COURT OF APPEALS
DECISION
DATED AND FILED

March 12, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2421-FT

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

WILLIAM FARINA,

PLAINTIFF-APPELLANT,

V.

MERIDIAN GROUP, INC.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: JACK F. AULIK, Judge. *Affirmed.*

DEININGER, J.[1] William Farina appeals an order dismissing his small claims action against his landlord, Meridian Group, Inc., for breach of the implied covenant of quiet enjoyment. Farina sought an abatement of his rent due to noise problems caused by other tenants of the apartment building where he

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

resides. The trial court dismissed Farina's claim, holding that Farina had presented no evidence from which it could conclude that the leased premises were untenantable. Farina contends the trial court erred because he was denied a remedy for his injury, in violation of Article I, section 9 of the Wisconsin Constitution. We conclude the trial court correctly dismissed Farina's claim because Farina failed to establish a prima facie case for a breach of the implied covenant of quiet enjoyment. Accordingly, we affirm.[2]

BACKGROUND

Farina filed a small claims action against Meridian on September 17, 1996, demanding payment of $1,608 as an abatement of rent because of noise problems created by other tenants in his apartment building, and the additional sum of $1,535 for a theft loss he sustained when his apartment was broken into. A court commissioner found for Farina on the first claim and ordered Meridian to pay him $1,608 plus costs. Meridian requested a trial de novo in circuit court under § 799.207(3), STATS.

At trial, Farina, appearing pro se, testified that he had problems with "neighbors partying all night long." To support this claim, Farina produced reports showing numerous police contacts at his apartment complex for dates between August 1, 1995, and August 31, 1996. He had complained to Meridian about the noise problems since sometime before December 1, 1995. The noise continued despite Farina's complaints. Despite the unresolved complaints, however, Farina signed two additional leases with his landlord for the periods December 1, 1995 to November 30, 1996, and December 1, 1996 to May 30,

[2] This is an expedited appeal under RULE 809.17, STATS.

1997. Before signing the last lease, Farina testified that his landlord again assured him that the noise problems would be taken care of, but, according to Farina, his landlord failed to keep that promise. Farina remained in possession of the apartment at the time of the court trial on June 25, 1997. He asked the court to award him "one third of my rent for a period of one year."[3]

At the close of Farina's case, Meridian moved to dismiss. The trial court determined that Farina had presented no evidence from which it could conclude that the premises were untenantable; that there was no basis other than speculation for it to find some percentage of untenantability based on the noise problems; and finally, that Farina had waived his claim for rent abatement by signing new leases and continuing to reside on the premises long after he became aware of the noise problems. The court granted Meridian's motion to dismiss the action, and Farina appeals the order of dismissal.

ANALYSIS

After the plaintiff has presented his evidence in a trial to the court, the defendant may move to dismiss "on the ground that upon the facts and the law the plaintiff has shown no right to relief." Section 805.17(1), STATS. When deciding a motion to dismiss, a trial court need not view the evidence in the light most favorable to the plaintiff. ***Meas v. Young***, 138 Wis.2d 89, 95 n.4, 405 N.W.2d 697, 700 (Ct. App. 1987). Rather, the court may dispose of the case on its merits at this stage if it concludes that plaintiff has failed to establish a prima facie case. ***Id.*** A circuit court's findings of fact will not be reversed unless they are

[3] Farina also testified that he suffered a $1,535 property loss stemming from a break-in at his apartment. The court did not specifically rule on the theft claim when it dismissed Farina's complaint. Farina does not raise the dismissal of his theft claim as an issue in this appeal.

clearly erroneous. Section 805.17(2); ***Madison Reprographics, Inc. v. Cook's Reprographics, Inc.***, 203 Wis.2d 226, 238, 552 N.W.2d 440, 446 (Ct. App. 1996). However, where facts pertinent to a particular issue are undisputed, application of a legal standard to those facts is a question of law, which this court reviews de novo. ***Id.*** Thus, since Meridian had yet to refute Farina's testimony in any way, whether that testimony established a prima facie case for breach of the covenant of quiet enjoyment is a question of law which we decide independently.

