COURT OF APPEALS
DECISION
DATED AND FILED

June 8, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2054 **Cir. Ct. No. 2015SC3135**

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

KEVIN A. HARRY,

PLAINTIFF-RESPONDENT,

V.

C & C ADMINISTRATION, LLC,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: MARIA S. LAZAR, Judge. *Affirmed and cause remanded.*

¶1 NEUBAUER, C.J.[1] This is an appeal from an order evicting C & C Administration, LLC, from a commercial property it leased. The action

[1] This appeal is 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.

was commenced by Kevin A. Harry, who took over the lease after having allegedly acquired the property from the original landlord, Better Living Property Management, LLC. The trial court concluded that the lease was void because it included a provision giving C & C the right to renew the lease every two years in perpetuity. C & C claims that the trial court's interpretation of the lease was erroneous. In addition, for the first time on appeal, C & C asserts that Harry lacked standing to commence this action because Signature Properties, LLC, of which Harry is purportedly the sole member, purchased the property from Better Living. Harry concedes this fact, but argues that the defense of standing was waived. We affirm.

¶2 On July 1, 2011, Better Living, the owner of a commercial property in Elm Grove, entered into a lease agreement with C & C. The term of the lease was two years, beginning on August 1, 2011, and ending on July 31, 2013. The lease included a provision, entitled "Renewal," granting to C & C

> an automatic renewal of this lease agreement for like successive periods [two years] and upon said terms unless [C & C] shall notify the other in writing, ninety (90) days before the Expiration date of this lease agreement or any successive renewal periods or extension hereof of its desire to terminate or modify said lease agreement.

The lease did not afford the landlord the right to terminate the lease in the absence of a default on the part of C & C.

¶3 On April 30, 2015, Harry, claiming to be the owner/landlord of the premises, served C & C with a ninety-day notice to terminate the tenancy and requested that C & C vacate the premises by the end of July. When C & C failed to vacate the premises by that time, Harry commenced this action to evict C & C.

¶4 At the eviction hearing, Harry testified that he purchased the premises in February 2014. Harry contended that while the language of the lease appeared to create one in perpetuity, such an interpretation was disfavored in the law and "periods" should be interpreted to mean one automatic renewal. Since the lease had already been renewed and Harry had provided proper notice terminating the lease, C & C should be evicted from the premises. Alternatively, if the lease gave more than one period of automatic renewal, then the lease was void.

¶5 C & C argued that it was not contending that the lease was perpetual but that the lease provided for three two-year terms, that is, two renewals, such that the lease would not expire until July 2017.

¶6 In rendering its determination, the trial court noted that the parties had entered into a stipulation regarding certain facts. In that stipulation, the parties agreed that "Harry purchased [the premises] from Better Living Property Management." Relying on ***Gray v. Stadler***, 228 Wis. 596, 280 N.W. 675 (1938), and ***Ginsberg v. Gamson***, 141 Cal. Rptr. 3d 62 (Cal. Ct. App. 2012), the trial court concluded that the lease was a perpetual one, rendering it void. C & C was entitled to one renewal and, thus, the trial court held the lease terminated on July 31, 2015. As a result, no notice was needed to evict C & C. The court ordered that C & C be evicted.

¶7 On appeal, for the first time, C & C argues that Harry had no standing to commence this action because Signature, and not he, is the owner of the premises. Characterizing standing as an issue of the court's subject matter jurisdiction, C & C argues that this issue can be raised at any time and cannot be deemed waived by its failure to raise it at an earlier juncture. In addition, C & C argues, Harry's false testimony that he owned the property renders his hands

unclean and should void the eviction order. Alternatively, C & C contends that whether the lease was in perpetuity is unripe for adjudication because the lease can be interpreted to provide for two renewal periods, thereby marking its termination on July 31, 2017.

¶8 "'Standing' is a concept that restricts access to judicial remedy to those who have suffered some injury because of something that someone else has either done or not done." ***Krier v. Vilione***, 2009 WI 45, ¶20, 317 Wis. 2d 288, 766 N.W.2d 517 (citation omitted). The essence of standing is whether the party being challenged has a personal interest or stake in the controversy, whether that party will be injured or adversely affected, and whether judicial policy calls for protecting the interest of that party. ***Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n***, 2011 WI 36, ¶¶5, 40, 333 Wis. 2d 402, 797 N.W.2d 789. Standing, however, "is not a matter of jurisdiction, but of sound judicial policy." ***McConkey v. Van Hollen***, 2010 WI 57, ¶15, 326 Wis. 2d 1, 783 N.W.2d 855; *see* ***Foley-Ciccantelli***, 333 Wis. 2d 402, 422 n.18 ("no case can be found holding standing to be a jurisdictional prerequisite"). Thus, contrary to C & C's contention, standing can be waived. ***Brown Cty. v. DHSS***, 103 Wis. 2d 37, 42, 307 N.W.2d 247 (1981).

