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**IN THE
COURT OF APPEALS OF INDIANA**

JOHN PAGOREK,)

Appellant-Defendant,)

vs.)

No. 45A03-1005-SC-243

ADRIENNE GARIPPO and)
JIMMY WARREN,)

Appellees-Plaintiffs.)

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Julie N. Cantrell, Judge
The Honorable Michael N. Pagano, Magistrate
Cause No. 45D09-0909-SC-2797

April 29, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Adrienne Garippo (“Garippo”) and Jimmy Warren (“Warren”) (collectively, “Tenants”) brought an action in small claims alleging trespass to chattels by their landlord, John Pagorek (“Pagorek”). The trial court found Pagorek had trespassed against their personal property and assessed damages. Pagorek appeals from the trial court’s denial of his Motion to Correct Error. We affirm.

Issues

Pagorek presents two issues for our review:

- I. Whether the trial court erred when it found Tenants had not abandoned the property, and therefore that Pagorek trespassed against their personal property; and
- II. Whether there was sufficient evidence for the trial court to assess damages in the amount of \$6,000.

Facts and Procedural History

On February 7, 2009, Garippo entered into an oral lease with Pagorek for a second floor apartment. Warren, Garippo’s boyfriend, also lived in the apartment. The oral lease provided that rent of \$550.00 was to be paid on the seventh of every month. As of August 2009, Garippo was behind on rent. However, Pagorek had neither sought nor obtained an eviction order from the court.

In August 2009, Tenants informed Pagorek that they would vacate the apartment at some point, but no firm date was given. “As late as August 20, 2009, [Pagorek] spoke with Tenants,” and was aware that they were still in possession of the apartment. (Appellant’s App. 5.) Nevertheless, on August 25, 2009, Pagorek and his property manager entered the

apartment and removed the Tenants' remaining belongings. "All of their property, including what had been placed on the porch, was heaped in the backyard," including "a mattress and bedspring, television, computer, various furniture and clothing." (Appellant's App. 5.) Some of these items were broken or lost. Pagorek had "previously told Tenants that if they did not vacate he would throw their property over the railing." (Appellant's App. 5.)

A hearing in small claims court was held on January 22, 2010, and the Court entered judgment in favor of Tenants in the amount of \$6000.00 plus court costs and post-judgment interest. On February 16, 2010, Pagorek filed his Motion to Correct Error, which the trial court denied on April 7, 2010. This appeal followed.

Discussion and Decision

I. Whether the trial court erred when it found Tenants had not abandoned the property, and therefore that Pagorek trespassed against their personal property.

Pagorek appeals from the trial court's denial of his Motion to Correct Error. "The standard of appellate review of trial court rulings on motions to correct error is abuse of discretion." Zaremba v. Nevarez, 898 N.E.2d 459, 463 (Ind. Ct. App. 2008). "An abuse of discretion occurs when the decision is clearly against the logic and effect of the facts and circumstances before the court, including any reasonable inferences therefrom." Id.

Pagorek claims that the trial court's finding that Garippo and Warren had not abandoned the property was not supported by sufficient evidence. "[I]n reviewing the sufficiency of evidence in a civil case, we will decide whether there is substantial evidence of probative value supporting the judgment." Wolf v. Estate of Custer ex rel. Custer, 867 N.E.2d 589, 595-596 (Ind. Ct. App. 2007), trans. denied. "We neither weigh the evidence

nor judge the credibility of witnesses but consider only the evidence most favorable to the judgment along with all reasonable inferences to be drawn therefrom.” Id. at 596. This action took place in small claims court. Small claims actions are “informal, with the sole objective of dispensing speedy justice between the parties according to the rules of substantive law.” Ind. Small Claims Rule 8(A). Judgments in small claims actions are “subject to review as prescribed by relevant Indiana rules and statutes.” S.C.R. 11(A). Under Indiana Trial Rule 52(A), the clearly erroneous standard applies to appellate review of facts determined in a bench trial with due regard given to the opportunity of the trial court to assess witness credibility. Trinity Homes, LLC v. Fang, 848 N.E.2d 1065, 1067 (Ind. 2006).

