

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 9, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP110

Cir. Ct. No. 2016SC4170

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

DEBRA MELTON,

PLAINTIFF,

LAW OFFICE OF ARTHUR HEITZER,

RESPONDENT,

v.

NATIONAL MANAGEMENT LLC AND GB II PROPERTIES LLC,

DEFENDANTS-APPELLANTS,

DAVID BYCZEK,

DEFENDANT.

DEBRA MELTON,

PLAINTIFF-APPELLANT,

v.

NATIONAL MANAGEMENT LLC AND GB II PROPERTIES LLC,

DEFENDANTS,

DAVID BYCZEK,

DEFENDANT-RESPONDENT.

APPEAL and CROSS-APPEAL from orders of the circuit court for Milwaukee County: ELLEN R. BROSTROM, Judge. *Affirmed.*

¶1 KESSLER, J.¹ National Management, LLC and GB II Properties, LLC, appeal an order of the small claims court awarding \$9000 in attorney fees to the Law Office of Arthur Heitzer stemming from its representation of Debra Melton. Melton cross-appeals an order of the small claims court dismissing David Byczek from her landlord/tenant action against National Management. We affirm the small claims court.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

BACKGROUND

¶2 Melton applied for an apartment and made an earnest money payment of \$725 to National Management, LLC. GB II Properties, LLC is the owner of the property. Byczek is a member of both LLCs.

¶3 Melton did not receive the apartment and filed a complaint against National Management and Byczek. Counsel for National Management and Byczek moved to dismiss Melton's complaint, arguing that neither defendant was the landlord for the property at issue. Counsel's affidavit stated that National Management was the property manager for the property's owner, GB II Properties, LLC. Melton filed an amended complaint naming National Management, Byczek, and GB II as defendants. Counsel for all three defendants moved to dismiss.

¶4 In her affidavit opposing the dismissal motion, Melton alleged that she paid a security deposit and the first month's rent to Christine Solis, the on-site manager. The affidavit included receipts with the National Management logo and contained a description of at least two phone calls with Byczek. In one conversation, Byczek told Melton that he would not rent to "you people." In another, Byczek told Melton that he did not receive any money from her and he would repay her after an insurance check was received. Melton argued that all three defendants fit the definition of "landlord" under the Wisconsin Administrative Code.

¶5 The small claims court initially denied the motion to dismiss; however, counsel for the defendants renewed the motion as to Byczek on the first day of trial, arguing that as a member of the LLCs, Byczek was not a landlord and could not be personally liable for any damages sustained by Melton. The small claims court dismissed Byczek. Immediately thereafter, National Management

and GB II admitted liability. The parties settled for a payment to Melton of \$3000.

¶6 Melton’s counsel, Brenda Lewison, filed a motion for attorney fees, asking the court for fees in the amount of \$12,953.14 and costs in the amount of \$346.12. She also filed a motion for reconsideration, asking the small claims court to reconsider its decision to dismiss Byczek. At a hearing on the motion for attorney fees, Lewison withdrew her motion for reconsideration. Lewison also reduced her attorney fees request to \$9000, three times the settlement amount with Melton. After considering all of the factors in WIS. STAT. § 814.045, the court granted Lewison’s motion.

¶7 National Management appeals the order granting attorney fees in the amount of \$9000. Melton appeals the order dismissing Byczek.

DISCUSSION

¶8 On appeal, National Management contends that the small claims court erroneously exercised its discretion in awarding Lewison \$9000 in attorney fees. Melton contends that the small claims court erroneously dismissed Byczek from the case because he was a landlord under the Wisconsin Administrative Code and not shielded from liability by a “corporate veil.”

Attorney Fees

¶9 When the reasonableness of a small claims court’s award of attorney fees awarded under a fee-shifting statute is challenged on appeal, we affirm unless the small claims court erroneously exercised its discretion. *See Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2004 WI 112, ¶22, 275 Wis. 2d 1, 683 N.W.2d 58. A court properly exercises its discretion when it employs a logical rationale based on

correct legal principles and the facts of record. *Id.* We give this deference to the small claims court’s decision “because the [small claims] court is familiar with local billing norms and will likely have witnessed first-hand the quality of the service rendered by counsel.” *See id.*

¶10 The supreme court has adopted a lodestar methodology, and has “direct[ed] circuit courts to follow its logic when explaining how a fee award has been determined.” *Id.*, ¶30. Under this lodestar approach, the starting point is a determination of the number of hours reasonably expended multiplied by a reasonable hourly rate, with upward or downward adjustments then made based on other relevant factors not already considered. *Id.*, ¶29. The other factors that may be relevant are contained in SCR 20:1.5:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

See id.; *see also Pierce v. Norwick*, 202 Wis. 2d 587, 597, 550 N.W.2d 451 (Ct. App. 1996).

¶11 Here, the small claims court evaluated the SCR 20:1.5 factors.² The court discussed: Lewison’s tenacity, the amount of time and effort required for Lewison to obtain Melton’s settlement, the fact that National Management did not admit liability until the first day of trial (after Byczak was dismissed), the personal risk to Lewison in taking Melton’s case, the reasonableness of Lewison’s hourly rate, Lewison’s experience, the complexity of the case (noting that the case was not particularly complex), and fees customarily charged in the locality, among other things. The small claims court kept with the lodestar approach set forth in *Kolupar* and considered several other relevant factors. Accordingly, the court properly exercised its discretion.

Byczek’s Dismissal

¶12 We reject Melton’s contention that Byczek was improperly dismissed from the case because we conclude that Melton forfeited the ability to raise this argument on appeal. At the hearing on attorney fees, Melton withdrew her motion for reconsideration, telling the small claims court:

At this point, the Defense maintained that they believed that the settlement that we had reached the last time we were here in court meant that the individual David Byczek would be dismissed for all claims, not only the claims by my client against the two defendants but also the claim for attorney fees.... And I wanted my client to get her money and ... I was going to dismiss Mr. Byczek.

(Some formatting altered.)

¶13 By withdrawing the motion for reconsideration, the small claims court did not have an opportunity to issue a definitive ruling on that motion.

² The court evaluated the factors in the context of WIS. STAT. § 814.045, which requires a circuit court to consider the many of the same factors when evaluating attorney fees in a civil action.

Accordingly, Melton has forfeited the right to raise that issue on appeal. *See State v. Ndina*, 2009 WI 21, ¶¶29-30, 315 Wis. 2d 653, 761 N.W.2d 612 (“Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.... In other words, some rights are forfeited when they are not claimed at trial; a mere failure to object constitutes a forfeiture of the right on appellate review.”) (citation and one set of quotation marks omitted; some formatting altered).

¶14 For the foregoing reasons, we affirm the small claims court.

By the Court.—Orders affirmed.

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

