STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0530

Marthamae Kottschade,
Appellant,

vs.

Richard A. Mokua, et al.,
Respondents.

Filed January 30, 2023
Affirmed
Gaïtas, Judge

Olmsted County District Court
File No. 55-CV-22-1339

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

Travis M. Ohly, Ohly Law Ltd., Rochester, Minnesota (for respondents)

Considered and decided by Gaïtas, Presiding Judge; Bratvold, Judge; and Larson, Judge.

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

Appellant-tenant Marthamae Kottschade appeals the judgment for recovery of premises in favor of respondents-landlords, Richard and Elizabeth Mokua (collectively, the Mokuas). Kottschade argues that the district court (1) erred by trying the case under a theory of ouster, which was not alleged in the complaint; (2) made clearly erroneous findings of fact; (3) erred by prohibiting Kottschade from returning to her apartment; and

(4) erred by issuing a writ of recovery after Kottschade filed a notice of appeal. Because Kottschade fails to establish prejudicial error, we affirm and do not reach the writ of recovery issue.

FACTS

Kottschade's apartment flooded in February 2022 making her unit uninhabitable. In response, she brought various claims against the Mokuas in the district court, including lockout and an emergency tenant remedies action. The Mokuas counterclaimed for eviction. After a court trial, the district court denied Kottschade's claims and entered judgment for recovery in favor of the Mokuas. Kottschade now challenges that decision.

Our summary of the facts is based on the district court's factual findings and undisputed trial evidence. Kottschade began renting the apartment in 2013. The Mokuas purchased the four-unit apartment building in 2015. Around the same time, the Mokuas and Kottschade entered into a month-to-month lease agreement. The lease required Kottschade to pay $710 in rent each month, which was later raised to $750. It also provided that, if the premises became destroyed and uninhabitable, either the Mokuas or Kottschade could end the lease by giving "prompt written notice."

On February 6, 2022, another tenant alerted the Mokuas and Kottschade via text message of wet carpet in the common hallway near the door of the vacant unit across from Kottschade's apartment. The Mokuas' son, W.M., went to the building to investigate. W.M. checked the interior of the vacant apartment and other common areas, and he dried the water where he could. He knocked on Kottschade's door, but she was not at home.

W.M. reported his findings to his parents, who then attempted to locate a professional to investigate the source of the water.

Eventually, Kottschade arrived home to find that a bathroom pipe had leaked, causing her apartment to flood. She immediately alerted the Mokuas and called her friends to help salvage her belongings. Elizabeth Mokua and W.M. went to the apartment building. A cleaning and restoration company also arrived on site.

While Kottschade and her friends worked to remove her belongings from the apartment, their interactions with Elizabeth Mokua and W.M. were tense. The district court found that, during these interactions, Kottschade and one of her friends made "frighteningly racially charged" comments to Elizabeth Mokua and W.M.

Due to the significant flooding, Kottschade's apartment was no longer habitable. The Mokuas paid for Kottschade to stay in a hotel for seven nights, but they would not fund additional time in the hotel or allow Kottschade to move into the vacant unit in the building. Although Kottschade no longer resided in her apartment, she retained her key and still had access to it. After the flood, Kottschade regularly went to the building, checking her mail and moving her belongings.

By mid-February, the cleaning and restoration repair company required consistent access to work on the apartment. Because Kottschade had the only key, the Mokuas changed the locks and provided the company with a key. The company also complained about insufficient power to the apartment, which was causing circuits to trip and interfering with repairs. The company suggested that the Mokuas contact Rochester Public Utilities (RPU) to inquire about improving the power supply to the apartment. The Mokuas

followed this advice. To make the requested upgrades, RPU required the Mokuas to transfer the electric bill to themselves, which they did.

On February 18, Kottschade discovered that the locks had been changed. Building maintenance gave her access to the apartment. Richard Mokua arrived at the building and told Kottschade that she could not live in the apartment while it was being repaired. Kottschade called the police. A few hours later, and after police intervention, Kottschade was given a new key to the apartment.

