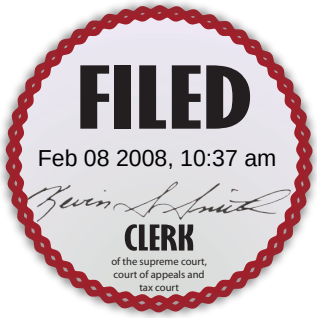

ATTORNEY FOR APPELLANT:

KENT HULL
South Bend, Indiana

IN THE
COURT OF APPEALS OF INDIANA

KY MORTON,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 71A03-0708-CV-386
	)	
JEROME P. IVACIC,	)	
	)	
Appellee.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable William T. Means, Judge
Cause No. 71D03-0703-SC-2172

February 8, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Ky Morton appeals the small claims court's judgment awarding Jerome Ivacic immediate possession of property Morton leased from Ivacic. Morton raises the following issues:

1. Did the small claims court violate Morton's Fourteenth Amendment right to procedural due process by not allowing him to present a defense?

2. Did the bifurcation of the immediate possession aspect of the case and the damages aspect of the case violate Morton's Fourteenth Amendment right to due process and equal protection?

We affirm.

Morton leased the property located at 1513 Miami Street, Apartment B, South Bend, Indiana, from Ivacic for nearly five years. In March of 2007, Ivacic filed an application for immediate possession of real property with the small claims court. Ivacic sought to have Morton ejected from the property and to have possession of the property returned to him.

On May 17, 2007, the small claims court held a hearing on Ivacic's application for immediate possession. During the course of the hearing, the small claims court specified that the hearing was only meant to address the issue of possession of the property. Any issues concerning damages would be addressed at a second hearing scheduled for June 15, 2007. Ivacic testified that his relations with Morton over the last three or four months had been rough due to "unpaid rent, disruptive behavior, and other people living in the unit." *Transcript* at 3-4. He then proposed that he and Morton should decide upon a mutually agreeable move-out date.

The judge asked Morton if he understood what Ivacic was proposing with regard to a move-out date. Morton stated that he did not, and the judge began to explain the situation to him. The following exchange then took place:

> MR. MORTON: Well, I understand that. I just – your Honor, I just want to get this whole thing behind me and I mean he has – I felt that he had a right for a possession of the premises because of unpaid rent, you know, but we made an agreement and I followed the agreement exactly and I paid him everything up-to-date and I'm caught up, you know, so I don't owe him any rent.
>
> And he claims that these lease violations that I've made, like a tenant living with me, and I have a notarized letter from her stating that she doesn't live with me, that she has her own place.
>
> THE COURT: Now, this is not the point, sir.
>
> MR. MORTON: Yes, sir.
>
> THE COURT: If he is claiming damage to the property or other violations, it may be something that he feels he's entitled to some compensation for, that comes up at an additional hearing on June 15th.

Id. at 5.

The judge again tried to explain to Morton that Ivacic was proposing that they choose a move-out date and the following exchange occurred:

> MR. MORTON: Well, I understand that, your Honor, but I don't want to move because I felt that I didn't have any violations. The only violation of my lease was the unpaid rent.
>
> THE COURT: Ultimately, he's going to get possession of the property. So I would suggest to you that you make some agreement with him to pick a date certain to move out. Otherwise, I'm just going to enter an order for – make a preliminary determination and set the bond. And if he posts the bond, you'll have to move. That's just where we are. That's just where we are [sic].
>
> ***
>
> MR. MORTON: So I'm losing my place after four-and-a-half, five years of being a good tenant and I paid him everything up-to-date.

