

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-212

FEBRUARY TERM, 2002

Ray and John Nichols	}	APPEALED FROM:
	}	
v.	}	Chittenden Superior Court
	}	
Vincent Vellinnari and Donna	}	
Grimstead	}	DOCKET NO. S1051-00 CnC
	}	
	}	Trial Judge: David A. Jenkins
	}	
	}	
	}	

In the above-entitled cause, the Clerk will enter:

Tenants, who appear pro se, appeal a judgment granting landlords a writ of possession for the premises tenants occupy in the City of Burlington and awarding landlords unpaid rent and attorneys fees. We affirm.

On appeal, we review a trial court's factual findings in the light most favorable to the prevailing party below, and we disregard the effect of any modifying evidence. Coates v. Coates, 171 Vt. 519, 520 (2000). We will not set aside findings unless they are not supported by credible evidence and are clearly erroneous. Id. We thus defer to the trial court's judgment concerning the credibility of witnesses and the weight to be accorded the evidence admitted at trial. Kanaan v. Kanaan, 163 Vt. 402, 405 (1995). In other words, this Court does not substitute its judgment on matters of evidentiary weight or credibility for that of the trial court. Everlasting Mem'l Works v. Huyck Monument Works, 128 Vt. 103, 109 (1969). "It is not what appellate judges would have done had they been trier of fact that governs in an appeal." Hoover v. Hoover, 171 Vt. 256, 261 (2000). This Court is not a trial court, and thus we do not consider evidence that has not been admitted in the proceeding below. See Schott v. Baker, 132 Vt. 564, 565 (1974) (Supreme Court will not consider evidence which could have been, but was not, presented to trial court). With those standards in mind, we turn to the procedural history of this matter and the facts as found by the trial court.

Tenants leased an apartment at 83 Grant Street in Burlington from landlords beginning in November 1, 1998. The rent was set at \$500 per month, although tenants obtained a subsidy from the Burlington Housing Authority ("BHA") under the so-called Section 8 Assistance Payments Program to assist them with their rental payments. On September 3, 1999, landlords gave tenants notice that they were not going to renew the lease when it expired. Although landlords did not give tenants a reason for that decision, the trial court found that the decision was due to the parties' relationship no longer being a "reasonable" one. Tenants remained in the premises after the lease expired despite the notice to quit.

Tenants continued to pay rent during their holdover tenancy, but their payments became erratic after BHA stopped assistance payments in April 2000. The court found that tenants paid only \$381 for May 2000, \$389 for July and August 2000, and nothing for the months of June and September 2000. On July 12, 2000, landlords gave tenants notice to quit the premises for nonpayment of rent. On August 9, 2000, tenants were served with a summons and complaint for eviction. The eviction complaint was grounded on tenants' failure to pay rent. Tenants filed their answer to the complaint denying the allegations on August 31, 2000. The answer also asked the court to award tenants damages for

lost wages and expenses that tenants "couldn't avoid, to keep [them] safe from others and most of all relief from [their] pain and suffering because of retaliatory acts (discriminating/ discrimination) done onto [them] by" landlords and their property manager.

On September 6, 2000, landlords filed a motion for a default judgment or alternatively judgment on the pleadings. They also moved for an escrow order directing tenants to pay rent into court. The trial court denied landlords' motions for default and judgment on the pleadings, and scheduled a hearing on the escrow motion for September 29. On September 25, landlords moved to amend their complaint to add an additional ground for eviction. Tenants filed their opposition to that motion on September 28, and for the first time asked for a jury trial. The response also contained a motion for an injunction against landlords, their property manager, and various individuals not parties to the case. On that same day, tenants filed a document entitled, "We Plead 'Paper' for Plaintiff's Motion for Payment of Rent Into Court" with various documents attached, including photocopies of what appear to be receipts for money orders for rental payments. The next day, the court held a hearing on landlords' escrow motion which tenants did not attend. The court granted landlords' motion and ordered tenants to pay their \$500 monthly rent into court until the case terminated.

The court convened an evidentiary hearing on the merits of landlords' complaint on October 23, 2000. Landlords advised the court that tenants did not make the first escrow payment as required by the court's September 29 order. Tenants informed the court that they disagreed with the order and did not attend the September 29 hearing on the issue because they were afraid to leave their apartment due to alleged harassment by other tenants in the building. The court found that tenants did not have good cause for failing to appear at the hearing and for not complying with the order. It therefore directed tenants to make timely payments into court and allowed tenants additional time to make up the payment they missed.