On March 1, Kottschade filed a verified petition for possession of residential rental property following unlawful removal under Minnesota Statutes section 504B.375 (2022), known as a "lockout" petition. In her petition, Kottschade alleged that she was locked out of the apartment and requested that possession be returned to her. She also sought emergency relief under Minnesota Statutes section 504B.381 (2022) for the loss of essential utilities. Lastly, Kottschade sought damages under Minnesota Statutes section 504B.221 (2022), alleging that her utilities had been unlawfully terminated. The Mokuas counterclaimed for eviction based on nonpayment of January and February rent and breach of lease. They alleged that Kottschade breached her lease by causing the water leak. Specifically, the Mokuas claimed that Kottschade's personal property had covered the heating vents, which caused the temperature in the apartment to drop and a pipe to freeze.

The district court presided over a court trial. Kottschade, Kottschade's friend, Elizabeth Mokua, and W.M. testified. At the close of trial, the district court ruled from the bench that Kottschade was not to enter the apartment until the district court had issued its written order addressing the parties' claims.

The following day, April 15, the district court issued its written order, granting the Mokuas' request for recovery of the premises but denying their other requests for relief. The district court's order also denied Kottschade's requests for relief.

Kottschade filed a letter on April 15 notifying the district court that she intended to appeal. She filed her notice of appeal to this court the next day. On April 24, the Mokuas asked the district court to issue a writ of recovery. Kottschade did not respond to the request. The district court issued a writ of recovery on April 28. Kottschade did not object or file a motion in the district court for a stay pending appeal. The Olmsted County Sheriff served the writ of recovery by posting on May 9.

DECISION

I. The district court did not err by considering whether Kottschade was entitled to treble damages under Minnesota law even though Kottschade did not specifically request this relief.

Kottschade argues that the district court erred by "trying the case on a legal theory" that she did not raise in her petition for emergency relief. Specifically, Kottschade contends that the district court erroneously considered "the never-asserted Minn. Stat. § 504B.231," which is a section of chapter 504B that allows for monetary damages for an unlawful ouster. To obtain treble damages under section 504B.231, a tenant must show that a landlord acted unlawfully and in bad faith to remove the tenant. Minn. Stat. § 504B.231(a) (2022). Noting that this standard is "nearly impossible to prove," Kottschade argues that the district court erred by sua sponte considering the availability of treble damages. Appellate courts "review a district court's application of the law de novo." *Harlow v. State, Dep't of Human Servs.*, 883 N.W.2d 561, 568 (Minn. 2016).

Initially, we consider the claims that Kottschade did raise and the district court's disposition of those claims. In her petition and at trial, Kottschade first alleged that she was entitled to monetary damages under Minnesota Statutes section 504B.221 because her utilities had been unlawfully terminated. To establish "unlawful termination of utilities," Kottschade was required to show that the Mokuas "interrupt[ed] or cause[d] the interruption" of her utilities. Minn. Stat. § 504B.221(a). The district court rejected Kottschade's allegation that the Mokuas had interrupted her utilities, and consequently denied her claim for damages under section 504B.221. Kottschade also requested recovery of the premises, claiming that the Mokuas had locked her out of the apartment. *See* Minn. Stat. § 504B.375, subd. 1 (providing that the remedy for actual or constructive lockout is recovery of the premises). The district court implicitly determined that Kottschade had not been actually or constructively locked out of the apartment because it also denied Kottschade's request for recovery of the premises.

In addition to considering the claims that Kottschade raised in her petition, the district court also addressed whether she was entitled to treble damages for unlawful ouster pursuant to section 504B.231. To establish an unlawful ouster, Kottschade needed to show that the Mokuas "unlawfully and in bad faith remove[d], exclude[d], or forcibly ke[pt] out [Kottschade] from residential premises." Minn. Stat. § 504B.231(a). The district court sua sponte raised this issue and concluded that Kottschade did not establish that the Mokuas had unlawfully or in bad faith ousted her from the apartment.