> THE COURT: That isn't necessarily – it isn't necessarily pay everything. That's very, very important, granted, but there are other considerations, such as perhaps too many people living with you.
>
> MR. MORTON: I'm the only person there. No one lives with me. I have a notarized letter.
>
> THE COURT: Sir, where there's smoke there's fire. I mean he isn't making this up. He's a substantial citizen. He's not making this up.
>
> MR. MORTON: He's just wrong, your Honor. Your Honor, he is just wrong. It ain't about him making anything up. He says I have someone living with me and I'm saying that's wrong and I have a letter here that's proof that she does not live with me. She has several addresses in her name and I have a notarized letter from a notary public saying that she does not live with me. So that's one lease violation that is unfounded.
>
> ***
>
> MR. MORTON: I'm sorry, your Honor. I just didn't want to lose my place. I just wanted this to be over with. Because I felt that I did everything he asked me to do. He asked me to pay late fees. I paid his late fees. He asked me to make a payment arrangement. I made a payment arrangement. I got caught up and I asked for a statement of account to make sure that I'm paying everything and then he starts – he got upset and then went back and added more late fees and then, you know, something about this lease violation and everything and the tenant and being argumentative. I'm not trying to argue with the man.

Id. at 6-8.

The judge told Morton that there were two possible options in this instance. Morton and Ivacic could agree upon an acceptable move-out date, or the judge could issue an order granting Ivacic immediate possession of the property upon payment of a $2,000 bond. The benefit of the first option was that it would likely give Morton more time to move out. Under the second option, once Ivacic paid the $2,000 bond, Morton would only have forty-eight hours to vacate the property. Morton again stated that he did not feel that he owed Ivacic anything, and the judge responded, "Evidently, you owe him

something." *Id.* at 9. The judge then entered an order granting immediate possession of the property to Ivacic upon payment of a $2,000 bond, and this appeal ensued.

Because this case was tried before the bench in small claims court, we review for clear error.[1] *Lowery v. Housing Auth. of City of Terre Haute*, 826 N.E.2d 685 (Ind. Ct. App. 2005). We will affirm a judgment in favor of a party having the burden of proof if the evidence was such that a reasonable trier of fact could conclude that the elements of the claim were established by a preponderance of the evidence. *Id.* We presume that the trial court correctly applied the law and give due regard to the trial court's opportunity to judge the credibility of the witnesses. *Id.* We will not reweigh the evidence, and we will only consider the evidence and reasonable inferences therefrom that support the trial court's judgment. *Id.*

As a preliminary matter, we note that Ivacic has not filed an appellee's brief. As such, we are not required to develop arguments on his behalf, and we may reverse the trial court upon Morton's prima facie showing of reversible error. *McKinney v. McKinney*, 820 N.E.2d 682 (Ind. Ct. App. 2005). In this context, "prima facie" is defined as '"at first sight, on first appearance, or on the face of it."' *Burrell v. Lewis*, 743 N.E.2d 1207, 1209 (Ind. Ct. App. 2001) (quoting *Johnson County Rural Elec. Membership Corp. v. Burnell*, 484 N.E.2d 989, 991 (Ind. Ct. App. 1985)).

[1] Morton's brief does not state the applicable standard of review. We remind Morton's counsel that pursuant to Indiana Appellate Rule 46(A)(8)(b), an appellant is required to include a concise statement of the applicable standard of review for each issue presented.

1.

Morton first argues that the small claims court violated his Fourteenth Amendment right to procedural due process by not allowing him to present a defense. The Fourteenth Amendment to the United States Constitution prohibits any state from depriving a person of life, liberty, or property without due process of law. "Generally stated, due process requires notice, an opportunity to be heard, and an opportunity to confront witnesses." *Indiana State Bd. of Educ. v. Brownsburg Cmty. Sch. Corp.*, 842 N.E.2d 885, 889 (Ind. Ct. App. 2006). The United States Supreme Court has specifically stated that due process requires that there be an opportunity to present every available defense. *Lindsey v. Normet*, 405 U.S. 56 (1972) (quoting *American Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932)). We have previously held that where a party is not allowed to present a defense, its procedural due process rights were violated in the sense that it was denied its right to be fully heard. *Anderson Fed. Sav. and Loan Ass'n v. Guardianship of Davidson*, 173 Ind. App. 549, 364 N.E.2d 781 (1977).