Here Pagorek appeals from the trial court’s judgment that he trespassed against the Tenants’ personal property. To prove trespass to chattels, a plaintiff must show that (1) defendant dispossessed plaintiff of plaintiff’s chattel; (2) defendant impaired the chattel’s condition, quality, or value; (3) defendant deprived plaintiff of the use of the chattel for a substantial time; or (4) defendant harmed some other thing in which plaintiff had a legally protected interest. Coleman v. Vukovich, 825 N.E.2d 397, 407 (Ind. Ct. App. 2005). Abandonment is not an enumerated element of trespass to chattels, but instead serves as an affirmative defense to the Tenants’ claim. It was Pagorek’s burden to establish abandonment as an affirmative defense to the trespass to chattels claim. A party with the burden of proof of an affirmative defense appeals from a negative judgment. Mominee v. King, 629 N.E.2d 1280, 1282 (Ind. Ct. App. 1994). We will reverse a negative judgment only if the decision of the trial court is contrary to law, which requires a determination of whether the undisputed

evidence and all reasonable inferences to be drawn therefrom lead to one conclusion, and the trial court has reached a different one. Id.

Our statutes define abandonment in the context of a residential landlord-tenant relationship. See I.C. § 32-31-4-2 & I.C. § 32-31-5-6. Each of these defines abandonment as whether a reasonable person would conclude that the dwelling had been abandoned. In prior cases, this court has defined abandonment as “concurrency of the intention to abandon and an actual relinquishment.” Hoepfner v. Slagle, 141 Ind. App. 622, 231 N.E.2d 51, 53 (1967) (quoting Schaffner v. Benson, 90 Ind. App. 420, 166 N.E. 881 (1929)). “Abandonment has been defined as the relinquishment of property to which a person is entitled, with no purpose of again claiming it, and without concern as to who may take possession” Schaffner, 166 N.E. at 883. Thus, Pagorek was required to prove by a preponderance of the evidence that a reasonable person would conclude that the Tenants had abandoned the apartment and their personal property with intentional relinquishment and with no intention to reclaim the property. The trial court found this not to be so, and therefore held that a reasonable person would not conclude the property had been abandoned.

Notwithstanding Pagorek’s insistence to the contrary, the trial court clearly concluded that the Tenants had not abandoned the apartment. At the close of the hearing, the court stated, “[w]ith that much property sitting on the porch and in the apartment, counsel, I find it very hard for a reasonable person to assume the tenants had abandoned.” (Appellant’s App. 107.) Also, the judgment provided that “[b]ased on the evidence before the court including the fact that Landlord was aware as late as August 20 that Tenants were still in possession

and particularly the sheer volume of personal property that was still at the residence, the court finds Landlord's assertion of abandonment to be patently unreasonable and lacking in credibility." (Appellant's App. 6.)

Although a significant amount of property was on the outside porch, the trial court found the porch to be part of the leasehold. Moreover, substantial amounts of the Tenants' property – including a television, computer, and a bed – still remained within the unit before Pagorek dumped it on the lawn. Neither reweighing the evidence nor judging the credibility of any witnesses, and viewing the evidence most favorable to the judgment, the trial court's discretionary finding that the Tenants had not abandoned their property was not clearly erroneous.¹

Without abandonment and in the absence of an eviction order, it appears that the lease had not been terminated because there was no specified move-out date. "[A]lthough a defendant may not have possession of the disputed property, damages for wrongful detention or loss of use may still be recovered in a replevin action, if the taking or the detention of the property is shown to be wrongful." Romanowski v. Giordano Management Group, LLC, 896 N.E.2d 558, 562 (Ind. Ct. App. 2008). "Furthermore, once a wrongful detention is established, at least nominal damages may be awarded." Id.

