCHINSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County:
KATHRYN W. FOSTER, Judge. *Affirmed.*

¶1 GUNDRUM, J.¹ Spencer Hutchinson appeals pro se from an order granting a judgment of eviction in favor of his landlord, Cheryl Duffrin. He

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

argues Duffrin failed to give him the sixty-day written notice of termination of tenancy required by his month-to-month lease. He also complains that Duffrin terminated the lease in retaliation for Hutchinson's complaints to the village regarding Duffrin renting out a unit across the hall from his on a short-term basis.² For the following reasons, we affirm.

¶2 On October 4, 2016, Duffrin filed a small claims summons and complaint seeking inter alia eviction of Hutchinson from Duffrin's rental property and the issuance of a writ of restitution permitting removal of Hutchinson and his property. Following a November 3, 2016 court trial, the circuit court entered an order granting a judgment of eviction and a writ of restitution. Hutchinson filed a notice of appeal on November 7, 2016, appealing the court's ruling of November 3. Also on November 7, Hutchinson filed a motion for relief pending appeal in the circuit court, seeking a stay of the writ of restitution. After a hearing on the motion, the circuit court stayed the writ subject to several conditions.

² Hutchinson asserts other claims of error in his appellate briefing; however, we do not address them because they either are not related to the November 3, 2016 ruling that Hutchinson appealed, are being raised for the first time on appeal, and/or are insufficiently developed and unsupported by any relevant legal authority. See *Clean Wis., Inc. v. PSC*, 2005 WI 93, ¶180 n.40, 282 Wis. 2d 250, 700 N.W.2d 768 (“We will not address undeveloped arguments.”); *Shadley v. Lloyds of London*, 2009 WI App 165, ¶25, 322 Wis. 2d 189, 776 N.W.2d 838 (“It is well-established law in Wisconsin that those issues not presented to the trial court will not be considered for the first time at the appellate level.”); *Industrial Risk Insurers v. American Eng'g Testing, Inc.*, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 (“[W]e will not abandon our neutrality to develop arguments” for the parties.); *W.H. Pugh Coal Co. v. State*, 157 Wis. 2d 620, 634, 460 N.W.2d 787 (Ct. App. 1990) (we do not consider arguments unsupported by legal authority). Hutchinson also fails to cite to the record throughout most of his appellate briefing. See *Grothe v. Valley Coatings, Inc.*, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463 (We may refuse to consider a party's argument when the party has failed to cite to parts of the record relied on.). While we recognize that some latitude may be afforded to pro se appellants such as Hutchinson, pro se appellants nonetheless are required to abide by the same rules governing attorneys. See *Waushara Cnty. v. Graf*, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992).

Hutchinson did not adhere to the conditions and thus the court lifted the stay and granted an immediate writ of restitution.

¶3 It is undisputed that at all times relevant to the issues on appeal, Hutchinson's tenancy was on a month-to-month basis, based upon a signed lease renewal following the expiration of an earlier nine-month lease. The month-to-month lease required sixty-days notice to terminate the tenancy. Hutchinson complains that Duffrin failed to give him the requisite notice.

¶4 The following relevant evidence was presented at the November 3 trial. Introducing a supportive exhibit, Duffrin testified that she gave Hutchinson a notice terminating his tenancy on April 27, 2016, requiring him to vacate the premises by July 15, 2016. She testified that this written notice followed numerous verbal notices that Duffrin "wanted [Hutchinson] to move." When Hutchinson asked Duffrin for more time, she afforded him that, while continuing to insist he move out. On July 5, 2016, Duffrin gave Hutchinson an additional notice requiring that his tenancy be terminated by August 15, 2016. When Hutchinson again requested more time, Duffrin agreed to let him stay until the end of August 2016. Hutchinson did not vacate the premises by the end of August, and he and Duffrin had further discussions on September 1, 2016, regarding him vacating by September 30, 2016. Related to those discussions, on September 1, 2016, Hutchinson signed a document, Exhibit 8, agreeing to vacate the premises by September 30, 2016. September 30 came and went, and Hutchinson remained in the apartment, prompting Duffrin to file the present eviction action.

¶5 Duffrin testified that she wanted Hutchinson out of her building because of the "hazard[ous]" and "[un]clean" condition in which he kept his apartment, how he treated guests and other tenants, including "interrogating" other

people in the apartment building, “and the smells” that emanated from Hutchinson’s unit into the hallway, of which Duffrin stated that another long-term tenant repeatedly complained. Duffrin also testified to losing a potential tenant because of Hutchinson.

¶6 Hutchinson testified that he believed Duffrin was attempting to evict him in retaliation for complaining to village officials about Duffrin renting a unit across the hall from his on a short-term basis, which he believed was in violation of a village ordinance. Hutchinson stated he first approached a village official about this use of the unit in “late May” 2016. He testified that the odor of which Duffrin testified came from the basement of the apartment building not his unit, but he acknowledged that Duffrin had brought her concern about an odor to his attention “once or twice.” He stated he “never had any problems” and had been “very friendly” with other individuals in the building. He testified that he believed the April 2016 notice terminating tenancy “was sent to the mailbox on the street” but that Duffrin “knows that I don’t use that mailbox.” He stated he was “not aware of anything that was delivered to that mailbox.” He testified that Duffrin “said that there was a notice that was a notice to vacate that was put in the mailbox, and then she also said afterwards that she noticed that the notice was gone.” With regard to Exhibit 6, the July 5, 2016 notice to terminate tenancy, Hutchinson acknowledged receiving that notice and discussing it with Duffrin. With regard to Exhibit 8, in which Hutchinson agreed to vacate the premises by September 30, 2016, Hutchinson testified that Duffrin was “within her rights to have a sheriff remove me in the next day or so. You know, I don’t know what else to say about that.”

