

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 17, 1998

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. 98-0580-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

CHATEAU GARDENS APARTMENTS,

PLAINTIFF-RESPONDENT,

V.

SHERRY LOBAJESKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: HENRY B. BUSLEE, Judge. *Reversed and cause remanded.*

NETTESHEIM, J. Sherry Lobajeski appeals from a judgment evicting her from her residence leased from Chateau Gardens Apartments. The circuit court entered judgment against Lobajeski on the return date without a trial despite the fact that Lobajeski had filed an answer to Chateau's complaint. We reverse and remand for a trial.

The controlling facts are straightforward and are not in dispute. Chateau commenced a small claims action against Lobajeski alleging that she was delinquent in her rental payments under a written lease between the parties. On the return date, Lobajeski appeared with her counsel and filed an answer to Chateau's complaint. The answer alleged the following facts. Lobajeski was a resident of Chateau's subsidized housing project which receives funding under the federal project-based Section 8 Certificate program. As such, Chateau was bound by the relevant provisions of the Code of Federal Regulations as part of its contract with HUD. These provisions required Chateau to recalculate Lobajeski's rent based upon her income and expenses. Chateau had failed to recalculate Lobajeski's rent pursuant to these provisions.

On the return date, Chateau stated that Lobajeski had not paid any rent, but conceded that Lobajeski's rent may not have been correctly calculated under the HUD regulations. Chateau asked for a writ of restitution. When the trial court indicated that it intended to grant Chateau's request for a writ of restitution, Lobajeski's counsel objected contending that a judge in a prior proceeding had told Lobajeski that she should pay the rent once it was recalculated.¹ Chateau disputed this history. The trial court granted Chateau's request for a writ of restitution and reserved the question of damages for trial at a future date. Lobajeski appeals.

On appeal, Chateau contends that the trial court properly entered judgment against Lobajeski under a local court rule which provides that eviction actions shall be tried on the return date. Lobajeski responds that the local rule

¹ Chateau had commenced a prior proceeding against Lobajeski but later dismissed it without prejudice.

cannot supersede the provision of § 799.20, STATS., which provides that a defendant may file an answer or otherwise respond to the complaint on the return date.

However, we do not address the parties' dispute on this point because no trial occurred on the return date.² Instead, after an exchange between the parties' counsel, the trial court simply entered judgment restoring the premises to Chateau. No testimony or evidence was taken in a trial-like setting before the court took this action. Thus, the judgment entered by the court appears to have been more in the nature of a default judgment.

The trial court apparently believed that Chateau was entitled to a writ of restitution because Chateau's counsel stated that Chateau had not received any rent. However, the court did not address the issue raised in Lobajeski's answer and repeated by her counsel at the return date proceeding which contended that Chateau had failed to recalculate Lobajeski's rent pursuant to the HUD regulations in light of her then income and expenses.

We, of course, make no judgment as to whether Chateau was in fact required to make such a recalculation. Nor do we determine what amount of rent Lobajeski might owe under such a recalculation assuming such a computation was necessary. We simply observe that Lobajeski's answer disputed Chateau's claim that her nonpayment of the full rent called for in the lease constituted a breach of the lease. In the final analysis, the trial court's grant of a writ of restitution to

² Neither the trial court nor the parties referred to the local rule during the proceedings on the return date.

Chateau may prove correct. However, that determination cannot be made until the issue drawn between the parties by their pleadings has been tried.

By the Court.—Judgment reversed and cause remanded.

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