The court then began hearing evidence on the merits of the matter. During tenants' presentation of their case, the court ran out of time and continued the hearing. At no time during the first day of hearing did landlords or tenants ask the court to rule on landlords' motion to amend the complaint, which the court had not yet addressed. In addition, tenants did not ask the court to rule on their motion for a jury trial. The court scheduled additional time for hearing for November 17, 2000.

At the beginning of the November 17 continued merits hearing, the court sua sponte raised the issue of tenants' jury trial request. ⁽¹⁾ The court determined initially that tenants were entitled to a jury trial because the request in their response to landlords' motion to amend the complaint was timely. The court then proceeded to hear tenants' motion for an injunction. Tenant Vellinnari testified on tenants' behalf and described in general, confused, and rambling terms the harassment and retaliation for which tenants were seeking an injunction. The court repeatedly advised tenants that it needed specific facts regarding tenants' allegations to make findings and conclusions regarding their request. Landlords eventually agreed to an injunction enjoining them and their agents from harassing tenants or inciting others to harass tenants. The court directed landlords' counsel to draft an order reflecting the agreed-upon injunction for tenants to review and for the court to sign. ⁽²⁾

Once the injunction matter was finished, the court reviewed the case file again and decided to revisit the jury trial issue. The court noted that it had not yet ruled on landlords' motion to amend the complaint. Landlords responded by orally withdrawing the motion to amend. Tenants objected. The court explained to tenants that landlords could withdraw their motion before the court ruled on it. Because tenants did not request a jury trial in their original answer, the court revised its earlier ruling and denied their request for a trial by jury.

The merits hearing continued with tenants presenting their evidence, which consisted of their sworn testimony, various documents, including receipts for rental payments, and some photographs. The court specifically inquired whether tenants had documentation that they paid the \$500 rent for the months landlords insisted were either not paid or not paid in full. Tenants reviewed their exhibits and discovered that they did not have receipts for June and September. They insisted to the court that receipts for those months were among the receipts they asked the court clerk to copy and file in the case in September and could not understand why the photocopies and original documents were missing. They told the court that they could obtain copies of the receipts within four to six weeks. At the end of the hearing, the court took the matter under advisement. Tenants never came forward with evidence of their alleged rental payments for June or September 2000, however.

On April 12, 2001, the court issued its order in landlords' favor. As noted previously, the court found that tenants defaulted on their payment obligation in June and September 2000, and failed to make full payments in May, July and August that year. The court found that the receipts tenants produced corresponded exactly with landlords' records, and that landlords' records "confirm and are credible that no rent payments were made in June and September, the same months' receipts [tenants] say the court staff did not return." The court noted that tenants admitted on the record that they "missed timely rental payments because they instead spent money to purchase and install video cameras about the property and purchased and used many tapes." Tenants installed those cameras for surveillance purposes in the attic, outside on the side of the building, and in the upstairs common hall, all without landlords' permission. The court was unable to find that landlords' action was retaliatory, and determined that the evidence was insufficient to substantiate tenants' claims that other tenants were engaged in drug dealing on the premises, that landlords failed to provide sufficient heat and hot water, or that the apartment was otherwise in disrepair. The court also found that the numerous disputes between tenants and others living in the building were not caused solely by one party; all parties to the disputes shared some responsibility for the discord in the building. Tenants subsequently appealed the adverse decision to this Court.

We first observe that tenants pro se brief does not comply with our rules in that it does not state the case concisely, V.R.A.P. 28(a)(3); does not delineate clearly the issues for our consideration, V.R.A.P. 28(a)(1) and (4); does not provide specific references to the record, V.R.A.P. 28(3); and fails to cite any statutory authority or case law to support tenants' arguments, V.R.A.P. 28(a)(4). Considering tenants' pro se status, however, we will consider the issues that we can discern from tenants' otherwise nonconforming brief.⁽³⁾ See Beyel v. Degan, 142 Vt. 617, 619 (1983) (mindful of appellant's pro se status on appeal, Court will reluctantly consider issues which appellant raises in his brief although brief does not comply with appellate rules).

Tenants appear to raise the following claims on appeal: (1) the court denied them due process; (2) the court erroneously denied them a jury trial; (3) tenants are entitled to damages and an apology from landlords for defamation, discrimination/retaliation, damage to their property, and emotional distress; (4) the Court should issue an injunction preventing landlords from ever renting property again; (5) the trial court failed to rule on tenants' various motions, including their request for an injunction; (6) the court clerk failed to give copies of their rent receipts to Judge Jenkins; and (7) the evidence does not support the court's findings and conclusions.