In this case, Ivacic sought to have Morton ejected from the rental property. In such situations, Ind. Code Ann. § 32-30-3-2 (West, PREMISE through 2007 1st Regular Sess.), provides that at a prejudgment possession hearing, the defendant should be given an opportunity to "show cause why the judge should not remove the defendant from the property and put the plaintiff in possession." In *Cunningham v. Georgetown Homes, Inc.*, 708 N.E.2d 623 (Ind. Ct. App. 1999), although a due process claim was not raised, we reversed the trial court's order granting plaintiff possession of certain property, in part,

because defendant was not given an opportunity, as required by statute, to present evidence at the prejudgment possession hearing.

The situation in this case is different from the one presented in *Cunningham* in that Morton was allowed to present evidence in his defense. Here, Ivacic testified that he should be granted immediate possession of the property because of Morton's failure to pay rent, his disruptive behavior, and because there were other people living with Morton on the property. In an effort to contradict these assertions, Morton testified that he had not violated the lease. He told the judge that he was caught up on his rent payments. Morton explained that he had fallen behind on the rent, and as a result, Ivacic had assessed him late fees, which Morton said he paid. Ivacic then asked Morton to make payment arrangements, which Morton alleged he did. Morton testified that when he got caught up on his rent payments, he asked for a statement of account. He noted that this upset Ivacic and caused him to assess more late fees and to allege lease violations.

Morton also testified that no one lived with him at the rental property. He told the judge that he had a notarized letter from the woman whom Ivacic believed lived with Morton. The record does not indicate whether the judge looked at the letter, and the letter was not introduced into evidence. Morton, though, testified that in the letter, the woman explained that she had several addresses but asserted that she did not live with Morton.

The transcript of the hearing does not indicate that Morton had any further evidence to present or that the small claims court judge barred him from introducing any further evidence. Nor does Morton allege that he had any further defenses to raise. Although Morton may have wanted to elaborate on his defenses, hearings before a small

claims court are to be "conducted informally, with the objective of dispensing speedy justice between the parties according to the rules of substantive law." Ind. Code Ann. § 33-28-3-5(d) (West, PREMISE through 2007 1st Regular Sess.). We have specifically stated that "[a]n expeditious resolution of the claim is essential to the efficacy and attractiveness of the small claims process." *Stout v. Kokomo Manor Apartments*, 677 N.E.2d 1060, 1067 (Ind. Ct. App. 1997). Given the informal nature of small claims proceedings, Morton was given a sufficient opportunity to present a defense. Therefore, Morton's Fourteenth Amendment procedural due process rights were not violated.

2.

In this case, the proceedings were bifurcated by the small claims court with the possession hearing taking place on May 17, 2007, and a damages hearing scheduled for June 15, 2007. Morton argues that this bifurcation of proceedings violated his Fourteenth Amendment rights to due process and equal protection.

Morton's equal protection argument is not supported by cogent argument or citation to authority. *See* Ind. Appellate Rule 46(A)(8)(a) (specifying that appellant's arguments must be supported by cogent reasoning and citations to the authorities, statutes, and appendix that were relied on). His argument is therefore waived. *See Davis v. State*, 835 N.E.2d 1102 (Ind. Ct. App. 2005) (noting that the failure to present a cogent argument or citation to authority constitutes waiver of the issue for appellate review), *trans. denied*.

As to Morton's due process claim, the United States Supreme Court has specifically addressed the bifurcation issue raised by Morton and concluded that this does

not violate due process. *Lindsey v. Normet*, 405 U.S. 56. We will not revisit this issue. Therefore, the trial court's bifurcation of the proceedings did not violate Morton's Fourteenth Amendment right to due process.

Judgment affirmed.

MATHIAS, J., concurs.

ROBB, J., dissents without opinion.