COURT OF APPEALS
DECISION
DATED AND FILED

June 2, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

Appeal Nos. 2014AP2462
2015AP572

Cir. Ct. Nos. 2014SC5044
2014SC7633

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

ROSS SHRAGO,

PLAINTIFF-RESPONDENT,

V.

SEAN P. BURKE,

DEFENDANT-APPELLANT,

MARILYN E. MARTIN,

DEFENDANT.

APPEALS from judgments and orders of the circuit court for Dane County: RICHARD G. NIESS and JUAN B. COLÁS, Judges. *Affirmed*.

¶1 BLANCHARD, J.[1] In this consolidated appeal from two eviction actions, tenants Sean Burke and Marilyn Martin[2] appeal two grants of summary judgment ordered by two circuit court judges for Burke's failure to pay rent to landlord Ross Shrago during two distinct time periods. As to the first eviction action, Burke argues that the court erred in rejecting Burke's retaliation defense. As to the second eviction action, Burke argues that the court erred in rejecting his "plea in abatement" defense under WIS. STAT. § 802.06(2)(a)10. and his claim preclusion defense. Burke also asserts that it was "basically unfair" for the court to require a bond for the appeal of the second eviction. I affirm the judgments of the circuit court for the following reasons.

¶2 The parties do not dispute the following pertinent facts. Burke entered into a one-year lease for the term May 1, 2013, to April 30, 2014, which was renewed for a 6-month term. Burke did not pay the full amount of rent due for April or May 2014, and paid no rent for June. On July 2, 2014, Shrago served Burke with a notice to terminate the tenancy, commonly referred to as a "5-day notice."[3]

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[1] These appeals are decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] I refer to Burke and Martin collectively as "Burke" for ease of reference, because neither side in this appeal distinguishes between their conduct or their interests in this appeal.

[3] WISCONSIN STAT. § 704.17(2)(a), the "5-day notice" statute, provides in pertinent part as follows:

> If a tenant under a lease for a term of one year or less, or a year-to-year tenant, fails to pay any installment of rent when due, the tenant's tenancy is terminated if the landlord gives the tenant notice requiring the tenant to pay rent or vacate on or before a date at least 5 days after the giving of the notice and if the tenant fails to pay accordingly.

¶3 On July 11, 2014, Shrago filed an eviction notice, alleging that Burke failed to avoid termination of the tenancy because he failed to pay the allegedly overdue April-June rent within the time period established under the 5-day notice. Burke filed a counterclaim alleging, as pertinent to this appeal, that Shrago filed the eviction action in retaliation for Burke's having petitioned for a restraining order against Shrago on July 3, 2014. The details of the petition for a restraining order do not matter to any issue raised on appeal.

¶4 On October 17, 2014, the circuit court held a hearing at which the court granted Shrago's motion for summary judgment.[4] The court found that Shrago had provided proper notice of nonpayment of rent, and that even under "the most optimistic or favorable interpretation of the evidence for [Burke]," Burke had not paid his rent in full. The court also concluded that Shrago's alleged retaliatory conduct could not be the basis for Burke's defense against an eviction for unpaid rent under WIS. STAT. § 704.45(2).[5]

[4] The Honorable Richard G. Niess entered the order granting summary judgment in the first eviction action for Burke's failure to pay rent for April-June 2014.

[5] WISCONSIN STAT. § 704.45(2) excludes evictions based on unpaid rent from the circumstances in which landlords are prohibited from retaliatory conduct:

> **Retaliatory conduct in residential tenancies prohibited. (1)** Except as provided in sub. (2), a landlord in a residential tenancy may not increase rent, decrease services, bring an action for possession of the premises, refuse to renew a lease or threaten any of the foregoing, if there is a preponderance of evidence that the action or inaction would not occur but for the landlord's retaliation against the tenant for doing any of the following:
>
> (a) Making a good faith complaint about a defect in the premises to an elected public official or a local housing code enforcement agency.

(continued)

¶5 On October 20, 2014, Burke filed a notice of appeal. On October 22, 2014, the circuit court held a motion hearing to set the surety bond amount and issue a temporary stay of the writ of restitution. The court set the bond at $4,500 to cover the rent owed to Shrago.

¶6 On November 4, 2014, Shrago filed a second eviction action against Burke for unpaid rent for July, August, September, and October 2014. This period of alleged non-payment was not referenced in the first 5-day notice that is referred to above, nor was it referenced in the first eviction judgment.

