COURT OF APPEALS
DECISION
DATED AND FILED

October 9, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0655-FT

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

JEROME ESSER,

PLAINTIFF-RESPONDENT,

V.

DAVID BEERS AND STEPHANIE GORDON,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Reversed.*

VERGERONT, J.[1] David Beers and Stephanie Gordon appeal from a judgment of eviction ordering that they vacate premises owned by Jerome Esser where they were then living. The judgment was entered based on the pleadings. On appeal, Beers and Gordon (appellants) contend that the trial court erred in granting judgment against them on the pleadings, because there were disputed

[1] This appeal is decided by one judge pursuant to § 752.31(2)(a), STATS.

issues of fact entitling them to a trial on Esser's claim for eviction. We agree with the appellants and therefore reverse.

BACKGROUND

On December 12, 1996, Esser filed an eviction and replevin summons and complaint in small claims court which stated: "They [appellants] refuse to pay rent." A "Five Day Notice to Quit or Pay Rent" contains a stamp with the same filing date. This notice to the appellants is dated November 13, 1996, and states:

> *Tenant owes rent of $725.00 for October, 1996, and for November, 1996, and owes security deposit of $725.00. Tenant was employed by owner with compensation for labor at $7.00 per hour to be offset against the rent and security deposit. Total labor was $1,635.76. Owner paid $400.00 of labor to tenant with a net of $1,235.76 to apply to rent and security deposit. Tenant quit employment on November 6, 1996. Tenant owes $939.24 to owner.

Gordon appeared for both appellants, entered a denial and requested a jury trial. A jury trial was scheduled for February 13, 1997.

Appellants retained counsel and on February 4, 1997, their counsel filed a notice of appearance, an answer including affirmative defenses, and counterclaims. The answer denied that the appellants owed rent when they were served with the Notice to Quit or Pay Rent on November 13, 1996, and alleged that the appellants paid $1,450 to Esser on September 30, 1996, for the security deposit and the first month's rent; that November rent was to be taken out of wages owed to Beers which were well in excess of $1,000 and that on the date of service of the notice, Esser owed the appellants at least $510.76 in unpaid wages. The answer alleged three affirmative defenses—retaliatory eviction, breach of

§ 704.07, STATS.,[2] and breach of implied warranty of habitability—and several counterclaims, including a counterclaim for unpaid wages, electricity and water

[2] Section 704.07, STATS., provides in part:

> Repairs; untenantability. (1) APPLICATION OF SECTION. This section applies to any nonresidential tenancy if there is no contrary provision in writing signed by both parties and to all residential tenancies. An agreement to waive the requirements of this section in a residential tenancy is void. Nothing in this section is intended to affect rights and duties arising under other provisions of the statutes.
>
> (2) DUTY OF LANDLORD. (a) Unless the repair was made necessary by the negligence or improper use of the premises by the tenant, the landlord is under duty to:
>
> 1. Keep in reasonable state of repair portions of the premises over which the landlord maintains control;
>
> 2. Keep in a reasonable state of repair all equipment under the landlord's control necessary to supply services which the landlord has expressly or impliedly agreed to furnish to the tenant, such as heat, water, elevator or air conditioning;
>
> 3. Make all necessary structural repairs;
>
> 4. Except for residential premises subject to a local housing code, repair or replace any plumbing, electrical wiring, machinery or equipment furnished with the premises and no longer in reasonable working condition, except as provided in sub. (3) (b).
>
> 5. For a residential tenancy, comply with a local housing code applicable to the premises.
>
> ….
>
> (4) UNTENANTABILITY. If the premises become untenantable because of damage by fire, water or other casualty or because of any condition hazardous to health, or if there is a substantial violation of sub. (2) materially affecting the health or safety of the tenant, the tenant may remove from the premises unless the landlord proceeds promptly to repair or rebuild or eliminate the health hazard or the substantial violation of sub. (2) materially affecting the health or safety of the tenant; or the tenant may remove if the inconvenience to the tenant by reason of the nature and period of repair, rebuilding or elimination would impose undue hardship on the tenant. If the tenant remains in possession, rent abates to the extent the tenant is

(continued)

bills for Esser's cattle operation, the time appellants spent cleaning the premises, and disbursements they made to make it habitable.

Esser, through counsel, filed various motions in limine and a request to sever the trial of the appellants' counterclaims from the trial of the eviction claim. At the hearing on these motions, held on February 10, 1996, Esser, through counsel, made an oral motion for a judgment on the pleadings. Esser's counsel argued that, based on the pleadings, it was undisputed that it was agreed that Beers do farm work for Esser as a condition for living on the premises; it was also undisputed that Beers quit work as a general laborer, although he continued to feed and water the cattle. Esser's counsel contended that the Notice to Quit or Pay Rent shows that the eviction was based both on failure to pay rent and on quitting work as a general laborer for Esser.

