COURT OF APPEALS
DECISION
DATED AND FILED

January 16, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1246 **Cir. Ct. No. 2007SC1208**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

LAKESIDE GARDENS,

PLAINTIFF-RESPONDENT,

V.

NYLA LASHAY,

DEFENDANT-APPELLANT,

CHRISTINE LASHAY,

DEFENDANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: RICHARD J. NUSS, Judge. *Reversed and cause remanded with directions.*

¶1 BROWN, C.J.[1] Nyla LaShay's tenancy was terminated because she allegedly kept cats in her apartment, contrary to the lease terms. LaShay fought her eviction on multiple grounds, all to no avail, as the small claims court entered a judgment for eviction. She appeals, again raising several grounds, but we deem one issue to be dispositive. LaShay was a tenant in federally subsidized Section 8 New Construction housing. As such, the owner could only terminate upon strict compliance with the federal laws regarding notice and the small claims court was required to apply that law to this case. Because the small claims court declined to apply federal law, this court must reverse and remand with directions which we will later specify.

¶2 We need only recite those facts pertinent to our decision. Lakeside Gardens alleged that its management entered LaShay's apartment on March 30, 2007, in order to do emergency repair of a water leak and discovered two cats, in violation of the lease. As a result, Lakeside gave a ten-day notice terminating tenancy for breach of the lease. The notice, which LaShay says was posted on the door of her apartment, read in relevant part:

> This notice terminates your tenancy and requires you to remove from the following described premises on or before April 13, 2007, unless you comply with the lease agreement. Resident Handbook page 5 states "Lakeside Gardens does not allow any large animals in the apartments …. Large animals include … cats ….
>
> On March 30, 2007 while … investigating a water leak we personally noticed that you had 2 cats in your apartment. I had spoken to you about this at the time and you stated you knew that animals were not allowed. This action is a violation on your lease agreement and could lead

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

> to your eviction. You have 10-days to correct all behaviors we [sic] will be inspecting your apartment in the next 10 days to make sure the animals are removed.

¶3 Lakeside alleged in its complaint that when its representatives returned to inspect the premises on or about April 13, 2007, LaShay would not let them enter. On May 1, an eviction complaint was filed with the court. The complaint was answered, and on the return date, the small claims court heard from the lawyers and also certain interested persons, though no one was sworn in. Thereafter, the court rendered judgment. LaShay filed an undertaking which stayed the eviction[2] and we now have this appeal.

¶4 As we said, LaShay brings several issues to us on appeal. And as we said, one issue is dispositive. Before getting to the dispositive issue, we feel compelled to at least list all the issues raised by LaShay that we will *not* decide. We will, however, *discuss* one of these issues later on in our opinion because it is relevant to our directions on remand.

¶5 Here is the list of the nondispositive issues. LaShay claims: that the owner identified in the lease is a different party than Lakeside Gardens, thus bringing into question Lakeside's right to bring this eviction under either state statutes or federal rules; that the notice of termination was not served as mandated by the lease; that both the lease and federal rules mandate a thirty-day notice of termination in this instance; that federal law prohibits termination prior to the end of the lease term if it is for "other good cause," which she claims is the case here; that the ten-day notice did not apprise her of her procedural rights as required under both the lease and federal regulations; that the lease does not, within its four

[2] *See* WIS. STAT. § 799.445.

corners, prohibit cats—rather, the rule is contained in a handbook which was not incorporated into the lease; that just because she denied entry, this does not mean the cats were still on the premises; that the cats were no longer on the premises; that a small claims trial may only proceed on the return date with the consent of the parties per WIS. STAT. § 799.21(2) and she did not consent; that the trial was conducted in such summary fashion, with no swearing-in of witnesses despite significant factual disputes on issues central to eviction; that she did not have a meaningful opportunity to be heard; and thus, that she was denied due process.

¶6 Now, we get to the dispositive issue. When LaShay's attorney pointed out that notice provisions for Section 8 tenants must comply with federal law, the small claims court replied: "Ma'am, this is a contractual situation, regardless of what entity they may be subservient, and the bottom line is that they certainly are required to comply and conform with the terms of the lease. The mere fact that there might be some other standards or guidelines out there doesn't necessarily …." Later, when counsel again brought up federal regulations, the small claims court responded: "Well, you might want to take that to district court, ma'am. I'm looking at the four corners of the lease."

¶7 The small claims court erred. Absent a showing that the termination complied with the lease terms *and federal law*, the owner is not entitled to terminate a Section 8 tenancy, nor is it entitled to possession of the real property. *See* ***Driver v. Hous. Auth. of Racine County***, 2006 WI App 42, 289 Wis. 2d 727, 713 N.W.2d 670. In ***Driver***, this court held that strict compliance with federal regulations for Section 8 voucher tenancies, including that specific information be contained within a written termination notice, is imperative as a matter of law and policy. ***Id.***, ¶22.