¶7 On cross-examination, Hutchinson acknowledged that the April 2016 notice terminating tenancy came before “late May” 2016, the time frame that

Hutchinson testified he first contacted village officials regarding Duffrin's short-term rentals. Hutchinson acknowledged signing Exhibit 8 in early September 2016, but claimed he did so due to "coerc[ion]" and or "duress."

¶8 Taking the stand again, Duffrin testified she was not attempting to evict Hutchinson in retaliation for his approaching village officials regarding any short-term rentals at her apartment building. On cross-examination, she acknowledged that she first observed that the April 2016 notice terminating tenancy was in Hutchinson's mailbox and later that she observed it was no longer in there, and further testified that she "know[s]" Hutchinson gets his mail "[a]t this residence where" she sent Hutchinson the notice. Duffrin acknowledged that she did not have a certified or registered mail receipt for the April 2016 notice.

¶9 The circuit court found Duffrin's testimony to be "truthful" and "far more credible" than Hutchinson's. It rejected Hutchinson's defense that Duffrin attempted to terminate his tenancy in retaliation for his complaining to village officials about Duffrin's short-term rentals. The court specifically found as true evidence that Duffrin had begun her attempts to remove Hutchinson from the property before Hutchinson ever complained to village officials about the short-term rentals. The court added that there was "no credible evidence ... that this eviction is the result of retaliation." The court found that Hutchinson had received the July 5, 2015 notice to terminate tenancy, but determined that Exhibit 8 was the "crucial document" because Hutchinson signed and agreed that he would vacate the premises by September 30, 2016. Despite his agreement to do so, Hutchinson did not vacate the premises. The court also found that Hutchinson's signing of Exhibit 8 was not due to coercion or duress. The court concluded that Duffrin afforded Hutchinson "more than enough time to vacate on a month-to-month tenancy. You gave him essentially a year." The court ordered that Hutchinson be

evicted but subsequently granted his motion to stay the writ of restitution pending appeal. The court imposed several conditions on the stay, which conditions Hutchinson violated. The court then lifted the stay and granted an immediate writ of restitution resulting in the sheriff's department assisting Hutchinson with vacating the premises.

¶10 On appeal, we will not upset a circuit court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2); *Farrell v. John Deere Co.*, 151 Wis. 2d 45, 62, 443 N.W.2d 50 (Ct. App. 1989). Additionally, when, as in the case now before us, the circuit court "acts as the finder of fact, and where there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses." *Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979); *see also Welytok v. Ziolkowski*, 2008 WI App 67, ¶28, 312 Wis. 2d 435, 752 N.W.2d 359.

¶11 Here, the testimony of Duffrin and Hutchinson conflicted on multiple points. The circuit court found Duffrin more credible than Hutchinson. Hutchinson has developed no argument to convince us the court erred in that determination, and our independent review of the trial record does not suggest any reason to question it. Accordingly, we conclude that the court's finding that Duffrin's testimony was more believable than Hutchinson's is not clearly erroneous.

¶12 WISCONSIN STAT. § 704.45(1)(c) provides that a landlord may not "bring an action for the possession of the premises, refuse to renew a lease or threaten [to do so] ... if there is a preponderance of evidence that the action ... would not occur but for the landlord's retaliation against the tenant" for asserting various legal rights. Whether Duffrin refused to continue Hutchinson's month-to-

month tenancy and filed this eviction action in retaliation for Hutchinson's complaints to the village regarding short-term tenancies is a question of fact. *See Fiduciary Real Estate Dev., Inc. v. Goodavage*, No. 2010AP3056, unpublished slip. op. ¶9 (WI App Dec. 22, 2011). The circuit court specifically found that Duffrin did not so retaliate. This finding is fully supported by the evidence—significant credible testimony and documentary evidence revealed that Duffrin had been attempting to remove Hutchinson from the premises months before Hutchinson approached the village regarding the short-term tenancies. The circuit court found the same.

¶13 Hutchinson complains that he did not receive sixty days written notice prior to the termination of his month-to-month tenancy, as required by the lease renewal agreement. This complaint is belied by the record. Duffrin provided testimony from which a fact finder could reasonably infer that Hutchinson received the April 27, 2016 notice terminating tenancy. But regardless of that notice, the circuit court specifically found that Hutchinson received the July 5, 2016 notice to terminate tenancy and that finding is supported by the record. While the notice originally indicated Hutchinson was required to vacate the premises by August 15, 2016,³ Duffrin repeatedly agreed to extend that time until Hutchinson finally agreed in writing to vacate the property by September 30, 2016. On that date, more than sixty days after the July 5 notice terminating tenancy, Hutchinson was still in the apartment. Duffrin then filed this eviction action a few days later.

³ WISCONSIN STAT. § 704.19(5) provides that “[i]f a notice specified any ... inaccurate termination date ... the notice is valid but not effective until the first date which could have been properly specified in such notice subsequent to the date specified in the notice.”

¶14 Hutchinson has failed to convince us the circuit court erred in any way with regard to the eviction or writ of restitution. *See Seltrecht v. Bremer*, 214 Wis. 2d 110, 125, 571 N.W.2d 686 (Ct. App. 1997) (“[I]t is the burden of the appellant to demonstrate that the [circuit] court erred.”).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