¶7 Burke filed a motion to dismiss, arguing that the second eviction claim was barred under the "plea in abatement" doctrine, because the first eviction action covered the same issues between the same parties and was still pending. *See* WIS. STAT. § 802.06(2)(a)10.[6] The circuit court denied Burke's motion, concluding that the second action was based on allegations of nonpayment of rent for time periods not claimed in the first action.

¶8 Burke filed a motion for judgment on the pleadings, arguing that the second eviction action was barred under the doctrine of claim preclusion. The

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> (b) Complaining to the landlord about a violation of s. 704.07 or a local housing code applicable to the premises.
>
> (c) Exercising a legal right relating to residential tenancies.
>
> **(2)** Notwithstanding sub. (1), a landlord may bring an action for possession of the premises if the tenant has not paid rent other than a rent increase prohibited by sub. (1).

[6] WISCONSIN STAT. § 802.06(2)(a)10. provides that a party may object by motion to a complaint involving "[a]nother action pending between the same parties for the same cause." This is a codification of the "plea in abatement" doctrine. *See Plea in abatement*, BLACK'S LAW DICTIONARY (7th ed. 1999).

circuit court rejected Burke's claim preclusion argument, based on the fact that the second action alleged unpaid rent for July-October, after the first action alleging unpaid rent for April-June had been filed. Turning to the merits of the second action, the court concluded that Burke was in breach of the lease due to nonpayment of the July-October rent and granted summary judgment in favor of Shrago.[7]

¶9 Burke filed a notice of appeal from the summary judgment in the second action, and an accompanying motion to stay the judgment pending appeal. The circuit court granted the motion to stay. The court initially accepted as adequate the bond Burke posted in the first action as surety and did not order any further bond for the second appeal. However, on its own motion, the court reconsidered and eventually set the surety bond in the second appeal at $7,000.

Retaliation Defense

¶10 Burke renews his argument on appeal that Shrago brought the first eviction action in retaliation for Burke petitioning for a restraining order against Shrago and that therefore a judgment of eviction should not have been entered. However, I conclude that this argument has no merit for at least the following reason: under WIS. STAT. § 704.45(2), a tenant has no defense of retaliatory conduct to an eviction for failure to pay rent.

¶11 Wisconsin law prohibits a landlord from evicting a tenant for "exercising a legal right relating to residential tenancies." WIS. STAT.

[7] The Honorable Juan B. Colás entered the order granting summary judgment in the second eviction action for Burke's failure to pay rent for July-October 2014.

§ 704.45(1)(c). Assuming without deciding that a tenant's petition for a restraining order against a landlord could be considered the exercise of a legal right related to the tenancy, "[n]otwithstanding sub. (1), a landlord may bring an action for possession of the premises if the tenant has not paid rent …." Section 704.45(2). Burke does not challenge the finding of the circuit court that Burke did not pay rent under the lease terms for the months of April-June 2014. I reject Burke's argument that retaliation could be a defense to an eviction for the nonpayment of rent.

¶12 For his only discernable argument on the retaliation-as-defense topic, Burke argues that WIS. STAT. § 704.45(2) is unconstitutional. However, the record shows that Burke failed to raise this constitutional challenge to the statute in the circuit court, and therefore the argument is subject to forfeiture. *See* ***Schill v. Wisconsin Rapids Sch. Dist.***, 2010 WI 86, ¶45 n.21, 327 Wis. 2d 572, 786 N.W.2d 177 (issues not raised by appellants in the circuit court may be deemed forfeited). I see many sound reasons to deem this argument forfeited, and no reason not to do so.

Plea in Abatement and WIS. STAT. § 802.06(2)(a)10.

¶13 Burke argues that the circuit court erroneously exercised its discretion in denying his motion to dismiss the second eviction action on the ground of plea in abatement. As referenced above, this is the argument that the second eviction action should have been dismissed because there was "[a]nother action pending between the same parties for the same cause," namely, the first eviction then pending on appeal. *See* WIS. STAT. § 802.06(2)(a)10. I conclude that the circuit court did not erroneously exercise its discretion in denying Burke's motion to dismiss the second eviction action on this ground.

¶14 "Whether dismissal is warranted under WIS. STAT. § 802.06(2)(a)10. is left to the discretion of the circuit court. A circuit court's discretionary decision will not be reversed unless the court erroneously exercised its discretion." ***Barricade Flasher Serv., Inc. v. Wind Lake Auto Parts, Inc.***, 2011 WI App 162, ¶5, 338 Wis. 2d 144, 807 N.W.2d 697 (citations omitted). This court will uphold the court's discretionary decision if the court examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶15 In denying Burke's motion to dismiss the second action, the court reasoned that, in the second action, the alleged breach "involves failure to pay rent [for] months that were not involved as grounds for eviction in the first action." Based on these undisputed facts, the court concluded that "the cause is different and therefore no grounds exist to dismiss this action under [WIS. STAT.] § 802.06(2)(a)10."

