

STATE OF MICHIGAN
COURT OF APPEALS

DACHRIKI, L.L.C.,

Plaintiff/Counterdefendant-
Appellee,

v

FINANCIAL STRATEGIES, INC., and RICK D.
FLATT,

Defendants/Counterplaintiffs/Third-
Party Plaintiffs-Appellants,

v

ASSURED INVESTMENT PLANNERS, INC.,
and DAVID H. KISSER,

Third-Party Defendants-Appellees.

UNPUBLISHED
March 5, 2013

No. 304797
Oakland Circuit Court
LC No. 2008-095648-CK

Before: FORT HOOD, P.J., and METER and MURRAY, JJ.

PER CURIAM.

Defendants, Financial Strategies, Inc., and Rick D. Flatt, appeal by right from the trial court's order granting the motion for directed verdict filed by plaintiff, Dachriki, L.L.C., and entering judgment of \$66,086.61 in favor of plaintiff and third-party defendants, Assured Investment Planners, Inc., and David H. Kisser. We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

This case concerns payments on a commercial lease. Defendants were the tenants for a commercial lease and Dachriki, Kisser's company, was the landlord. The beginning date of the lease at issue was October 1, 2005, although Flatt had been a tenant at the property since January of 1996. In addition to this landlord/tenant relationship, Flatt and Kisser had a working relationship. Kisser worked as the independent marketing organization through which Flatt and Financial Strategies sold insurance products. Flatt worked with two of Kisser's companies, Assured Investment Planners and AIP Marketing Alliance. Kisser received "overrides," or commissions, on Flatt's and Financial Strategies' sales.

According to Flatt, he and Kisser met periodically, calculated how much rent Flatt owed Kisser and how much in commissions Kisser owed Flatt and then one would write the other a check. According to Kisser, these meetings never happened and a different person in his office handled commissions; Kisser had nothing to do with commissions. Kisser testified Flatt was typically behind in rent. Flatt testified he would sometimes be behind in rent, but only until he and Kisser met and “reconciled” the commissions. Flatt also testified that when he moved out, in October 2008, he did not owe any rent.

A letter typed on Assured Investment Planners letterhead and dated September 25, 2009, was addressed to Flatt and stated that due to his service at Assured Investment Planners, his rent payments from October 2007 to October 2008 were waived. There was no dispute that Kisser’s original signature was on the letter. Flatt testified the letter was authentic and memorialized an agreement he had with Kisser. Kisser testified the letter was not authentic and that Flatt had manipulated letterhead Kisser had signed for a different purpose.

There was documentary evidence that Flatt was behind in rent, received a letter that provided notice to terminate the lease due to nonpayment of rent and, finally, received notice of termination when he did not pay rent. It was undisputed that defendants moved out of the property on the date of termination. Flatt acknowledged his handwriting was on two statements of rent from October and November of 2007, and his notes appear to calculate the balance due. However, Flatt testified the figures on the statements were not accurate. Flatt also identified his handwriting on the back on another invoice dated March 10, 2008, but testified he never saw the front of this invoice; he picked it up out of a trash can to write a note on the back.

During the jury trial, three applications were admitted into evidence. These applications were for contracts or employment with different insurance companies and signed by Flatt. They each asked a question concerning criminal history, and on each one Flatt answered he did not have any criminal history. Before trial, defendants moved to preclude the admission of these applications, but the trial court denied the motion. During trial, when asked a yes or no question as to whether he had made a misrepresentation regarding his criminal history on an application, Flatt stated, “[w]ell, if you’re referring back to 1979, . . . when I was 19 years old as a passenger in a car and the car got pulled over, and I pled guilty to some misdemeanor that I forgot about as an adult all my life, then yes, I did.” Following this response, there was a bench conference that was not transcribed. Back on the record, plaintiff’s counsel questioned Flatt regarding the nature of his conviction.

Plaintiff’s complaint sought to recover unpaid rent, and defendants filed a counterclaim alleging breach of contract, civil conspiracy, and abuse of process. At the close of proofs in the jury trial, plaintiff and third-party defendants moved for directed verdict. Defendants voluntarily withdrew the civil conspiracy claim. The trial court granted directed verdict in favor of plaintiff and third-party defendants as to all remaining counts. In reaching this decision, the trial court expressed disbelief concerning Flatt’s testimony. The trial court made statements such as “I can’t bring your [Flatt’s] testimony into agreement with other facts” and, “I think that I cannot buy Mr. Flatt’s position on any of the arguments that had been made today.”