Farina first argues that his residential lease included an implied covenant that he was to have "quiet enjoyment" of the premises. We agree. ***Hannan v. Harper***, 189 Wis. 588, 595, 208 N.W. 255, 258 (1926) ("[I]t seems to be well settled in this state that there is an implied covenant for quiet enjoyment in every lease for a term of less than three years."). Although it is denominated as one of "quiet enjoyment," the covenant does not relate specifically or exclusively to freedom from "noise problems" similar to those experienced by Farina. Rather, the covenant relates to possession of the property and protects the tenant's right to be free from "entry and expulsion from or actual disturbance of … possession." ***Id.*** A breach is not limited to actual expulsion from the leased premises, but can include constructive eviction, that is, '"any act of the landlord or of any one who acts under authority or legal right given him by the landlord which so disturbs the tenant's enjoyment of the premises as to render them unfit for occupancy for the purposes for which they are leased."' ***Id.*** at 596, 208 N.W. at 258-59 (quoted source omitted). *See also* ***Bruckner v. Helfaer***, 197 Wis. 582, 222 N.W. 790 (1929) (holding that "noise problems" may contribute to or cause a breach of the covenant).

Farina next argues that he is entitled to a remedy if the covenant of quiet enjoyment is breached. Again, we agree. WIS. CONST. art. I, § 9 ("Every

person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character ….”); *and see* ***Pines v. Perssion***, 14 Wis.2d 590, 596-97, 111 N.W.2d 409, 413 (1961) (covenants to provide habitable house and to pay rent are mutually dependent; breach of former relieves tenant of liability to pay rent). It appears that Farina is entitled to at least the following two remedies for a breach of the covenant of quiet enjoyment: (1) he may abandon the premises and avoid any further liability for rent (constructive eviction), ***Bruckner***, 197 Wis. at 584-85, 222 N.W. at 791; *see also* ***First Wis. Trust Co. v. L. Wiemann Co.,*** 93 Wis.2d 258, 269-70, 286 N.W.2d 360, 365-66 (1980); or (2) he may remain on the premises and seek to have Meridian’s breach of the covenant enjoined during the term of the lease. ***Hannan***, 189 Wis. at 598-99, 208 N.W. at 259.

Here, Farina remained in possession of the leased premises and sued, not for an injunction, but for an abatement of past rent. He argues that this remedy should be available to him inasmuch as it parallels a similar remedy provided by statute for physical deficiencies in leased premises. Section 704.07(4), STATS., provides as follows:

> (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) [landlord’s duty to repair] 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 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. If the tenant justifiably moves out under this subsection, the tenant is not liable for rent after the premises become untenantable and the

> landlord must repay any rent paid in advance apportioned to the period after the premises become untenantable. This subsection is inapplicable if the damage or condition is caused by negligence or improper use by the tenant.

(Emphasis added.)

Farina's argument is essentially that the public policy underlying the statutory remedy of rent abatement for physical inadequacies which render leased premises partially unusable, also mandates the availability of that remedy for circumstances such as his, where "noise problems" from other tenants interfere with his use and enjoyment of the leased premises. We conclude, however, that Wisconsin law is clear that "a breach of the covenant for quiet enjoyment results only from an eviction, actual or constructive, from the whole or part of the premises." ***Hannan***, 189 Wis. at 595-96, 208 N.W. at 258. "Constructive eviction can only take place when the tenant abandons the premises within a reasonable time after a substantial breach of the lease." ***First Wis. Trust Co.***, 93 Wis.2d at 269-70, 286 N.W.2d at 365-66.[4]

[4] We note that RESTATEMENT (SECOND) OF PROPERTY provides some support for Farina's position:

