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IN THE
COURT OF APPEALS OF INDIANA

GARY MOODY,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 41A01-0906-CV-264
	)	
WELLMAN GROUP, LLP	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE JOHNSON SUPERIOR COURT
The Honorable Jane Spencer Craney, Special Judge
Cause No. 41D03-0802-SC-146

November 25, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Gary Moody appeals from a small claims judgment in favor of Wellman Group, LLC (Wellman), Moody's former landlord, for unpaid rent and damages. Proceeding pro se, Moody presents the following consolidated and restated issues for review:

1. Did the trial court abuse its discretion by denying Moody's requests for the appointment of counsel?

2. Did the trial court abuse its discretion by denying Moody's third request for a continuance?

3. Did the trial court improperly accept testimony from an unsworn witness?

4. Did the trial court and its staff exhibit bias and unprofessional conduct toward Moody?

We affirm.

This small claims, landlord-tenant matter began on February 20, 2008, when Wellman filed a claim for possession and rent due. Following a hearing regarding possession, Wellman was granted possession and gained said possession on or about March 28, 2008. A separate damages hearing was scheduled for April 28, 2008. While awaiting the damages hearing, Moody filed a number of pro-se motions and pleadings with the trial court. Among these were a petition for a jury trial and a counterclaim.[1] Moody's request for a jury trial was denied.

On two occasions, Moody's request for a continuance of the damages hearing was granted, with the second request not being made until the day of the hearing. Following the second continuance, the hearing was rescheduled for July 3, 2008. As a result of correspondence from Moody apparently indicating that he had filed a disciplinary complaint

[1] The nature of Moody's counterclaim is unknown, as he has not included it in his appendix.

against the magistrate assigned to the case, the magistrate recused on June 17. After multiple issues regarding the selection of a judge, the Honorable Jane Spencer Craney filed a qualification of special judge on November 24, 2008. The hearing on damages, as well as Moody's counterclaim, was then set for February 24, 2009.

On or about February 5, 2009, Moody was informed in writing that he would not be provided with assistance through the Johnson County Legal Aid Program. Therefore, on February 6, Moody filed a Motion Requesting Appointment of Pro Bono Counsel, claiming that he was indigent and had made diligent effort to obtain the assistance of counsel by contacting legal aid organizations. Moody's motion was denied by the court that same day. Moody then filed a Motion Requesting Continuance on February 18, claiming that his unsuccessful search for pro bono counsel had left him unable to prepare in the short period remaining before the scheduled hearing. The trial court denied this motion the day after it was filed.

At the hearing on February 24, once again Moody requested a continuance and the appointment of counsel. After thoroughly addressing the matter with Moody, the trial court denied his requests. Wellman then presented evidence regarding unpaid rent and other damages. Moody refused to present his case in light of the court's refusal to appoint counsel and grant a continuance. The trial court entered judgment in favor of Wellman in the amount of $1296.66 and found against Moody on his counterclaim "due to failure to present evidence." *Appendix* at 10.

1.

Moody initially challenges the trial court's refusal to appoint counsel for him in this small claims case. In this regard, Moody claims that he was entitled to counsel because he is mentally ill and "this is an extremely complex case which may involve significant precedent in landlord-tenant law." *Appellant's Brief* at 7. Moody, however, neither elaborates on the extent of his mental illness[2] nor on the alleged complexities of this landlord-tenant dispute.

Ind. Code Ann. § 34-10-1-2 (West, PREMISE through 2009 1st Regular Sess.) provides in relevant part as follows:

> (b) If the court is satisfied that a person who makes an application described in section 1 of this chapter does not have sufficient means to prosecute or defend the action, the court:
>
> (1) shall admit the applicant to prosecute or defend as an indigent person; and
>
> (2) *may, under exceptional circumstances, assign an attorney to defend or prosecute the cause*.
>
> (c) The factors that a court may consider under subsection (b)(2) include the following:
>
> (1) The likelihood of the applicant prevailing on the merits of the applicant's claim or defense.
>
> (2) The applicant's ability to investigate and present the applicant's claims or defenses without an attorney, given the type and complexity of the facts and legal issues in the action.
>
> * * *

(emphasis supplied).

Contrary to Moody's argument on appeal, the statute grants the trial court discretion in determining whether to appoint counsel for an indigent civil defendant. To be sure, the

[2] Though not discussed on appeal, Moody eventually told the trial court, after much prodding, that he suffered from "PTSD and severe depression" for which he was on "quite a bit" of medication. *Transcript* at 9. Moody refused to divulge the medication he was taking but indicated that his mental illnesses were, for the most part, controlled by his medications.

statute provides that the court "may" appoint counsel when "exceptional circumstances" are present. *Id*. Moody's vague assertions on appeal regarding his mental health and the complexity of the case do not suffice to establish an abuse of discretion. Aside from bald assertions, there is nothing in the record before us establishing Moody's inability to investigate and present his defense and counterclaim without an attorney. Though certainly complicated by the plethora of motions and pleadings filed by Moody, at its heart, this small claims action is a routine landlord-tenant dispute that should have been finished soon after its inception. The trial court did not abuse its discretion in denying Moody's requests for appointed counsel.