We agree with Kottschade that her petition did not seek treble damages. Still, Kottschade fails to explain how the district court's decision to consider whether there had

been an unlawful ouster requiring treble damages prejudiced her in any way. *See* Minn. R. Civ. P. 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."). Thus, we conclude that any error in the district court's consideration of treble damages was harmless.

II. We reject Kottschade's challenges to the district court's findings of fact.

Kottschade argues that some of the district court's factual findings are not supported by the trial evidence. An appellate court reviews a district court's factual findings for clear error. *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 797 (Minn. 2013). The appellate court examines the record to determine whether reasonable evidence supports the district court's findings. *Id.* In doing so, the appellate court must "view the evidence in the light most favorable to the verdict." *Id.* Findings of fact are clearly erroneous if the appellate court is "left with the definite and firm conviction that a mistake has been made." *Id.* (quotation omitted).

Kottschade argues that the district court clearly erred when it found: "In mid-February 2022, [the cleaning and restoration company] needed to have consistent access to [the apartment], [the Mokuas] did not have a spare key to give to them, so they changed the locks." She contends that the district court clearly erred by determining that the Mokuas were justified in changing the locks. We disagree. At trial, Elizabeth Mokua testified that the cleaning and restoration company required a key to the apartment, the Mokuas did not have a spare key, and the Mokuas changed the locks to provide the cleaning and restoration company with a key. Because the record supports the district court's factual finding, it is not clearly erroneous.

Kottschade also challenges the district court's finding that the Mokuas were justified in transferring the electric bill from Kottschade's name to their name while repairs were ongoing. She argues that the record does not reveal why this was necessary. Again, we disagree. Elizabeth Mokua testified that when she contacted RPU about increasing the voltage in the apartment to support the repairs, she was required to transfer the account from Kottschade to the Mokuas. Thus, the district court's factual finding was not clearly erroneous.

Next, Kottschade challenges the district court's finding that she "failed to prove that [the Mokuas] caused any additional damages to the apartment and her personal property" because there was no evidence "as [to] how long it took for the damage to occur or if it could have been mitigated or lessened if something else had been done." Kottschade contends that the record shows that the Mokuas are partly responsible for the damage to the apartment because, when W.M. initially investigated the source of the water, he did not enter Kottschade's apartment. But the record does not establish when the flooding began. And there is nothing in the record to suggest that if W.M. had entered the apartment, he could have mitigated the damage. Accordingly, the challenged factual finding is not clearly erroneous.

Kottschade also contends that the district court clearly erred in finding that Kottschade was not "locked out" of her apartment. In support of this argument, she notes, "It is undisputed that [the Mokuas] changed the locks and interrupted [her] utilities." But the record shows that Kottschade's apartment was destroyed by flooding. Although Kottschade could no longer reside in the apartment, it was because of the flood and not the

Mokuas' actions. The record also shows that the Mokuas gave Kottschade a new key to the apartment a few hours after she discovered that the original key no longer worked. We therefore conclude that the district court did not clearly err in finding that the Mokuas did not lock out Kottschade.

Finally, Kottschade argues that the district court erred by finding that, under the terms of her lease, verbal notice was sufficient to terminate the lease if the apartment became uninhabitable.[1] The district court's finding is contrary to the lease. Kottschade's lease states that if the apartment "is destroyed or becomes totally uninhabitable or completely unfit for occupancy," the landlord or tenant may end the lease. Notice of the termination must be in writing.[2] Thus, the district court erred in finding that verbal notice was sufficient to terminate the lease. However, the record does not suggest that the district court relied on the oral notice given on February 18 to conclude that possession of the premises should be returned to the Mokuas in April. We therefore conclude that this factual error was harmless. *See* Minn. R. Civ. P. 61 (requiring the courts to disregard harmless error).

[1] At trial, the Mokuas argued that on February 18, they terminated the lease by giving Kottschade verbal notice that she could not live in the apartment while repairs were underway.