Tenants' claims for violation of due process, defamation, property damage, and intentional infliction of emotional distress, and their request for an injunction to prevent landlords from renting any property again were waived by tenants' failure to properly raise the claims in the first instance at trial. See In re D.C., 157 Vt. 659, 660 (1991) (to preserve issue for appeal, party must first raise it with specificity and clarity with trial court to give court opportunity to rule on it).

We will not address tenants' claim that the court failed to rule on their motions because, with one exception, tenants do not identify to which motions they refer. The court in fact addressed their motions (1) to recuse Judge Jenkins, (2) for a continuance, (3) to enjoin landlords and their agents from harassing tenants, and (4) for a jury trial. We note that the record reflects that many of tenants' so-called motions were simply filings opposing the relief landlords sought. In any event, we will not search the record for error where the appellant fails to provide us with adequate argument or citations to the record and controlling legal authority. Tallarico v. Brett, 137 Vt. 52, 61 (1979).

Tenants complain here, as they did below several times, that the court clerk failed to give Judge Jenkins copies of the rental receipts the clerk copied for tenants and which tenants filed with the court. Tenants apparently believed that Judge Jenkins was free to review and consider those documents in reaching his decision even if they were not admitted at the trial on the merits. Their complaint reflects a fundamental misunderstanding of the judicial process and the meaning of the term "evidence." "Evidence" on which a court may base its decision consists of testimony, documents, and other exhibits "legally presented at the trial of an issue" only. Black's Law Dictionary 385 (6th ed. 1991). Thus, the court clerk and Judge Jenkins acted properly by requiring tenants to present their evidence, including the rent receipts, during the October and November hearings rather than by simply filing the documents with the court clerk.

Tenants also claim that the court's decision on their request for a jury trial was erroneous. We find no error. Under Rule 38(d) of the Vermont Rules of Civil Procedure, a party waives the right to a jury trial if the party does not request it in

writing within ten days of service of the last pleading directed to the issue. V.R.C.P. 38(d); *Beyel*, 142 Vt. at 619. As the court properly found, and as tenants admitted at hearing, they did not make their jury trial request in the August answer to the original complaint. Thus, under the Rules and our precedent, tenants waived a trial by jury.

Tenants nevertheless argue that the motion for a jury trial contained in their answer to landlords' proposed amended complaint was timely and effective to require a jury trial of the matter. They suggest that the court should have sustained their objection to landlords' withdrawal of the motion to amend the complaint. Nothing in our rules prevents a party from withdrawing a motion prior to the court's ruling on that motion, and tenants cite no case law or other authority to support their claim of error. Accordingly, we find no error in the court's decision on this issue.

Tenants insist that they proved, contrary to the court's findings and conclusions, that landlords harassed them and retaliated and discriminated against them, and thus the eviction was illegal. In support of their argument, they claim their evidence and testimony proved that landlords' case was based on lies, and the court should not have ruled in landlords' favor. We have reviewed the record and are satisfied that the evidence supports the court's findings which in turn support the court's legal conclusions. See *In re D.T.*, 170 Vt. 148, 156 (1999) (trial court's findings will stand unless clearly erroneous, and legal conclusions will be upheld if supported by findings). We emphasize that it is the trial court's responsibility to assess the credibility of the witnesses who appear before it and to weigh the evidence. *Beyel*, 142 Vt. at 620. Although tenants' evidence on the harassment/ discrimination/retaliation issue may have conflicted with landlords' evidence, the trial court was free to give more weight to landlords' evidence and issue findings on that issue in landlords' favor. *Id.* As far as tenants' nonpayment of rent was concerned, we note that the court allowed them ample time to provide copies of the missing rent payment receipts, but tenants never produced those records. The uncontroverted evidence therefore supports the court's findings that tenants defaulted on their payment obligation, and therefore the writ of possession for landlords was entirely proper.

Affirmed.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

John A. Dooley, Associate Justice

James L. Morse, Associate Justice

1. Immediately before the continued merits hearing, the parties argued tenants' motion to recuse the presiding judge, Judge Jenkins, on the grounds that he was biased against tenants. Judge McCaffrey denied tenants' motion, explaining that tenants had to show more than simply adverse rulings by the judge to warrant a finding of actual bias requiring recusal. The propriety of that order is not an issue in this appeal.
2. Judge Jenkins signed the injunction order on December 1, 2000.
3. Tenants' brief includes an affidavit of Linda Wilson testifying about her support of tenants' case on appeal. As we stated above, we cannot consider evidence not in the record before the trial court. Therefore, the affidavit played no role in our consideration of this matter.