Pagorek draws our attention to Romanowski, with intent to distinguish it from the instant case. His argument is not persuasive. Similar to Romanowski, Pagorek interfered

¹ Pagorek contends that abandoned property is not required by law to be stored for ninety days. We need not reach the issue whether abandoned property must be stored for ninety days, due to the fact that the court determined that Tenant's property was not abandoned.

with the Tenants' property resulting in a loss of use. Although the landlord in Romanowski had permission to move the tenant's property, he changed the locks before the filing of an eviction action or the end of the lease, thus improperly denying access to the dwelling and the property therein. Here, Pagorek had not filed an eviction action nor had the lease ended, and Pagorek's removal of the personal property resulted in a loss of use, due to the fact that most of the property was damaged or lost.

We thus conclude that the trial court's findings of no abandonment and Pagorek's liability for trespass to chattels are supported by sufficient evidence.

II. Whether there was sufficient evidence for the trial court to assess damages in the amount of \$6,000.

Pagorek goes on to claim that the damage award "was excessive and was against the weight of the evidence." (Appellant's Br. 10.) "Generally speaking, damages for total destruction to personal property are measured by the fair market value of the property at the time of loss." Ridenour v. Furness, 546 N.E.2d 322, 325 (Ind. Ct. App. 1989). However, small claims hearings are designed to be informal, "with the sole objective of dispensing speedy justice" S.C.R. 8(A). The Indiana Supreme Court has concluded "that small claims rules mean that all lawsuits are not created equal." Matusky v. Sheffield Square Apartments, 654 N.E.2d 740, 741 (Ind. 1995). The court has also held that small claims court judgments may be supported solely by hearsay. Id. at 740. "While the Plaintiff need not prove the amount of damages suffered to a mathematical certainty, the award must be support by evidence in the record." Gigax v. Boone Vill. Ltd. P'ship, 656 N.E.2d 854, 856 (Ind. Ct. App. 1995).

The trial court found evidence to support the determination of damages, stating “[t]he total cost for all broken, lost or damaged property exceeds \$6000.00.” (Appellant’s App. 5.) Garippo testified that among the items lost or damaged were a computer worth \$1200, a television worth about \$400, a full bedroom set worth about \$600, kitchen utensils worth about \$600, clothes of both Tenants worth between \$1200-\$1400, tools worth about \$450, jewelry worth between \$360-\$400, \$800 in cash, an Aztec lamp worth about \$200, kitchen tables and chairs worth about \$200, business supplies worth \$1547, and tax papers, birth certificate, and social security information. (Appellant’s App. 18-23.) The photos also indicate items such as a vacuum and furniture were thrown into a pile. (Ex. 1.) Warren testified that his military pictures from Vietnam were lost and are irreplaceable. (Appellant’s App. 27.) Though the value of each item is not mathematically certain, there is sufficient evidence to support the trial court’s judgment.

Though Pagorek claims that the property on the uncovered porch was exposed to the weather, and thus reduced in value, the trial court found that “substantial amounts of their property remained in the home.” (Appellant’s App. 5.) Pagorek also failed to counterclaim for any overdue rent. To the extent Pagorek invites us to reweigh the evidence in this case, we must decline his invitation. See Wolf, 867 N.E.2d at 596. Neither reweighing the evidence nor judging the credibility of any witnesses, and viewing the evidence most favorable to the judgment, the trial court’s assessment of \$6000.00 of damaged personal property was supported by sufficient evidence.

Conclusion

The trial court's finding that Tenants had not abandoned the apartment or personal property was supported by sufficient evidence. The trial court's calculation of damages, in the amount of \$6000.00, was supported by sufficient evidence due to the amount and nature of property lost or damaged through Pagorek's conversion.

Affirmed.

NAJAM, J., and DARDEN, J., concur.