¶9 While waiver—like standing—is a matter of "judicial administration," *see* ***Sussex Tool & Supply, Inc. v. Mainline Sewer and Water, Inc.***, 231 Wis. 2d 404, 409 n.2, 605 N.W.2d 620 (Ct. App. 1999), and in the proper case may be disregarded, *see* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), *superseded on other grounds by* WIS. STAT. § 895.52, this is not such a case. The waiver rule promotes the efficient administration of justice. *See* ***State v. Freymiller***, 2007 WI App 6, ¶16, 298 Wis. 2d 333, 727 N.W.2d 334 (2006). For example, it gives both the "parties and the trial judge notice of the

issue and a fair opportunity to address the objection." ***Id.*** (citation omitted). So, had C & C objected to Harry's standing earlier in the litigation, either in its answer or in a motion to dismiss, *see* WIS. STAT. §§ 802.03(1), 802.06(2), Harry could have amended the complaint, *see* WIS. STAT. § 802.09(1), or moved to substitute Signature for himself, *see* WIS. STAT. § 803.01(1).[2] In addition, while we do not insinuate that this is the case here, reviewing this issue now would create an incentive in future cases for "sandbagging errors." ***Freymiller***, 298 Wis. 2d 333, ¶16 (citation omitted). In cases of evictions and foreclosures, a defendant who waits until there is an appeal to raise a meritorious standing defense can get a "do over" of the litigation, thereby prolonging its time in the property, even when it has no substantive defense to the eviction or the foreclosure.

¶10 As for C & C's related claim that Harry has "unclean hands" because he testified that he purchased the property, assuming the unclean hands doctrine is applicable, this is another way of challenging Harry's standing. Harry can hardly be said to have "unclean hands" since the law places the burden on C & C, as the defendant, to raise an objection to Harry's standing, *see* WIS. STAT.

[2] Had an objection been raised, the parties could have submitted the evidence they now present for the first time on appeal showing that Signature purchased the property and that Harry is its sole member. Such evidence could have formed a basis for substituting Signature for Harry. *See* WIS. STAT. § 803.01(1); *cf.* ***Weissman v. Weener***, 12 F.3d 84, 86 (7th Cir. 1993). On remand, the trial court may want to consider whether it is appropriate to substitute Signature for Harry, as the plaintiff, in accordance with WIS. STAT. §§ 803.01(1), 803.10.

§ 802.03(1), and C & C stipulated that "Harry purchased [the premises] from Better Living Property Management."[3]

¶11 Nor do we agree with C & C that the request for eviction is unripe because the lease does not expire until July 31, 2017. In essence, C & C is challenging the trial court's interpretation of the lease. The interpretation of a lease, like other contracts, is a question of law, which is reviewed independently of the trial court. ***Tufail v. Midwest Hosp., LLC***, 2013 WI 62, ¶22, 348 Wis. 2d 631, 833 N.W.2d 586. The law does not favor a lease in perpetuity. ***Gray***, 228 Wis. at 600. Thus, a lease "will not be construed as creating a perpetuity unless the intention to do so is clear and plainly manifest." ***Id.*** Like in ***Gray***, there is nothing in this lease that manifests an intent to create a lease in perpetuity. The fact that "periods" is used is "not sufficient to take the case out of the general rule, there being nothing to indicate that either of the parties had in mind the creation of a perpetual right." ***Id.***; *see* 49 AM. JUR. 2D *Landlord & Tenant* § 145 (2007).

¶12 The next question is whether C & C is entitled to more than one renewal. The rule is that C & C is "entitled to one renewal … without the right to a renewal thereafter." ***Gray***, 228 Wis. at 600; *see* ***Ginsberg***, 141 Cal. Rptr. 3d at 78-79 ("[W]e conclude the better approach is the one … which comports with the

[3] This contention also demonstrates the problem of raising an issue for the first time on appeal. The record is undeveloped, and both parties would have us look outside the record. Harry's testimony would not be intentionally misleading if, as Harry asserts, he is the sole member and, based on matters outside the record, he is the agent/manager of Signature. *See* ***Security Pac. Nat'l Bank v. Ginkowski***, 140 Wis. 2d 332, 339, 410 N.W.2d 589 (Ct. App. 1987). In other words, as the sole member and manager, when Harry testified that he purchased the property he was speaking on behalf of and with the authorization of the limited liability company. *See* WIS. STAT. § 183.0301(1) and (2) (members or managers are agents and acts by them in the ordinary course of business which are authorized have a binding effect on the limited liability company); WIS. STAT. § 183.1101 (member may bring an action on behalf of a limited liability company if authorized by an affirmative vote of the membership).

long-standing rule in numerous other jurisdictions…. [I]f whether a lease is to be perpetually renewed is at all uncertain, it 'will be construed as importing but one renewal.'" (citation omitted)); ***Open Lake Sporting Club v. Lauderdale Haywood Angling Club***, No. W2014–00436–COA–R3–CV, 2015 WL 5023245, *7 (Tenn. Ct. App. Aug. 25, 2015) ("[A]greement does not express an unequivocal intention that it is to be renewed perpetually, and as such, it should be construed as providing for only one renewal."); 49 AM. JUR. 2D *Landlord & Tenant* § 143 (2007). Therefore, since C & C was entitled to only one renewal, the lease terminated on July 31, 2015.

¶13 Accordingly, we affirm the order evicting C & C.

By the Court.—Order affirmed and cause remanded.

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