

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0279**

Community Housing Services - Park Towers, Inc.,
Respondent,

vs.

Julie Gay,
Appellant.

**Filed December 21, 2020
Affirmed in part and reversed in part
Johnson, Judge**

Olmsted County District Court
File No. 55-CV-19-8463

Kerri J. Nelson, Bassford Remele, P.A., Minneapolis, Minnesota (for respondent)

William L. French, Rochester, Minnesota (for appellant)

Considered and decided by Frisch, Presiding Judge; Johnson, Judge; and Schellhas,
Judge.*

S Y L L A B U S

In an eviction action, a district court shall not issue a writ of recovery unless and until it has entered judgment in favor of the plaintiff.

*Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

OPINION

JOHNSON, Judge

In this eviction action, the former tenant appeals from an adverse judgment following a jury trial and raises four issues. We conclude that the district court did not err by denying her request to proceed *in forma pauperis*, by considering the landlord's pre-trial motion concerning one of her affirmative defenses, or by granting the landlord's motion for judgment as a matter of law after both parties had rested. But we conclude that the district court erred by issuing a writ of recovery before entering judgment. Therefore, we affirm in part and reverse in part.

FACTS

In March 2011, Julie Gay began leasing a unit at the Park Towers Apartments in Rochester. The apartment building is owned and managed by respondent Community Housing Services—Park Towers, Inc.

In 2019, Gay and Park Towers' management clashed over a bedbug problem. During a preventive inspection in May 2019, a pest-control technician discovered an infestation of bedbugs in Gay's apartment and scheduled a heat treatment to eradicate them. Park Towers' management gave Gay instructions on how to prepare for the heat treatment. But Gay did not make the required preparations. The pest-control technician nonetheless conducted the heat treatment.

A second preventive inspection of Gay's apartment was performed in September 2019. The pest-control technician discovered a new infestation and concluded that the apartment needed to be heat treated again. The pest-control technician determined that,

based on the number and the age of the bedbugs found during both inspections, they probably had been in Gay's apartment for a matter of months. Park Towers' management determined that Gay had violated her lease agreement by failing to report the bedbug infestations. In a discussion with the building manager, Gay stated that she knew about the bedbugs but intentionally did not report them.

On October 14, 2019, a pest-control technician scheduled a meeting with Gay at her apartment to speak with her about the preparations she would need to make before another heat treatment. But on the technician's arrival, Gay walked out of her apartment and did not return. Later that day, Park Towers gave written notice to Gay that her lease would be terminated, effective October 25, 2019, for her failure to report bedbug infestations and failure to cooperate with remediation efforts. The termination letter stated that Gay had the option of entering into a lease-termination agreement with a mutually agreeable move-out date. Two days later, Gay signed a one-page document entitled "Intent to Vacate Notice," which specified a move-out date of December 1, 2019, for the stated reason of "mutual lease term[ination]."

On December 1, 2019, Gay refused to vacate her apartment as agreed. On December 6, 2019, Park Towers served a summons and eviction complaint on her. Gay retained an attorney, who entered an appearance on December 10, 2019. On the same day, Gay applied for *in forma pauperis* status. On the following day, the district court denied the application. On December 19, 2019, Gay filed an answer and requested a jury trial. The district court scheduled a jury trial for December 30, 2019.

At trial, Park Towers presented the testimony of three witnesses over two days. Gay rested her case without presenting any evidence. Park Towers moved for judgment as a matter of law (JMOL), and the district court granted the motion from the bench.

Immediately after the district court granted Park Towers' motion for JMOL, Gay's attorney informed the district court of her intent to appeal and requested that the writ of recovery be stayed. In response, Park Towers asked the district court for 48 hours (including the New Year's Day holiday) in which to decide whether to post a bond so that a writ of recovery could be issued. The district court granted Park Towers' request.

On January 2, 2020, Park Towers informed the district court by letter that it would post a bond, and it proposed the amount of \$11,250. Gay responded the next day by proposing an amount between \$35,000 and \$45,000. On January 6, 2020, the district court informed the parties that it would require a bond in the amount of \$15,000 and asked Park Towers to prepare and submit a proposed order. Park Towers did so, and the district court signed and filed its order on January 7, 2020. The order states, in part, "If Defendant timely files a Notice of Appeal for this matter, Plaintiff shall give a bond for \$15,000" as security for "payment of all costs and damages if on appeal the judgment of restitution is reversed and a new trial ordered."

In addition to setting the amount of the bond, the January 7, 2020 order also states, "The Writ of Recovery of Premises and Order to Vacate shall issue immediately." On the following day, Park Towers wrote to the court administrator to request that a writ of recovery be issued, and it was issued that same day. On January 9, 2020, a deputy sheriff

served the writ on Gay. Gay states in her appellate brief that she surrendered possession of the premises before the writ was executed.