> [The doctrine that abandonment of the premises is required before a tenant may claim constructive eviction] has been widely criticized on the grounds that it makes the law completely unavailable to tenants who … cannot move, e.g. indigent urban apartment dwellers in many cities, and available only at great risk to others, who must first deprive themselves of such benefit as they are deriving from the premises before getting a ruling on whether they were justified in doing so. The availability of rent abatement or suit for damages when the tenant chooses not to abandon the premises solves both these problems and makes [these] remedies ... more consistent with those available for the landlord's failure to maintain the premises in a tenantable condition …. The availability of these remedies [when] the landlord's breach of his obligations as to the condition of the leased property should provide a solid basis for such remedies when the landlord's conduct interferes with the availability of the leased property.

(continued)

If there is a substantial breach of a lease, the landlord is entitled to notice and has a reasonable time after receiving the notice to remedy the defect. ***Id.*** at 270, 286 N.W.2d at 366. Farina, of course, testified that he notified Meridian of the noise problems, not once but on numerous occasions during the two years prior to the trial of his claim. His claim for a breach of the covenant of quiet enjoyment was waived, however, when Farina failed to abandon the premises within a reasonable time after the breach, and instead signed two new leases for continued occupancy of the apartment. *See* ***id***. at 269-70, 286 N.W.2d at 365-66. (The tenant in ***First Wisconsin Trust Co.*** waited fifteen months after the landlord substantially breached an express covenant for quiet enjoyment before abandoning the premises. ***Id.*** at 267-69, 286 N.W.2d at 364-65. This delay exceeded a reasonable time in which to abandon the premises. ***Id***. at 270, 286 N.W.2d at 366.)

Farina thus failed to establish a prima facie case for breach of the covenant of quiet enjoyment because he did not show that he was either actually or constructively evicted from his apartment. Although Farina complained several times to his landlord regarding the excessive noise emanating from other apartments in his building, he failed to abandon the premises within a reasonable time after the breach. Moreover, he renewed his lease on two separate occasions after he was aware of the noise problems, and after Meridian had failed to act on his complaints. The lease renewals, together with his continued occupancy of the premises, constituted a waiver by Farina of any breach by Meridian of the implied covenant of quiet enjoyment.

RESTATEMENT (SECOND) OF PROPERTY § 6.1, reporter's note 6 at 234-35.

We therefore conclude that the trial court did not err in granting Meridian's motion to dismiss at the close of Farina's case. Farina asserts that the trial court's ruling, and by extension, our disposition of this appeal, creates "a terrible public policy." He cites his lengthy occupancy of the apartment (fifteen years), the relatively recent presence of "horribly disruptive neighbors," and the unfairness in holding that his only remedy is to move out:

> This raises the question of whether the law and public policy require the innocent party to suffer the disruption and inconvenience of having to move, rather than requiring the landlord to remedy the problem so that the innocent tenant can remain happily in the rented unit, as promised in their [sic] rental contract.

Our response to Farina's policy argument is twofold. First, it appears that abandonment of the premises is not the exclusive remedy available to Farina, in that he may seek to enjoin the breach during the term of his lease. ***Hannan,*** 189 Wis. at 598-99, 208 N.W. at 259. Second, whether the remedy of rent abatement, which the legislature has provided in cases where physical or structural defects render leased premises partially unusable, should be extended to circumstances where disruptive neighboring tenants interfere with one's enjoyment of the premises, but the interference does not rise to the level where occupancy is abandoned, is indeed a question of public policy. As such, the question must be addressed to the legislature, or perhaps to the Wisconsin Supreme Court, but it is beyond the charter of this court. *See* ***Jackson v. Benson***, 213 Wis.2d 1, 18, 570 N.W.2d 407, 415 (Ct. App. 1997) (We are an error correcting court; our primary role is neither to evaluate public policy nor to develop the law.).

By the Court.—Order affirmed.

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