¶8 Now, it could be argued that Section 8 tenants should not be accorded any greater rights than any other kind of tenant in this state and that Section 8 tenants should not be able to avail themselves of rules and regulations outside the written lease. This has some facial logic, surely. But, if such argument were to be made, closer examination would scuttle the premise. Owners and developers that get into the Section 8 housing market may well have some altruistic reason for doing so, but they also have economic incentive. Under the program, the owners receive subsidies. For example, tenants make rental payments based upon their income and ability to pay. HUD then makes "assistance payments" to the private landlords to make up the difference between the tenant's contribution and a "contract rent" agreed upon by the landlord and HUD. Another subsidy is that the building project may be financed by a loan insured by FHA for up to twenty years. There may be others of which we are unaware. But the fact is that Section 8 owners obtain economic assistance.

¶9 In return, Section 8 rules provide for specific procedure regarding termination of tenants with which the owners must strictly comply. Section 8 is a national program. Without uniformity in how it is managed, enforcement and oversight would be unwieldy and burdensome. Uniformity in the way termination notices are made is a burden that Section 8 owners can easily bear in order to make certain that the Section 8 tenant's interest is protected. *See* ***Pool v. City of Sheboygan***, 2006 WI App 122, ¶13, 293 Wis. 2d 725, 719 N.W.2d 792, *affirmed* 2007 WI 38, 300 Wis. 2d 74, 729 N.W.2d 415.

¶10 This quid pro quo makes eminent sense from a law and economics perspective. Section 8 housing for persons without the wealth to otherwise secure housing is the function of a political market rather than a private market for a good reason. Without subsidies and rental payment security, there would be no

incentive to build good housing units for rental to people who cannot afford it. In return, the political market seeks to spend its money sensibly so that unsustainable sums are not wasted on civil servants having to micromanage each Section 8 housing lease. That is why the burden of providing effective notice is shifted to the owner. There is almost zero economic burden on the owner to follow the rules and it would take little time at all to print lease forms that follow federal law. Where government does not have to pick up the cost of enforcement and owners have no real cost in following the rules, Section 8 law becomes maximally efficient. If the owner's lease terms do not conform to federal rules or if the owner does not follow the rules, it is the fault of the owner and the owner alone and results in an inefficient use of resources and time by the owner—a circumstance that can be easily fixed. We conclude that the small claims court must look to the federal rules no matter what the lease terms may say and that the owner must strictly comply with those federal rules for good reason, as we have explained. It is not for this court to determine whether, in fact, federal rules were violated. That is for the small claims court to determine on remand.

¶11 This brings us to the remand. The small claims court refused to allow a trial in the normal sense of the word (sworn witnesses, direct examination, cross examination, etc.) because it considered eviction actions to be summary in nature and thus wholly informal. We acknowledge that a court has great latitude in the conduct of small claims trials, as the rules of evidence do not apply. *See* WIS. STAT. § 911.01(4)(d). We further acknowledge that there are a very limited number of issues permissible in an eviction action. ***Clark Oil & Refining Corp. v. Leistikow***, 69 Wis. 2d 226, 234-35, 230 N.W.2d 736 (1975), recited those issues as follows: (a) whether the relation of landlord and tenant exists between the parties, (b) whether the tenant is holding over, (c) whether proper notice was

given, (d) whether the landlord has proper title to the premises, and (e) whether the landlord is attempting a retaliatory eviction. Thus, anything outside the five listed issues is irrelevant.

¶12 But here, LaShay's arguments pertain to issues (a), (c) and (d). LaShay certainly has the right under the law to contest these issues. And how may these issues be contested? In ***Highland Manor Associates v. Bast***, 2003 WI 152, ¶16, 268 Wis. 2d 1, 672 N.W.2d 709, the supreme court wrote about how eviction proceedings are intended to be "as summary *as possible* because there is seldom an issue for trial." (Emphasis added.) But if there *are* issues for trial, then the proceedings are not intended to be a hollow ritual, totally devoid of issue joining and an opportunity to be heard. The present eviction procedure is a compromise between the former procedure, which allowed full inquiry into all related issues, and a totally summary procedure: for example, proceedings by affidavit and order to show cause. Robert F. Boden, *1971 Revision of Eviction Practice in Wisconsin*, 54 MARQ. L. REV. 298, 302 (1971). In rejecting the totally summary procedure, the legislature recognized that there are issues which, in all fairness, should be resolved even in an accelerated procedure. If the court were to refuse to allow LaShay to present evidence which goes to the heart of the ultimate issues, including the very right to possession, it would, in effect, be establishing the totally summary procedure which the legislature rejected.

¶13 Moreover, we do not read the relaxation of evidentiary rules to mean that witnesses should not be sworn. Rather, it means that certain evidentiary rules relating to hearsay, opinion evidence and the like are relaxed. But swearing in of witnesses is a due process hallmark dating back to English common law—it is not an "evidentiary" rule as much as it is a rule of fundamental process. Our research has uncovered *no* published case that says a court may disregard the need to swear

in witnesses at a trial where factual findings must be made. The small claims court is not at liberty to disregard this practice, even in a summary eviction procedure. If a credibility determination must be made by the court, the witnesses must be sworn.

¶14 This cause is reversed and remanded with directions for a new trial. At such trial, LaShay may present any and all pertinent ***Clark Oil*** issues. Because compliance with federal rules is relevant to at least one of the ***Clark Oil*** issues—whether proper notice was given—that will also be an issue to be resolved on remand. *See* ***Clark Oil***, 69 Wis. 2d at 234-35. Finally, if any of the issues on remand call for credibility determinations, witnesses shall be sworn in.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.