

ARKANSAS COURT OF APPEALS

DIVISION III
No. CA11-636

JAMES DAVIS d/b/a COOKIES &
SWEETS

APPELLANT

V.

PINES MALL PARTNERS

APPELLEE

Opinion Delivered December 14, 2011

APPEAL FROM THE JEFFERSON
COUNTY CIRCUIT COURT
[NO. CV 2010-869-2]

HONORABLE ROBERT H. WYATT,
JR., JUDGE

AFFIRMED

RITA W. GRUBER, Judge

This appeal comes from an unlawful-detainer action brought by appellee Pines Mall Partners against appellant James Davis. The Jefferson County Circuit Court entered an order finding that appellant, doing business as Cookies & Sweets, unlawfully detained appellee's premises. The court ordered appellant to vacate the premises; return the premises to appellee; and pay damages, costs, and attorney's fees for a total amount of \$44,141. Appellant's only point on appeal is that the circuit court abused its discretion in denying his request for a continuance to obtain an attorney. We hold that the court did not abuse its discretion and affirm its order.

Appellee is the owner and landlord of The Pines shopping mall in Pine Bluff, where appellant leased retail space pursuant to a license agreement executed on June 19, 2009. The monthly rent under the agreement was \$615. The agreement provided that failure to pay rent



when due constituted an event of default, entitling appellee to immediate possession of the premises and triggering late fees of \$100 for each day that the rent remained unpaid. The agreement also provided that the lease term terminated on May 31, 2010, and that the relationship was converted to a “tenancy by sufferance” on that date. Any holdover without appellee’s written consent obligated appellant to pay specified daily damages to appellee and was terminable at will upon delivery by appellee to appellant of written notice to terminate.

Appellant quit paying rent in February 2010. In May, appellee sent a letter to appellant notifying him that he was in default under the license agreement, that he owed four months’ rent and late fees, and that appellee would initiate action to recover the property if appellant failed to cure his default. Appellee sent a similar notice in June. Appellant failed to respond to either letter. On September 23, 2010, appellee sent a letter to appellant notifying him to vacate the property within three days and remit to appellee past rent and late fees due in the amount of \$30,675 by September 30, 2010, but the letter was returned unclaimed. On December 2, 2010, appellee provided a notice to appellant by email, U.S. Mail, certified mail, and hand delivery to quit and vacate the premises within three days and to pay past-due rent and late fees in the amount of \$40,304 no later than December 6, 2010. Appellee stated that it would employ all legal means necessary to evict appellant and collect the amounts due under the license agreement if appellant failed to comply with the notice.

Appellant failed to respond, and on December 9, 2010, appellee filed a complaint initiating this action for unlawful detainer and breach of the license agreement. On December 14, 2010, appellant filed a handwritten objection to the complaint. On December 16, 2010,



appellee's attorney sent a letter to the court requesting a hearing on the matter and sent a copy of the letter to appellant. On January 14, 2011, the court entered an order setting the hearing for February 18, 2011. On January 12, appellee's attorney mailed to appellant via certified mail a copy of the order setting the hearing, which was returned marked "Refused." She sent a second notice by certified mail on January 27, 2011, which appellant admitted receiving on January 28, 2011.

At the beginning of the hearing on February 18, 2011, appellant requested a continuance to obtain a lawyer. He said that he realized he was at a disadvantage and that he thought appellee's lawyer had "an advantage" over him because appellant couldn't present it "the correct way" to the court. He admitted that he had known since December to hire a lawyer but argued that there were "not a lot of lawyers in this county for civil cases" and that the one he tried to hire said she could not represent him unless he could get an extension of time. The court denied appellant's request.

