

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 23, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2008AP2473

Cir. Ct. No. 2007SC24039

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

RICHARD J. NASTAL,

PLAINTIFF-APPELLANT,

V.

ROGELIO P. GUARNERO AND JACQUELINE GUARNERO,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM SOSNAY, Judge. *Affirmed.*

¶1 KESSLER, J.¹ Richard J. Nastal, *pro se*, appeals from a small claims judgment in favor of Rogelio and Jacqueline Guarnero, *pro se*. Nastal raises fourteen claims of error. We affirm.

BACKGROUND

¶2 Nastal was the Guarneros' landlord for seven years. On July 9, 2007, Nastal filed an eviction complaint against the Guarneros, alleging they were given a five-day pay or quit notice and had failed to pay rent or move out. Nastal also sought \$635 in delinquent rent plus \$1696.31 in damages, an amount that included rent for August, daily damages for July 8 through August 2 and mailing fees.

¶3 On July 19, 2007, the parties appeared before a court commissioner. The request for eviction was dismissed by agreement of the parties because the Guarneros had vacated the property. A hearing on the other claim was set for August 30, 2007.

¶4 The Guarneros subsequently filed a counterclaim seeking return of their security deposit of \$695, \$500 for cleaning they did before they moved in and \$200 for painting the apartment. Nastal filed an amended complaint seeking approximately \$1700 in additional damages, including damage to the roof.

¶5 The hearing before the court commissioner occurred on December 13, 2007. The commissioner found in favor of Nastal and rendered judgment for

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

\$2116. The Guarneros filed a demand for a hearing *de novo* before the trial court. *See* WIS. STAT. § 757.69(8).²

¶6 The case was subsequently assigned to the Honorable Mel Flanagan and trial was scheduled for January 8, 2008. However, the trial did not occur. The notice of the hearing date that was sent to the Guarneros was returned with a printed notice from the post office that stated: “Return to Sender [-] Temporarily Away” (some capitalization omitted). For reasons not detailed in the record, judgment for Nastal in the amount of \$2508.56 (this included the original judgment plus attorney and filing fees) was entered on January 2, 2008, according to a notice of entry of judgment dated February 8, 2008. Nastal proceeded to garnish Rogelio’s wages, ultimately collecting over \$2700.

¶7 In June 2008, the Guarneros sought to reopen the judgment, explaining that they never received the January 2008 hearing notice because it was sent to the wrong address.³ Nastal has not provided a transcript of a hearing that occurred before Judge Flanagan on June 9, 2008, but according to Wisconsin Circuit Court Access (WCCA) minutes, the trial court heard argument from the Guarneros concerning their motion to reopen; Nastal was not in court. The

² WISCONSIN STAT. § 757.69(8) provides:

(8) Any decision of a circuit court commissioner shall be reviewed by the judge of the branch of court to which the case has been assigned, upon motion of any party. Any determination, order, or ruling by a circuit court commissioner may be certified to the branch of court to which the case has been assigned, upon a motion of any party for a hearing *de novo*.

³ Handwritten notes on the file, presumably made by a court commissioner or court clerk on June 2, 2008, state: “Defendants, did not rec’d notice of ct date 1/8/08, because they moved. [Defendants] state that on 12/26/08 they informed [Room] 409’s clerk of new address but notices were sent to old address. [Defendants] want to appeal.....”

minutes indicate that the motion to reopen was continued to July 3, 2008. On July 3, Nastal and Rogelio appeared. Again, no transcript has been provided, but the WCCA minutes of that hearing indicate as follows: “Defendants’ motion to reopen heard. Court GRANT[s] the motion. Parties given rules for small claims court trials. Court Trial scheduled for 9-22-2008 at 10 a.m.” Subsequently, the case was transferred to the Honorable William Sosnay.

¶8 On September 4, 2008, Nastal filed a motion for summary judgment. His motion asserted that the Guarneros had failed to respond to requests for admissions dated July 16, 2008, and that the dispositive issues were therefore deemed admitted. On September 5, 2008, Nastal filed a copy of the request for admissions that Nastal asserted had been mailed to Rogelio Guarnero on July 16, 2008. Nastal also filed a “request for continuance,” asserting that the September 22 date should be used to consider his motion for summary judgment and not the trial.

¶9 On September 22, 2008, the parties appeared before the trial court. At the beginning of the hearing, Nastal referenced his motion for summary judgment. The court told Nastal that it had reviewed the motion and would take the motion “under advisement at this point” and “proceed to trial.”

¶10 Both parties presented testimony, including testimony concerning evidence of damage to the apartment and the date that the Guarneros vacated the apartment. The Guarneros also explained that Rogelio’s wages had been garnished since May 30, 2008, and that over \$2700 had been collected.

¶11 At the conclusion of the testimony, the trial court summarized the testimony and made findings of fact. Significantly, the court found that for reasons it could not discern from the record, the judgment in Nastal’s favor was

erroneously entered in January 2008, even though the Guarneros had filed a request for a *de novo* hearing before the trial court. The court vacated the January 2008 judgment and observed that Rogelio's wages should never have been garnished because the Guarneros had requested a trial *de novo*.