¶16 Citing a law review article, Burke concedes on appeal that a claim for unpaid rent may be considered "'a second cause of action in an eviction case.'" (Quoted source omitted.) Having made this concession, Burke fails to explain why, if this is the case, claims for unpaid rent covering two distinct time periods may not constitute different "causes" under WIS. STAT. § 802.06(2)(a)10. In short, Burke fails to provide a coherent argument based on legal authority that the court erroneously exercised its discretion, and I reject this argument on that ground.

Claim Preclusion

¶17 Burke argues that the second eviction should be barred under the doctrine of claim preclusion, which is a question of law reviewed without

deference to circuit court decisionmaking. *See* ***Great Lakes Trucking Co. v. Black***, 165 Wis. 2d 162, 168, 477 N.W.2d 65 (Ct. App. 1991). I reject Burke's claim preclusion argument because I conclude that the first and second eviction actions were based on different transactions and thus there was no identity of causes between the actions.

¶18 "[A] valid and final judgment on the merits is conclusive in all subsequent actions between the same parties, or their privies, as to all matters which (1) were litigated or (2) might have been litigated in the former proceeding." ***Id.*** Claim preclusion requires there to be "(1) an identity between the parties or their privies in the prior and present suits; (2) an identity between the causes of action in the two suits; and, (3) a final judgment on the merits in a court of competent jurisdiction." ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 551, 525 N.W.2d 723 (1995) (citing ***DePratt v. West Bend Mut. Ins.***, 113 Wis. 2d 306, 311, 334 N.W.2d 883 (1983)). Here, it is undisputed that the parties are identical in the first and second eviction actions, and that the court had entered a final judgment in the first eviction action. Therefore, the only question is whether there is an identity of claims.

¶19 Wisconsin has adopted the transactional approach to the issue of identity of claims, as set forth in the Restatement (Second) of Judgments § 24, under which claims are "pragmatically" assessed to determine whether a "factual grouping" "constitutes a 'transaction.'" *See* ***Menard, Inc. v. Liteway Lighting Products***, 2005 WI 98, ¶30, 282 Wis. 2d 582, 698 N.W.2d 738; RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982).

¶20 Shrago argues that two separate units of alleged unpaid rent, grouped by months, constitute different transactions: the first eviction action was based on

the 5-day notice for nonpayment of rent for April-June, and the second eviction action was based on the 5-day notice for nonpayment of rent for July-October. Burke fails to respond to this argument on appeal. Unrefuted arguments are deemed admitted, and I take this argument as admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). I now briefly explain why I agree with Shrago that principles of claim preclusion do not apply to bar Shrago's second eviction action against Burke.

¶21 There is not an identity of claims. The unpaid rents for the months underlying the first eviction action as set forth in the initial 5-day notice constitute one set of facts and the unpaid rents for the months underlying the second eviction as set forth in the second 5-day notice constitute a separate set of facts. As the circuit court observed, the Restatement (Second) of Judgments provides an example to support this conclusion:

> When a person trespasses daily upon the land of another for a week, although the owner of the land might have maintained an action each day, such a series of trespasses is considered a unit up to the time when action is brought. Thus if … the landowner were to bring suit on January 15, including in his action only the trespass on January 10 and obtain a judgment, he could not later maintain an action for the trespasses on January 11 through January 15.

RESTATEMENT (SECOND) OF JUDGMENTS § 24, cmt. d. Thus, had Shrago's first action filed in July been based on alleged unpaid rent for May only, he would have been precluded from bringing a separate action for unpaid June rent. However, when Shrago brought his first action in July based on the initial 5-day notice, he did not purport to seek relief for *future* unpaid rent, and instead sought that relief exclusively in the second action.

Second Appeal Bond/Basic Fairness

¶22 Burke asserts that "it was basically unfair to require a second appeal bond" to stay the second action pending appeal. However, Burke failed to make this assertion to the circuit court and I see no good reason not to deem it forfeited as a legal argument. Further, Burke candidly acknowledges that "[t]here is really no case law to guide the inquiry here." I decline to address whatever legal argument Burke may intend to advance in this regard.

¶23 For the foregoing reasons, I affirm the circuit courts' grants of summary judgment.

By the Court.—Judgments and orders affirmed.

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