On appeal, defendants first argue that the motion for directed verdict was improperly granted. We agree in part. A trial court’s decision on a motion for directed verdict is reviewed

de novo. *Zantel Mktg Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005). “A directed verdict is appropriate only when no factual question exists on which reasonable jurors could differ.” *Id.* “The appellate court reviews all the evidence presented up to the time of the directed verdict motion, considers that evidence in a light most favorable to the nonmoving party, and determines whether a question of fact existed.” *Id.* When reviewing a motion for directed verdict, “it is the factfinder’s responsibility to determine the credibility and weight of trial testimony.” *King v Reed*, 278 Mich App 504, 522; 751 NW2d 525 (2008) (quotation omitted). It is the jury’s prerogative to resolve issues of fact which include inherent credibility questions. *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 229; 755 NW2d 686 (2008). “If reasonable jurors could reach conclusions different than this Court, then this Court’s judgment should not be substituted for the judgment of the jury.” *Cacevic v Simplimatic Engineering Co (On Remand)*, 248 Mich App 670, 680; 645 NW2d 287 (2001). A motion for directed verdict is properly granted only when there is no factual question upon which reasonable minds could differ. *Heaton v Benton Constr Co*, 286 Mich App 528, 532; 780 NW2d 618 (2009). However, if the evidence presented is insufficient to establish the elements of the prima facie case, the motion for directed verdict should be granted as a matter of law because reasonable persons would agree that there was an essential failure in the proofs. *Zander v Ogihara Corp*, 213 Mich App 438, 441; 540 NW2d 702 (1995).

In this case, the record reflects that the trial court granted directed verdict because it did not believe Flatt’s testimony. We acknowledge that Flatt’s testimony was contradictory. However, granting directed verdict was in conflict with other evidence. Most significantly, there was the letter, with Kissler’s original signature, stating Flatt’s rent was waived for 12 months. There was also Flatt’s testimony that when he moved out he did not owe any rent. It is clear that in directing verdict, the trial court made a determination of credibility, which was the jury’s responsibility. *King*, 278 Mich App at 522. There remained a question of fact, specifically whether the letter waiving 12 months of rent payments, was authentic, on which reasonable jurors could differ. *Zantel Mktg Agency*, 265 Mich App at 568. When considering the evidence in the light most favorable to defendants, the credibility of Flatt’s testimony regarding waiver of 12 months of rent and whether Flatt owed any rent when he moved in October 2008 presented an issue for resolution by the trier of fact. *Moore*, 279 Mich App at 229. Thus, directed verdict was not appropriate as to the nonpayment of rent and breach of contract claims. *Zantel Mktg Agency*, 265 Mich App at 568.

The trial court also granted directed verdict of the abuse of process claim. Although it was improper to grant directed verdict on this claim based on credibility, directed verdict was proper as a matter of law because defendants did not present evidence to establish the elements of an abuse of process claim. *Zander*, 213 Mich App at 441. The elements of abuse of process are “(1) an ulterior purpose and (2) an act in the use of process which is improper in the regular prosecution of the proceeding.” *Vallance v Brewbaker*, 161 Mich App 642, 645; 411 NW2d 808 (1987) (quotation omitted). Additionally “the improper ulterior purpose must be demonstrated by a corroborating act; the mere harboring of bad motives on the part of the actor without any manifestation of those motives will not suffice to establish abuse of process.” *Id.* at 646. In this case, there was simply no evidence of an act that was a manifestation of those motives. *Id.* Regarding the abuse of process claim, when all the evidence is considered in the light most favorable to defendants, there was no factual question that the elements of abuse of process were not shown, and directed verdict was properly granted. *Zantel Mktg Agency*, 265 Mich App at

568. Although the trial court granted directed verdict of this claim based on an incorrect assessment of credibility, this Court “can affirm the trial court’s decision because the trial court reached the correct result, albeit for the wrong reason.” *Adams v West Ottawa Pub Sch*, 277 Mich App 461, 466; 746 NW2d 113 (2008). This case is remanded for a new trial only on the nonpayment of rent and breach of contract claims.¹

Affirmed in part, reversed in part and remanded for a new trial concerning the nonpayment of rent and breach of contract claims consistent with this opinion. We do not retain jurisdiction. No taxable costs, no party having prevailed in full.

/s/ Karen M. Fort Hood

/s/ Patrick M. Meter

/s/ Christopher M. Murray

¹ We note that defendant raised claims of alleged evidentiary error. However, defendant simply cited to the rules of evidence and did not provide a rationale for overruling the trial court, elaborate on his argument, or cite relevant case law. See *The Cadle Co v City of Kentwood*, 285 Mich App 240, 258 n 10; 776 NW2d 145 (2009). We have concluded that a new trial is warranted, and the presiding judge over the initial trial is no longer a visiting judge. A circuit court judge is required to follow the published decisions from the Court of Appeals and the Supreme Court and is not bound by a decision of a court of concurrent jurisdiction. *People v Hunt*, 171 Mich App 174, 180; 429 NW2d 824 (1988). Accordingly, on retrial, the presiding judge may examine the evidentiary issues anew.