Appellee introduced the license agreement and the various letters to appellant containing notices of default and testimony explaining these documents. Appellant testified that every time he spoke with Kandy White, the general manager of the mall, he explained his concern for the mall's "position and stability." He testified that because of that he was "incurring daily damages from loss of wages, pain and suffering." He testified that he was concerned about the failing mall and that was the reason that he began to withhold rent. At the conclusion of the hearing, the court found that the parties had entered into a valid contract and that appellant had breached the license agreement. The court determined that



appellant owed past-due rent from February 2010 through May 2010 of \$2,460 and rent due under the holdover period, at \$41 per day as specified in the agreement, from June 2010 through the date of February 18, the date of the hearing, of \$10,783. The court refused to award late fees under the agreement because it found the amount (\$38,200) to be unconscionable and thus unenforceable. But the court did find that the case was an appropriate one for treble damages under the unlawful-detainer statutes. This statute provides that, if the property recovered is used for commercial purposes, “the plaintiff shall receive liquidated damages at the rate of three (3) times the rental value per month for the time that the defendant has unlawfully detained the property.” Ark. Code Ann. § 18-60-309(b)(2) (Repl. 2003). Accordingly, the court awarded damages in the amount of \$39,729, plus costs and attorney’s fees.

For his sole point on appeal, appellant contends that the circuit court erred in refusing his request for a continuance so that he could hire an attorney. He then argues that the court failed to consider the four factors required to be considered under *Smith v. Arkansas Department of Human Services*, 93 Ark. App. 395, 219 S.W.3d 705 (2005), in deciding whether to grant or deny a motion for continuance. The four factors to which appellant refers are (1) the diligence of the movant; (2) the probable effect of the testimony at trial; (3) the likelihood of procuring the witness’s attendance in the event of postponement; and (4) the filing of an affidavit, stating not only what facts the witness would prove, but also that the appellant believes them to be true. *Id.* at 401, 219 S.W.3d at 708. The only factor relevant to this case is the first factor, diligence of the movant. The remaining factors are important only where



the continuance is requested in order to secure the testimony of a witness, which is not at issue here.

The court may, upon motion and for good cause shown, continue any case previously set for trial. Ark. R. Civ. P. 40(b) (2011). The granting or denying of a continuance is within the sound discretion of the circuit court, and we will not reverse the court's decision absent an abuse of discretion amounting to a denial of justice. *City of Dover v. City of Russellville*, 346 Ark. 279, 286, 57 S.W.3d 171, 175 (2001). An appellant must show prejudice from the denial of a continuance. *Looney v. Raby*, 100 Ark. App. 326, 329, 268 S.W.3d 345, 348 (2007). Finally, lack of diligence alone is sufficient to deny a continuance. *City of Dover*, 346 Ark. at 286, 57 S.W.3d at 175.

In this case, appellant did not request a continuance until the hearing began. He admitted to the circuit court that he had notice of the hearing two months before the trial. We note that he argues on appeal that he did not have notice until three weeks before the hearing, referring to the final certified copy of the order that he received on January 28, 2011. In either case, we hold it was not an abuse of discretion for the court to find that appellant had sufficient time to secure an attorney and that his request for a continuance to obtain one on the eve of trial showed a lack of diligence. See Ark. R. Civ. P. 6(c) (2011) (requiring motion and notice of hearing to be served no later than twenty days before the hearing). While he argues on appeal that he did not understand the law, his legal remedies or defenses, or the legal basis for objections, he does not argue or explain how he would have proceeded differently with an attorney. This is true in spite of the fact that he is represented by counsel



on appeal. In other words, he makes no argument on appeal regarding how he was prejudiced. It is appellant's burden to establish prejudice. *Lauderdale v. State*, 2011 Ark. App. 269. He mentions that, because of his lack of legal skills, he was unable to articulate to the circuit court whether treble damages should be awarded and he notes that the circuit court found the contract unconscionable, but he does not explain the defense he would have presented with an attorney regarding treble damages. Moreover, the circuit court refused to award late fees under the contract, and treble damages thereon, because the court found the late fees unconscionable. We fail to see how this prejudiced appellant.

We hold that the circuit court did not abuse its discretion in denying appellant's motion for continuance and affirm its order.

Affirmed.

VAUGHT, C.J., and PITTMAN, J., agree.