Appellants' counsel opposed the motion for a judgment on the pleadings. She argued that Beers' employment with Esser was not a condition of the tenancy and the answer did not allege that it was, but rather alleged that the amount Beers was owed for his labor was an offset against the amount owed for rent and that the amount Esser owed Beers was more than what the appellants owed him. She also argued that the complaint did not allege quitting employment as a ground for eviction and neither did the Notice to Quit or Pay Rent. She acknowledged that Beers had quit and stated that was because he was not being paid.

> deprived of the full normal use of the premises. This section does not authorize rent to be withheld in full, if the tenant remains in possession….

The trial court interpreted the notice as alleging that employment was a condition of the tenancy. It concluded that since appellants' counsel acknowledged that Beers had quit and the answer did not deny that he had quit, Esser was entitled to a judgment for eviction on the pleadings. The court interpreted the allegation in the answer concerning offset as a concession that employment was a condition of the tenancy. The court entered an order on February 11, 1997, directing the appellants to vacate the premises by February 14, 1997, and scheduled a trial for March 19, 1997, on Esser's claim for damages and the appellants' counterclaims. The court denied the appellants' motion for a temporary stay pending a motion for relief pending appeal, denied their motion for relief pending appeal without filing an undertaking, and denied their motion for reconsideration.

The appellants filed a notice of appeal. Just after this case was submitted for disposition to this court, we were advised by Esser's counsel that the appellants filed a Chapter 7 bankruptcy proceeding on April 18, 1997. In response to an order from this court, on August 26, 1997, we issued an order staying this appeal pending completion of the bankruptcy proceedings or lifting of the bankruptcy stay. The parties filed arguments on the effect of the bankruptcy on this appeal. On September 5, 1997, we received a letter from appellants' counsel, copied to Esser's counsel, advising us that the bankruptcy proceedings were completed on July 29, 1997, and that the bankruptcy stay had been lifted. Appellants' counsel asked that we proceed to decide this appeal. Esser has not filed a response.

DISCUSSION

We first address Esser's contention, made in his responsive brief, and again in response to our order concerning the bankruptcy, that the appeal is moot because the appellants have vacated the premises. The appellants reply that it is not moot because a judgment of eviction may affect their credit rating and their ability to obtain rental housing in the future. We are uncertain how a judgment of eviction might affect their credit rating in view of the bankruptcy. However, we are persuaded that such a judgment could adversely affect their ability to obtain rental housing. We therefore conclude that a decision on this appeal is not one that will have no practical effect, and we decline to dismiss it on the grounds of mootness.

The appellants contend that the trial court erred in granting a motion for judgment on the pleadings because the complaint alleged only nonpayment of rent as a ground for eviction and the trial court could not consider matters outside the pleadings—the Notice to Quit or Pay Rent—without giving the appellants the opportunity to also present additional materials outside the pleadings. The appellants also argue that the court's interpretation of the notice—that employment was a condition of the tenancy—is a "strained inference at best"; that they did not intend to admit this in their answer; and that the court erred in not interpreting the pleadings in the light most favorable to them, the opposing party.[3] Esser responds that the notice was properly considered by the trial court because it was part of the complaint, and it was properly interpreted by the court. Esser also

[3] In view of our resolution of these issues, it is unnecessary to address the appellants' other claims of trial court error.

argues that the appellants' allegation that they could offset unpaid wages against the rent is a concession that employment was a condition of the tenancy.

The propriety of the trial court's grant of a judgment on the pleadings involves a question of law, which this court reviews de novo. ***Freedom From Religion Foundation v. Thompson***, 164 Wis.2d 736, 741, 476 N.W.2d 318, 320 (Ct. App. 1991). A judgment on the pleadings is essentially a summary judgment minus affidavits and other supporting documents. ***Id.*** We first look at the complaint to determine if it states a claim for relief; if it does, we look at the responsive pleadings to determine whether a material fact exists. ***Id.***, *quoting* ***Schuster v. Altenberg***, 144 Wis.2d 223, 228, 424 N.W.2d 159, 161 (1988). A judgment on the pleadings is proper only if there is no genuine issue of material fact. ***Id***. Because the methodology for judgment on the pleadings involves the first two steps of summary judgment methodology, ***id.***, we apply certain principles from summary judgment methodology. The burden is on the moving party to establish the absence of a genuine issue of material fact, *see* ***Bantz v. Montgomery Estates, Inc.***, 163 Wis.2d 973, 984, 473 N.W.2d 506, 510 (Ct. App.1991), and we draw all reasonable inferences in favor of the nonmoving party. *See* ***Grams v. Boss***, 97 Wis.2d 332, 339, 294 N.W.2d 473, 477 (1980).

