

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 9, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-2735

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

PHILIP ANDERSON AND JACKIE ANDERSON,

PLAINTIFFS-RESPONDENTS,

V.

JUDITH LEAMY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Langlade County:
JAMES P. JANSEN, Judge. *Affirmed.*

MYSE, P.J. Judith Leamy, pro se, appeals a small claims judgment awarding Philip and Jackie Anderson \$300 pursuant to a written contract whereby Leamy agreed to pay the Andersons \$300 if they vacated a rented house by May 31, 1998. Leamy contends the trial court erred because the Andersons breached the agreement when they failed to remove certain items of personal property by the agreed upon date. Leamy further contends she did not have a fair

opportunity to present evidence to rebut the Andersons' claim or in support of her counterclaim. She asserts the trial court refused to grant her request for a continuance to obtain the testimony of absent witnesses and refused to allow testimony of witnesses present the day of the proceeding. Because this court concludes that Leamy has failed to prove that the Andersons breached the agreement and further concludes that the trial court properly denied her request for a continuance and properly dismissed Leamy's counterclaim, the judgment is affirmed.

Philip and Jackie Anderson rented a house from Harry Clark. Judith Leamy eventually purchased the house from Clark while the Andersons were tenants. Leamy and the Andersons then entered into an agreement that if they vacated the premises by May 31, 1998, Leamy would pay the Andersons \$300. The Andersons vacated the house on May 27.¹ Leamy subsequently found numerous items of personal property remaining on the premises. She contends she contacted the Andersons several times reminding them that if they remove the property, she would pay them the \$300. The Andersons contacted Clark for the purpose of removing the property from the premises. The day Clark arrived to remove the property he discovered that Leamy had already hired people to remove the property. At that point, neither Clark nor the Andersons removed the items. Instead, the personal property was removed and discarded by people Leamy retained for that purpose. Because the Andersons did not remove the personal property, Leamy withheld the \$300. The Andersons brought suit in small claims court to recover the money under the agreement. Leamy filed a counterclaim

¹ Judith Leamy testified that the Andersons phoned that they were out on May 27. Judith's husband testified that the keys were surrendered on May 27. Jackie Anderson testified that they moved out the Friday of Memorial Day weekend.

against the Andersons for costs incurred in removing the items of personal property and cleaning the house. The trial court awarded judgment to the Andersons for \$300 and dismissed Leamy's counterclaim. Leamy now appeals.

Although Leamy's appellate brief is disorganized and confusing, this court construes the following issues as raised on appeal: (1) the trial court erred because the Andersons breached the agreement by leaving their personal property on the premises beyond the May 31 deadline; and (2) Leamy was denied a fair opportunity to present evidence to rebut the Andersons' claim or in support of her counterclaim because the trial court refused to grant her request for a continuance to obtain the testimony of absent witnesses and refused to allow testimony of witnesses present the day of the proceeding.

Leamy first contends that the Andersons breached the agreement by leaving their personal property on the premises after May 31. Leamy's claim that the Andersons breached their agreement by failing to remove their personal property prior to May 31 raises a question of fact as to whether this was the Andersons' personal property. This court defers to the trial court's findings of fact unless they are unsupported by the record and are, therefore, clearly erroneous. Section 805.17(2), STATS. We search the record not for evidence opposing the trial court's decision, but for evidence supporting it. *Mentzel v. City of Oshkosh*, 146 Wis.2d 804, 808, 432 N.W.2d 609, 611 (Ct. App. 1988).

The trial court found that the personal property left behind belonged to Harry Clark. The record supports this finding. The Andersons contend that previous tenants had left the personal property, that Harry Clark advised them they could either keep or leave the items in the house, and that they had no use for the items of personal property.

Leamy contends that the property was not hers because it was not identified on her offer to purchase from Clark. This argument fails to establish that the Andersons owned the items of property. Leamy also testified she believed that the Andersons assumed ownership by virtue of their use of the property during their four years of tenancy. Such testimony is at best opinion. Finally, Darrell Leamy testified that Clark told the Leamys that the furniture belonged to the Andersons. While this testimony places ownership of the property in dispute, the trial court was entitled to believe the Andersons' testimony that this was not their personal property. When the trial court is the trier of fact, it is for that court to determine the credibility of witnesses and the weight to be given their testimony. *Leciejewski v. Sedlak*, 116 Wis.2d 629, 637, 342 N.W.2d 734, 738 (1984). Accordingly, the trial court could properly find that the property remaining on the premises after the Andersons had vacated was not their property.

Leamy also contends that she did not have a fair opportunity to present evidence to rebut the Andersons' claim or to support her counterclaim because the court refused to grant her request for a continuance so that absent witnesses could be present and refused to allow witnesses who were present to testify.

Motions for a continuance are addressed to the trial court's discretion, and that discretion will not be disturbed on appeal except when it is clearly shown that there has been a misuse. *State v. Echols*, 175 Wis.2d 653, 680, 499 N.W.2d 631, 640 (1993). When a continuance is sought to obtain a witness's testimony, the trial court is charged to consider whether the testimony of the absent witness is material, whether the moving party has been guilty of any neglect in procuring the witness's attendance, and whether there is a reasonable

expectation that the witness can be located. *Bowie v. State*, 85 Wis.2d 549, 556-57, 271 N.W.2d 110, 113 (1978).

Leamy appears to argue that a continuance was required because of the absence of two witnesses, an individual who cleaned the house after it was vacated, and Clark, the prior owner. The record, however, reflects that Leamy only sought the continuance based on the absence of the individual who cleaned the house. Further, Leamy presented the court with a letter written by this witness describing the condition of the house, as an alternative to the witness's appearance. This letter was accepted without objection. Leamy did not request a continuance due to Clark's absence, and there is nothing in the record demonstrating that Leamy sought his attendance in the first instance. If Clark's testimony was required, Leamy had the opportunity to subpoena Clark and compel his presence at the time of trial. Leamy's failure to compel the testimony or at least attempt to obtain Clark's presence was a result of her omissions. This court cannot conclude on this record that the trial court erred by denying Leamy's request for a continuance. Leamy acquiesced in the substitution of the letter for a witness's appearance and has not demonstrated she attempted to procure Clark's attendance at the proceeding. This court concludes that the trial court reasonably exercised its discretion by completing the trial on the day scheduled.

Leamy also appears to claim she was not provided a fair opportunity to present evidence because the trial court would not allow witnesses who were present to testify. Apparently, other witnesses were in attendance the day of the proceedings, but the record does not demonstrate Leamy attempted to call them to testify. Furthermore, it is clear from the record that both Leamy and others presented evidence to the trial court to rebut the Andersons' claim and in support of her counterclaim. The court heard testimony from both Leamy and her

husband, Darrell. The court also had before it the letter from the individual hired to clean the house and the agreement between Leamy and the Andersons. In sum, this court concludes Leamy was accorded a fair opportunity to present evidence both to rebut the Andersons' claim and to support her counterclaim.

Based on the foregoing, this court concludes that there was sufficient evidence to support the trial court's finding that the personal property left was not the Andersons'. The judgment in favor of the Andersons in the amount of \$300 is hereby affirmed. This court further concludes that the trial court properly denied the request for a continuance and properly dismissed Leamy's counterclaim based upon Leamy's inability to prove that the Andersons were responsible for the cost of removing the personal property remaining at the premises. The dismissal is hereby affirmed.

By the Court.—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.