On February 5, 2020, the district court filed an order directing the court administrator to enter judgment. The court administrator entered judgment on February 7, 2020. Gay filed a notice of appeal on February 21, 2020.

ISSUES

I. Did the district court err by denying Gay’s request for leave to proceed *in forma pauperis*?

II. Did the district court err by considering Park Towers’ pre-trial motion concerning one of Gay’s affirmative defenses?

III. Did the district court err by granting Park Towers’ motion for judgment as a matter of law?

IV. Did the district court err by issuing the writ of recovery before entering judgment?

ANALYSIS

I.

We begin by considering Gay’s argument that the district court erred by denying her request for leave to proceed *in forma pauperis*.

A party who is “financially unable to pay” the filing fees and costs of a civil action may be permitted to proceed “without prepayment.” Minn. Stat. § 563.01, subd. 3(a) (2018). A party is eligible to proceed *in forma pauperis* if he or she either “is receiving public assistance described in section 550.37, subdivision 14, . . . is represented by an

attorney on behalf of a civil legal services program or a volunteer attorney program based on indigency, or . . . has an annual income not greater than 125 percent of the poverty line.” *Id.*, subd. 3(b). In addition, the district court must find that the action is not frivolous. *Id.* This court applies an abuse-of-discretion standard of review to a district court’s denial of *in forma pauperis* status. *State v. Scheffler*, 932 N.W.2d 57, 60 (Minn. App. 2019).

In this case, the district court denied Gay’s application on the ground that she “is not found to be indigent and is not entitled to proceed *in forma pauperis*.” Gay contends that she is eligible for *in forma pauperis* status on the ground that she pays Medicare part B premiums. She acknowledges that, in her affidavit supporting her request for *in forma pauperis* status, she did not state that she pays Medicare part B premiums. But she contends that the district court should have drawn that inference based on other information she provided or that the district court should have inquired further.

Gay relies on section 550.37, subdivision 14, which is the statute referenced in the *in forma pauperis* statute. That statute defines public assistance to include “government assistance based on need,” which is defined to include, among other things, “payment of Medicare part B premiums or receipt of part D extra help.” Minn. Stat. § 550.37, subd. 14 (2018). In context, it is apparent that the word “payment” in that clause refers to *the government’s* payment of a person’s Medicare part B premiums, not *the person’s* payment of the premiums from his or her own resources. The latter type of payment is not government assistance based on need. Accordingly, Gay’s payment of Medicare part B premiums does not make her eligible for *in forma pauperis* status.

Gay contends in the alternative that the district court should have allowed her to pay a lesser filing fee. She relies on a statute that provides as follows:

If . . . the court finds that a party does not meet the eligibility criteria under paragraph (b), but the court also finds that the party is not able to pay all of the fees, costs, and security for costs, the court may order payment of a fee of \$75 or partial payment of the fees, costs, and security for costs, to be paid as directed by the court.

Minn. Stat. § 563.01, subd. 3(c). There is no indication in the record that Gay asked the district court to allow her to pay a lesser filing fee. The plain language of the statute, especially the word “may,” indicates that a district court has discretion to order a lesser filing fee pursuant to section 563.01, subdivision 3(c). *See, e.g., In re Welfare of Children of J.D.T.*, 946 N.W.2d 321, 327-28 (Minn. 2020). Gay has not cited any caselaw for the proposition that a district court is required to allow a lesser filing fee in any particular circumstance, and we are not aware of any such caselaw. Furthermore, Gay has not identified any particular features of her application that should have caused the district court to order a lesser filing fee. In the circumstances of this case, the district court did not abuse its discretion by not *sua sponte* ordering the payment of a lesser filing fee.

Thus, the district court did not err by denying Gay’s request to proceed *in forma pauperis*.

II.

Gay argues that the district court erred by considering, at the outset of trial, a motion that Park Towers served and filed three days earlier. Gay does not challenge the district

court's substantive ruling on the motion; rather, she challenges only the fact that the district court considered the motion.

The issue first arose at a preliminary hearing on December 19, 2019, when Park Towers requested leave to file a summary-judgment motion challenging some of Gay's affirmative defenses. The district judge requested informal briefs on the question whether a summary-judgment motion would be appropriate in an eviction action in light of its accelerated timelines. Park Towers filed a letter brief, and Gay filed a responsive letter brief. But Park Towers did not file a summary-judgment motion. Instead, it filed an eight-part motion *in limine* on December 27, 2019, three days before trial. The fifth part of that motion sought to exclude evidence relevant to Gay's affirmative defense that she has a constitutional right to free speech. On the morning of trial, the district court considered Park Towers' motion *in limine* and granted it with respect to the fifth part on the ground that Park Towers is not a state actor.