¶12 The trial court explicitly found that the witnesses for the Guarneros were more credible than the witnesses for Nastal. It found that the Guarneros had vacated the property on July 5, 2007, but were nonetheless liable to Nastal for rent for the month of July. The court further found that there was no evidence in the record to support Nastal's claim for rent for August and September. With respect to damages to the apartment, the court found that the Guarneros were responsible for \$75 in cleaning fees. With respect to the Guarneros' request for credit for work they performed prior to moving in, the court found that the Guarneros had already received a rent credit for that work and, therefore, the court did not award them anything for that work.

¶13 In summary, the trial court found that the Guarneros owed Nastal \$710 for July rent and cleaning fees. However, it found that the Guarneros were entitled to credits for their \$695 security deposit and \$2719 that had already been garnished from Rogelio's wages. Based on those credits, the trial court ordered judgment for the Guarneros in the amount of \$2704, which was the return of the garnished amount minus \$15 (the difference between the \$710 that Guarneros owed Nastal and their security deposit of \$695).

¶14 After the trial court made its findings, Nastal asked about his summary judgment motion. The trial court stated that the motion was denied, noting:

The court took it under [advisement]. Having heard the testimony and evidence in the record the court certainly finds that there were material issues of fact in dispute, that was clear from obviously the testimony, the fact that the plaintiff had submitted requests to admit, the court finds that they were not properly submitted, and the court aside from that still found and makes a finding [that] there were clearly material issues of fact in dispute and summary judgment even under those circumstances would not have been warranted in any event.

This appeal follows.⁴

DISCUSSION

¶15 Nastal makes fourteen arguments, which we will consider in six main categories: (1) the trial court failed to grant Nastal’s motion for summary judgment that was based on an unanswered request for admissions; (2) the trial court should not have denied Nastal’s motion for continuance; (3) the trial court should not have admitted evidence that was not included in the Guarneros’ Answer; (4) there is insufficient credible evidence to support the trial court’s findings; (5) the Guarneros’ relative should not have been allowed to “practice law” at the trial; and (6) the original judgment should not have been reopened.⁵

⁴ After filing his notice of appeal, Nastal filed a motion for reconsideration and a motion for a new trial based on newly discovered evidence. Although no transcript has been provided, WCCA minutes indicate that the parties appeared for a hearing and that the trial court denied Nastal’s motions. No amended notice of appeal was filed and we do not consider these motions.

⁵ We reject any subissues not specifically addressed because they are inadequately briefed. See *State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) (“An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.”); *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (appellate court may “decline to review issues inadequately briefed”).

I. Summary judgment.

¶16 Nastal argues that the trial court erred when it declined to discuss his motion for summary judgment and ultimately denied it at the conclusion of trial. He asserts:

The circuit court would only schedule the motion for the morning of the trial which certainly defeats the purpose of a request for admissions as a means to narrow issues since one would not have time to prepare his case in the event of failure on the motion. The appellant's motion for a continuance was also denied.

We reject Nastal's arguments.

¶17 Nastal implies that procedurally, the trial court was required to consider his motion for summary judgment, which was based on his request for admissions, prior to hearing the trial. This argument fails. Nastal has not provided us with a transcript of the July 3, 2008 motion hearing or the list of rules for court trials that the WCCA minutes state he was given. Thus, we have no way to determine if there was a scheduling order in place that provided deadlines for dispositive motions. "It is the appellant's responsibility to ensure completion of the appellate record and 'when an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling.'" *State v. Provo*, 2004 WI App 97, ¶19, 272 Wis. 2d 837, 681 N.W.2d 272 (citation omitted).

¶18 Also, the only request for admissions that appears in the record was addressed to and mailed to Rogelio; there is no indication that Jacqueline was served with a request for admissions. Moreover, the admissions Nastal drafted were flawed. Many of the proposed admissions raised multiple questions within a single admission and were not specific as to time and date. It would be difficult if

not impossible to answer many of the admissions affirmatively or negatively. These deficiencies support the trial court's finding that the request for admissions was "not properly submitted" and could not form the basis for summary judgment against the parties.

¶19 We agree with the trial court that genuine issues of material fact precluded summary judgment. As the testimony at trial demonstrated, the parties offered conflicting testimony concerning when the Guarneros moved out and the damage to the apartment. For these reasons, we reject Nastal's argument that the trial court erred when it denied his motion for summary judgment.

II. Nastal's motion for continuance.

¶20 Nastal asserts that the trial court should have granted his motion for continuance that he filed on September 5, 2008. He argues:

At the point in time of having established that it would ignore the effect of the matters within the 'Request for Admission' as having concluded factual matters and then bypassing the Motion for Summary Judgment, the granting of the Motion for Continuance would have given Nastal a chance to bring in witnesses....