On this record, we are unable to resolve the dispute over whether the notice of pleadings was attached to the complaint that was filed on December 12, 1996, and served on appellants.[4] The trial court made no finding on this point.

[4] The form complaint instructs: "Attach a copy of the termination notice which was served upon the complaint." Although the complaint and notice each contain a stamp with the same date and time of filing, each is numbered as separate one-page documents in the record. The affidavit of service describes the "papers" served as "Evictions summons and replevin complaint" and do not refer to the number of pages.

We will assume for purposes of discussion that the notice was attached to the complaint such that it was proper for the trial court to consider it as part of the motion for a judgment on the pleadings. We nevertheless agree with the appellants that the complaint (with notice) and the answer, drawing all reasonable inferences in the appellants' favor, presented genuine issues of material fact which entitled the appellants to a trial on the claim for eviction.

The Notice to Quit or Pay Rent states that there was to be an offset of compensation from labor against the rent and security deposit and states that "tenant quit employment." However, it does not expressly state that a condition of the tenancy was that Beers or Gordon work for Esser. That may be a reasonable inference but it is not a necessary one, because the notice is clearly asserting as a ground for eviction that the appellants owe rent, after the offset, which they have not paid. The appellants' alternative interpretation of the notice is a reasonable one: that the eviction is for nonpayment and the assertion about the offset and quitting is to explain how Esser is computing the unpaid rent.

In their answer, the appellants allege that there was an agreement to offset wages owed Beers against rent, thus agreeing on this point with Esser's description of the agreement between the parties. However, there is nothing in the answer that would give rise to a reasonable inference that the appellants are agreeing that employment was a condition of the tenancy, even if the rent were otherwise paid. The answer denies that the appellants were behind in their rent when the notice was served and, in the affirmative defense of breach of § 704.07, STATS., alleges that their "payments of $2,170.39, which do not include their security deposit of $725 plus 80 hours of their labor for cleaning far exceeded the value of 5 months rent for the premises in the condition it actually was, and more

than fully compensated plaintiff for the use appellants were able to derive from the premises."

Esser argues that, as a matter of law, there cannot be a setoff of obligations unless they are "mutual" and that means they are part of the same transaction. Esser reasons from this premise that the allegation in the answer that there was to be a setoff of the wages from Beers' labor against the rent is, in effect, a concession that Beers' labor was a condition of the tenancy. Esser cites in support of this argument ***Soo Line R. Co. v. Escanaba & Lake Superior R. Co.***, 840 F.2d 546, 551 (7th Cir 1988). However, that case does not support Esser's argument. ***Soo Line*** dealt with the propriety of deferring execution of one judgment until the dispute on another debt between the same parties was adjudicated, without an agreement between the parties to do so. The court referred to the common law right of setoff which permits a setoff only when the debts are mutual and concluded that the adjudicated debt and the unadjudicated debt were not mutual because they arose at different times out of different circumstances. ***Soo Line***, 840 F.2d at 551. The appellants here are not relying on a common law right of setoff. Rather, they allege that they and Esser agreed to set off unpaid wages against the rent. Esser has provided us with no authority for the proposition that parties may not agree to a setoff in these circumstances unless the employment is a condition of the tenancy, and we are aware of none.

Esser also contends that the appellants have no right to remain on the premises without paying rent, even if the employment is not a condition of the tenancy. The appellants do not dispute that. As we have noted above, they contend they did not owe any rent on the date the notice was served and that, according to their view of what rent they owed and what they paid, Esser received

all the rent he was entitled to for at least five months.[5] Esser is correct that a defense under § 704.07, STATS., of untenantability does not permit a tenant to both remain in possession of premises the tenant contends are untenantable and withhold rent "in full." Section 704.07(4). However, that same section provides that "if the tenant remains in possession, rent abates to the extent the tenant is deprived of the full normal use of the premises." ***Id***. The answer does not allege, or reasonably imply, that the appellants have withheld rent in full. Rather, it alleges that the rent they owe is abated due to the untenantability of the premises.

Whether the premises were untenantable and, if so, the proper amount of abatement are factual disputes, as are the issues of the amount the appellants paid Esser, the amount of unpaid wages due Beers, the terms of the agreement[s] between the parties and, finally, whether the appellants breached the agreement with respect to tenancy. These issues cannot be resolved by a judgment on the pleadings and the trial court erred in granting a judgment of eviction on the pleadings.

By the Court.—Judgment reversed.

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

[5] Presumably the appellants are referring to October 1996 through February 1997, the month in which the answer was filed and the hearing took place.