On appeal, Gay contends that, even though Park Towers' motion was labeled a motion *in limine*, it effectively was a summary-judgment motion, and it was not served according to the rules governing dispositive motions. *See* Minn. R. Gen. Prac. 115.03. We reject Gay's premise that the motion was a summary-judgment motion. The fifth part of the motion sought the exclusion of evidence, not a judgment or partial judgment in Park Towers' favor. *See Hebrink v. Farm Bureau Life Ins. Co.*, 664 N.W.2d 414, 418-19 (Minn. App. 2003). Even if the motion were deemed a summary-judgment motion, there would be no error unless Gay was prejudiced. *See Federal Land Bank v. Obermoller*, 429 N.W.2d 251, 255 (Minn. App. 1988). Gay was not prejudiced because her affirmative defense was

not viable given that she has not disputed Park Towers' assertion that it is not a state actor. *See West v. Atkins*, 487 U.S. 42, 48-50 (1988).

Thus, the district court did not err by considering the fifth part of the motion *in limine* that Park Towers filed three days before trial.

III.

Gay argues that the district court erred by granting Park Towers' motion for JMOL at the close of the evidentiary phase of trial.

A district court may grant a motion for JMOL “[i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.” Minn. R. Civ. P. 50.01(a). A district court may grant such a motion “with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.” *Id.* We apply a *de novo* standard of review to a district court's ruling on a JMOL motion. *In re Estate of Butler*, 803 N.W.2d 393, 399 (Minn. 2011). In reviewing a district court's grant of a motion for JMOL, we “view[] the evidence in a light most favorable to the nonmoving party,” and we “make[] an independent determination of whether there is sufficient evidence to present an issue of fact for the jury.” *Jerry's Enters., Ins. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 816 (Minn. 2006).

In this case, Park Towers orally moved for JMOL after Gay rested her case. After listening to arguments from counsel for both parties, the district court granted the motion from the bench. The district court reasoned that Park Towers was entitled to possession for two reasons: first, because Gay violated the terms of her lease by not reporting bedbugs,

and, second, because she agreed in writing to move out on December 1, 2019, but instead held over. The district court also reasoned that Gay could not prevail on her retaliation defense because there was no evidence that she had engaged in any conduct that is protected by statute.

On appeal, Gay challenges the district court's ruling that there was a lease violation. But Gay does not challenge the district court's ruling that Gay was a holdover tenant because she had agreed in writing to move out of her apartment on December 1, 2019. The second of those two rulings, which is unchallenged, is a sufficient basis for the district court's conclusion that Park Towers proved its right to possession. *See Hunter v. Anchor Bank, N.A.*, 842 N.W.2d 10, 17 (Minn. App. 2013), *review denied* (Minn. Mar. 18, 2014).

Gay also challenges the district court's ruling with respect to her statutory retaliation defense. A tenant can defeat an eviction action if he or she can prove that "the alleged termination was intended in whole or part as a penalty for the defendant's good faith report to a governmental authority of the plaintiff's violation of a health, safety, housing, or building code or ordinance." Minn. Stat. § 504B.285, subd. 2(2) (2018). Gay contends that there is evidence in the record that she engaged in protected conduct. She refers to the letter in which Park Towers' management gave her notice that it was terminating her lease. The letter suggests that Gay had made a report "to building safety." But the author of the letter testified that, when she wrote the letter, she merely assumed that Gay had made a report to the City of Rochester but actually had no basis for believing that Gay had done so. That testimony effectively negated the evidentiary value of the letter's reference to a purported report. Gay did not testify or introduce any other form of evidence.

Consequently, there is no evidence in the record that Gay engaged in protected conduct, which is a prerequisite of her retaliation defense.

Thus, the district court did not err by granting Park Towers' motion for JMOL.

IV.

Gay argues that the district court erred by issuing a writ of recovery before entering judgment.

Gay relies on a statute that provides:

If the court or jury finds for the plaintiff, the court shall immediately enter judgment that the plaintiff shall have recovery of the premises, and shall tax the costs against the defendant. The court shall issue execution in favor of the plaintiff for the costs and also immediately issue a writ of recovery of premises and order to vacate.

Minn. Stat. § 504B.345, subd. 1(a) (2018).¹ The plain language of this statute states that judgment shall be entered “immediately” after a finding in favor of a plaintiff and that a writ of recovery also shall be issued “immediately.” *Id.* But the statute does not expressly state whether one of those events should occur before the other.