Although the written motion is in the record, Nastal has not directed us to a record citation that identifies when or why the trial court denied his motion. Without citations to the record or a complete record, we cannot conclude that the trial court's discretionary decision to deny the motion was an erroneous exercise of discretion. Therefore, we reject Nastal's argument. See *Lechner v. Scharrer*, 145 Wis. 2d 667, 676, 429 N.W.2d 491 (Ct. App. 1988) (court need not consider arguments unsupported by references to the record); *Provo*, 272 Wis. 2d 837, ¶19.

III. Evidence not in the Guarneros' Answer or presented to the court commissioner.

¶21 Nastal argues that the trial court erred when it considered testimony that was not entered “into the record” by the court commissioner or included in the Guarneros’ Answer to the complaint. He has not provided any authority for his argument that the trial court was limited to evidence presented in the responsive pleading or in oral arguments to the court commissioner and, therefore, we reject it. *See State v. Marquardt*, 2001 WI App 219, ¶41, 247 Wis. 2d 765, 635 N.W.2d 188 (court “need not consider arguments unsupported by citations to authority”). However, for Nastal’s benefit, we note that only the initial complaint is required to be in writing. *See* WIS. STAT. § 799.06(1) (“All pleadings except the initial complaint may be oral.”). Further, we also note that the facts presented to and found by the court commissioner are not relevant. When a party requests a hearing *de novo*, the case is retried; the trial court does not defer to facts found by the court commissioner. *See* WIS. STAT. § 757.69(8); *Stuligross v. Stuligross*, 2009 WI App 25, ¶12, ___ Wis. 2d ___, 763 N.W.2d 241 (*de novo* hearing by trial court “requires a fresh look at the issues, including the taking of testimony.... The hearing is literally a new hearing, not merely a review of whatever record may have been made before the ... court commissioner.”).

IV. Challenges to the trial court’s findings.

¶22 Nastal takes issue with several findings made by the trial court. For instance, he argues that, contrary to testimony presented by the Guarneros, the apartment keys were not turned over to an individual that Nastal had hired to fix the garage. When considering the sufficiency of the evidence, we apply a highly deferential standard of review. The trial court’s factual findings will not be reversed unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2). We

review the record in the light most favorable to the trial court's findings to determine whether the findings are clearly erroneous. *Rohde-Giovanni v. Baumgart*, 2003 WI App 136, ¶18, 266 Wis. 2d 339, 667 N.W.2d 718. "When we undertake to determine whether a finding is clearly erroneous, rejection is not warranted merely because there is evidence in the record to support a contrary finding. The contrary evidence, rather, must constitute the great weight and clear preponderance of the evidence." *Id.* (citation omitted). The credibility of witnesses and the weight to be attached to that evidence are matters uniquely within the province of the trial court when it acts as the finder of fact. *See Global Steel Prods. Corp. v. Ecklund Carriers, Inc.*, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269. Applying these standards here, we reject Nastal's arguments.

¶23 We have carefully examined the trial transcript and we conclude that each finding of fact is supported by the evidence. The court explicitly found the Guarneros to be more credible than Nastal and the court's findings are consistent with that credibility determination.

V. Challenge to a relative's participation.

¶24 At trial, the trial court allowed Rogelio's sister, Rachel Rivera, to sit at counsel table. She was also a witness who testified about her seven years of assisting the Guarneros when they needed to communicate with Nastal. While she did ask Rogelio two questions, she did not otherwise question any witnesses. Rather, the trial court conducted much of the questioning of witnesses and Nastal questioned his own witnesses. On appeal, Nastal argues that Rivera should not have been allowed to "conduct" the case for the Guarneros. He asserts that he

“was unable to limit Rivera’s utterances which would have been precluded in a normal court setting with [a] witness testifying in a proper manner....”

¶25 We are unconvinced that Rivera’s participation resulted in an unfair trial. Small claims procedures are informal and are intended to foster the speedy and inexpensive resolution of disputes. *See County of Portage v. Steinpreis*, 104 Wis. 2d 466, 479-80, 312 N.W.2d 731 (1981). Consistent with the informal nature of small claims trials, the trial court exercised its discretion and allowed the parties to testify in a narrative fashion. The court also asked questions of all parties when issues arose. There is nothing about Rivera’s involvement that leads this court to doubt the fairness and completeness of the trial.

VI. Challenge to the reopening of the judgment.

¶26 As noted, in July 2008 the trial court reopened the January 2008 judgment and scheduled the case for trial. Nastal argues the case was “improperly reopened.” He summarizes what he claims to be the basis for the trial court’s decision and asserts that the facts found by the trial court were inaccurate. However, Nastal has not provided a transcript of the trial court hearings that occurred on June 9 and July 3, 2008. We are unable to review the findings of fact and reasons behind the trial court’s decision. Therefore, we conclude that the missing transcript supports the trial court’s ruling, *see Provo*, 272 Wis. 2d 837, ¶19, and we reject Nastal’s argument.

By the Court.—Judgment affirmed.

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