[2] Kottschade also correctly points out that verbal termination is contrary to Minnesota law, which requires written notice to terminate a month-to-month tenancy. *See* Minn. Stat. § 504B.135 (2022) ("A tenancy at will may be terminated by either party giving notice in writing.").

III. Kottschade fails to establish that the district court erred by prohibiting her from returning to her apartment.

Kottschade appears to argue that the district court had no legal basis to prohibit her from returning to her apartment after trial before a written order issued. But Kottschade's argument includes only the following paragraph:

> Though it never used the word, the trial court evicted Appellant. There is no legal precedent, statutory or otherwise, for this decision, and it must be reversed and the judgment vacated. Appellant was not even offered any of the statutory protections afforded to any tenant being evicted, e.g., staying the writ of recovery for up to seven days. Minn. Stat. Sec. 504B.345, Subd. (1)(d). In short, the trial court acted *ultra vires* to the detriment of Appellant. See Argument II above.

"[O]n appeal error is never presumed. It must be made to appear affirmatively before there can be reversal . . . . [and] the burden of showing error rests upon the one who relies upon it." *Waters v. Fiebelkorn*, 13 N.W.2d 461, 464-65 (Minn. 1944); *see Loth v. Loth*, 35 N.W.2d 542, 546 (Minn. 1949) (discussing *Waters*); *Luthen v. Luthen*, 596 N.W.2d 278, 283 (Minn. App. 1999) (applying *Loth*). Appellate courts decline to reach issues that are inadequately briefed, *State, Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997), because inadequately briefed issues are not properly before an appellate court, *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982); *see McKenzie v. State*, 583 N.W.2d 744, 746 n.1 (Minn. 1998) (applying the rule that arguments not briefed are waived in an appeal in which the appellant "allude[d] to" an issue but "fail[ed] to address them in the argument portion of his brief"). An assignment of error in a brief based on "mere assertion" and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *Schoepke v. Alexander*

Smith & Sons Carpet Co., 187 N.W.2d 133, 135 (Minn. 1971); *see State v. Andersen*, 871 N.W.2d 910, 915 (Minn. 2015) (applying this aspect of *Schoepke*); *Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994) (declining to address allegations unsupported by legal analysis or citation).

The only prejudice Kottschade identifies is that a seven-day stay of the writ was not available before the eviction order was filed the next day. *See* Minn. Stat. § 504B.345 (2022) (stating that the district court shall stay the writ of recovery for a reasonable period up to seven days if the tenant can show that immediate restitution of the premises to the landlord would cause the tenant substantial hardship). Because Kottschade was not living in the apartment, and the writ was not issued until April 28 or served until May 9, we discern no prejudicial error in the district court's directive to stay away until the order was filed.

IV. We do not consider whether the district court erred by issuing the writ of recovery after Kottschade filed her notice of appeal.

Kottschade argues that the district court erred by issuing a writ of recovery of premises after she notified the district court that she intended to appeal. *See* Minn. Stat. § 504B.371, subd. 1 (2022) (providing that the district court will issue an order staying the writ of recovery and order to vacate "for at least 24 hours after judgment" if the district court had entered judgment against a tenant and the tenant informed the court that the defendant intended to appeal). Because we affirm the judgment for recovery of premises, Kottschade's arguments regarding a stay pending appeal are moot.

We note, however, that the appropriate way for a party to seek review of a district court's decision on a stay motion is by motion filed in this court under rule 127 of the Minnesota Rules of Civil Appellate Procedure. Minn. R. Civ. App. P. 108.02, subd. 6 ("On a motion under Rule 127, [we] may review the [district] court's determinations as to whether a stay is appropriate, the terms of any stay, and the form and amount of security pending appeal."). Our special term panel rules on such motions for review of stay decisions and conditions. Because we have resolved the appeal, and Kottschade requested a stay *pending appeal*, there is no relief available that we could now grant.

Affirmed.