Other sources of law, however, provide more support for Gay's argument. This court has stated that it is “improper” for a district court administrator to “neglect to enter a judgment of restitution in unlawful detainer actions, and instead simply issue a writ of restitution based upon the order for restitution.” *Makela v. Peters*, 425 N.W.2d 605, 606

¹Another subdivision provides, with exceptions, that if “immediate restitution of the premises would work a substantial hardship upon the defendant or the defendant's family, the court shall stay the writ of recovery of premises and order to vacate for a reasonable period, not to exceed seven days.” Minn. Stat. § 504B.345, subd. 1(d).

(Minn. App. 1988). Our *Makela* opinion is consistent with the well-accepted general principle that a judgment is a necessary condition to the issuance of a writ. *See, e.g.*, 55 C.J.S. *Mandamus* § 447 (2020) (“Generally, a formal judgment must be rendered as the basis for [a] writ before it can issue.”). We note that, in eviction cases in Hennepin and Ramsey counties, a rule of court provides, “A writ of recovery and order to vacate shall issue within 24 hours *after* the entry of judgment, . . . unless a stay authorized by law is specifically ordered by the court.” Minn. R. Gen. Prac. 609 (emphasis added); *see also* Minn. R. Gen. Prac. 601 & 1991 cmt. Consistent with all of these authorities, this court previously has stated in non-precedential opinions that a district court errs if it issues a writ of recovery without entering or before entering judgment.²

In this case, the district court issued the writ of recovery on January 8, 2020. The district court entered judgment on February 7, 2020. Thus, the district court erred by issuing a writ of recovery before it had entered judgment.

The conclusion that the district court erred necessarily raises a question as to whether Gay is entitled to a remedy. Gay contends that the writ was “void *ab initio*” and

²*See Verjovsky v. Mental Health Resources, Inc.*, No. A11-454, 2011 WL 6306652, at *2 (Minn. App. Dec. 19, 2011) (“In an eviction action, the district court must order judgment in the landlord’s favor before a writ of recovery may be issued.”); *Morford-Garcia v. Metropolitan Council Hous. & Redevelopment Auth.*, No. A08-2203, 2009 WL 4909435, at *1 (Minn. App. Dec. 22, 2009) (“In an eviction action, the district court must order judgment for the landlord before a writ of recovery may be issued.”); *see also Prime Sec. Bank v. Hartman*, No. A11-1753, 2012 WL 3263785, at *2 (Minn. App. Aug. 13, 2012) (noting that, while appeal from Carver County was pending, special-term panel of court of appeals had “order[ed] vacation of the writ of recovery because the district court failed to enter judgment in the eviction proceeding before issuing the writ”), *review denied* (Minn. Oct. 16, 2012).

that she is “entitled to a reversal of the Writ of Recovery and entry of judgment in her favor.” She does not cite any legal authorities for these contentions. Park Towers contends that Gay was not prejudiced because the writ was issued before the resolution of this appeal.

Gay is not entitled to judgment in her favor. The district court determined the merits of the action in Park Towers’ favor. “If the court or jury finds for the plaintiff, the court shall immediately enter judgment that the plaintiff shall have recovery of the premises” Minn. Stat. § 504B.345, subd. 1(a). Thus, Park Towers was and is entitled to possession of the premises. The district court’s error is limited to the premature issuance of the writ of recovery. The appropriate appellate remedy for that error is simply reversal of the issuance of the writ. The limited nature of this relief is consistent with the limited nature of an eviction action, which is a “summary proceeding[] that [is] intended to adjudicate only the limited question of present possessory rights to the property.” *Deutsche Bank Nat’l Trust Co. v. Hanson*, 841 N.W.2d 161, 164 (Minn. App. 2014) (citing *Lilyerd v. Carlson*, 499 N.W.2d 803, 812 (Minn. 1993)). This is so even though Park Towers posted a bond in connection with Gay’s appeal. The purpose of such a bond also is limited: “to pay all costs and damages if on the appeal the judgment of restitution is reversed and a new trial ordered.” Minn. Stat. § 504B.371, subd. 7 (2018). Because we are not reversing the judgment and not ordering a new trial, Gay may not recover on the bond.

Thus, the district court erred by issuing a writ of recovery before entering judgment. As a consequence, we reverse the issuance of the writ.

DECISION

The district court did not err by denying Gay's request to proceed *in forma pauperis*, by considering Park Towers' pre-trial motion *in limine* concerning one of Gay's affirmative defenses, or by granting Park Towers' motion for judgment as a matter of law after the parties had rested. But the district court erred by issuing a writ of recovery before it had entered judgment. Therefore, we affirm in part and reverse in part.

Affirmed in part and reversed in part.