2.

Moody also argues that the trial court erred in denying his third motion for a continuance, filed five days before the damages hearing and reasserted on the day of the hearing. In typical short shrift, Moody claims his inability to find pro bono counsel was an unusual circumstance that left him at a disadvantage in preparing for the hearing.

Ind. Small Claims Rule 9(A) provides in relevant part as follows: "Either party may be granted a continuance for good cause shown. Except in unusual circumstances no party shall be allowed more than one (1) continuance in any case…." Moody has not established unusual circumstances in this case requiring a continuance. At the time he requested his third continuance, this small claims case had been pending for nearly a year with Moody proceeding pro se. While Moody apparently believed he would receive legal assistance through the Johnson County Legal Aid Program, he was contacted by that organization on

February 5 and informed in writing that he would not receive any assistance in his small claims matter. Thus, he had notice nearly three weeks before the hearing, if not sooner, that he would not receive legal aid. Further, the trial court denied his motion for appointed counsel on February 6. On the record before us, it appears Moody did nothing to prepare for the damages hearing once he learned he would be required to continue representing himself. Moreover, it is unclear what Moody could have accomplished during a short continuance that he could not have done in the weeks before the hearing.[3] The trial court did not abuse its discretion in this regard.

3.

Moody next asserts that the trial court erred in accepting testimony from an unsworn witness. The "witness" Moody speaks about is attorney James MacAbee, the president of the Johnson County Bar Association and one of the individuals Moody had spoken with in his search for pro bono counsel. During pretrial discussions, MacAbee was questioned briefly by the court regarding Moody's request for pro bono counsel and about the legal aid program in general. Moody did not object to the court's questioning of MacAbee and, in fact, informed the trial court that he had asked MacAbee to come into court and explain the situation. To the extent there was any error, which Moody has not established in his cursory argument on appeal, it was waived by Moody's failure to object below. *See, e.g.*, *Perez v. Bakel*, 862 N.E.2d 289 (Ind. Ct. App. 2007).

[3] S.C. R. 9(A) also provides that continuances "shall be for as short a period as possible".

4.

Finally, Moody claims that the trial court violated the Code of Judicial Conduct by being impatient and discourteous with him, as well as biased against him due to his psychiatric disabilities.[4] Moody initially argues as follows:

> The Judge was extremely impatient with me, to the point of not allowing full explanation of the circumstances which led to my inability to defend on the trial date. The judge repeatedly interrupted, truncated, and silenced my speech. Furthermore, the judge, in my view, tormented me, in a cruel manner, and after lengthy discussion of my mental illness, to near the point of nervous breakdown, by attempting to force me to participate in proceedings which I repeatedly stated I was unable to defend….

Appellant's Brief at 9.

Our review of the record reveals that Moody's accusations are wholly without merit. The trial court gave Moody ample opportunity to support his requests for appointed counsel and a continuance. Further, the court exhibited much patience despite Moody's refusal to cooperate and answer relevant questions regarding his alleged mental illness and its effect on his ability to represent himself in this small claims matter.

Moody further asserts:

> The court, in actions and statements, particularly the incident involving the tape recorder, showed bias against the [sic] me due to my psychiatric disabilities, which the court had in fact aggravated as stated above. I was further disturbed, and placed at a disadvantage in the proceeding, by the unnecessary presence of two bailiffs behind me during the remainder of the hearing.

Id.

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[4] Moody provides incorrect and non-existent citations to the Code of Judicial Conduct. Upon further review, it is apparent that Moody is relying upon Ind. Judicial Conduct Cannon 3(B)(4) and (5).

When the impartiality of the trial judge is challenged on appeal, we will presume that the judge is unbiased. *Perry v. State*, 904 N.E.2d 302 (Ind. Ct. App. 2009), *trans. denied*. To rebut that presumption, the appellant must establish from the judge's conduct actual bias or prejudice that places him in jeopardy. *Id*. "'To assess whether the judge has crossed the barrier into impartiality, we examine both the judge's actions and demeanor.'" *Id.* at. 307-08 (quoting *Timberlake v. State*, 690 N.E.2d 243, 256 (Ind. 1997)).

The tape recorder incident to which Moody refers occurred when the court discovered that Moody had been recording the hearing with his own tape recorder. After hearing a noise from the recorder, the court stated, "Call the Security please. What is that?" *Transcript* at 42. When Moody asked why security had been summoned, the court explained that Moody would be required to turn the tape over to the court reporter and that the court wanted to avoid any problems. The trial court's actions in this regard do not establish judicial bias.

Finally, Moody makes unsupported allegations that the courthouse staff displayed bias and unprofessional conduct toward him when he went to the clerk's office on July 28, 2009 (well after the small claims hearing) in an attempt to retrieve his audio recording of the hearing. Once again, we find no merit to Moody's argument.

Judgment affirmed.

NAJAM, J., and BRADFORD, J., concur.