COURT OF APPEALS
DECISION
DATED AND FILED

February 8, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal No. 2017AP985 **Cir. Ct. No. 2017SC78**

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

ROBERT WENGER AND LORI WENGER,

PLAINTIFFS-RESPONDENTS,

V.

GAIL SWAINE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Green County: JAMES R. BEER, Judge. *Affirmed*.

¶1 SHERMAN, J.[1] In this eviction action, Gail Swaine appeals from the judgment of the circuit court. The circuit court awarded Swaine return of her security deposit and denied her claims for constructive eviction or rent abatement.

[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 indicated.

The court did not award double damages or attorney's fees. Swain argues on appeal that she was entitled to double damages and attorney's fees for violation of WIS. ADMIN. CODE § ATCP 134.06 (through Feb. 2018), as well as damages for being illegally locked out.[2] For the reasons discussed below, I affirm.

BACKGROUND

¶2 On September 8, 2016, Swaine signed a six-month lease to rent a house from Robert Wenger and Lori Wenger from that date until March 8, 2017. Pursuant to the terms of the lease, Swaine paid the Wengers the first month's rent of $850, the last month's rent of $850 and a security deposit of $850 upon entering into the lease. The Wengers attempted to terminate the lease on December 28, 2016, sending Swaine a purported 28-day notice to terminate the tenancy. When Swaine stood upon the lease and refused to vacate by January 28, 2017, the Wengers filed this eviction action. Swaine counterclaimed for rent abatement.[3]

¶3 It is undisputed that, in a court hearing, Swaine committed to being out of the leased premises by March 8, 2017, the final date of her tenancy under the terms of the lease, but was not. Swaine testified that she began removing her property from the leased premises on March 8, 2017, but injured her back and was unable to remove all of her personal property from the leased premises by March 8. On March 9, the Wengers changed the locks. At that time, personal property belonging to Swaine remained on the premises.

[2] By not appealing the denial of her claim for rent abatement, Swaine has abandoned that claim. *See* ***State v. Allen***, 2004 WI 106, ¶26 n.8, 274 Wis. 2d 568, 682 N.W.2d 433.

[3] Swaine subsequently filed a second counterclaim for the Wengers' self-help eviction.

¶4 For various reasons, it took several days for Swaine to regain access to the premises. She finally removed all of her property, cleaned the premises and was fully removed from the premises on March 17, 2017. On April 6, 2017, the Wengers' counsel sent a security deposit deduction letter to Swaine's counsel alleging that Swaine had caused $2,822.84 in damages and that the Wengers were retaining the entirety of Swaine's security deposit.

¶5 A trial to the court was held on May 9, 2017. Although eviction was no longer an issue, several issues remained, including the Wengers' entitlement to the entirety of Swaine's security deposit; the Wengers' claims of damage to the property; and Swaine's claims of constructive eviction and for abatement of rent. Ultimately, the circuit court ruled that the Wengers were not entitled to any reductions in the security deposit for damages and ordered its return to Swaine. In addition, the court found that the Wengers' action in changing the locks was reasonable; it denied Swaine's claim for abatement of rent, and denied Swaine's demand for double damages and award attorney's fees. Swaine appeals.

DISCUSSION

A. Double Damages and Attorney's Fees

¶6 Swaine contends that the court should have awarded her double damages and attorney's fees because the Wengers failed to timely return her security deposit. As I explain below, Swaine's argument is not well developed and I refuse to address it for that reason. *See* ***Associates Fin. Servs. Co. of Wis., Inc. v. Brown***, 2002 WI App 300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56 (generally, this court does not consider undeveloped arguments).

¶7 Swaine argues that case law required the circuit court to order double damages and attorney's fees, notwithstanding the court's finding that amounts were not wrongfully withheld, because the court ultimately determined that Swaine is entitled to the entirety of her security deposit. Swaine bases her argument on ***Armour v. Klecker***, 169 Wis. 2d 692, 697-698, 486 N.W.2d 563 (Ct. App. 1992), and other similar cases, wherein the issue was whether the circuit court lacked discretion on whether to order double damages and attorney's fees when WIS. ADMIN. CODE § ATCP 134.06 had been violated as an unfair trade practice under WIS. STAT. § 100.20. All of the cases cited to this court by Swaine were decided prior to the enactment of WIS. STAT. § 704.95.

¶8 WISCONSIN STAT. §704.95 states:

> Practices in violation of [WIS. STAT. §§] 704.28 or 704.44 may also constitute unfair methods of competition or unfair trade practices under [WIS. STAT. §] 100.20. However, the department of agriculture, trade and consumer protection may not issue an order or promulgate a rule under [§] 100.20 that changes any right or duty arising under this chapter.

Section 704.28 addresses the withholding from and return of security deposits.

¶9 WISCONSIN STAT. § 704.95 was enacted by 2013 Wis. Act 76, § 27 and took effect on March 1, 2014, well before the Wengers' actions that underlie this appeal. The plain language of § 704.95 limits the rulemaking authority of the Department of Agriculture, Trade, and Consumer Protection.

¶10 Swaine does not cite, let alone discuss WIS. STAT. § 704.95, and, consequently, does not address whether the current version of WIS. ADMIN. CODE § ATCP 134.06 "changes any right or duty arising under" ch. 704. As a consequence, Swaine does not address whether ***Armour***, or any of the other cases

cited as authority for the proposition that the circuit court is compelled in this situation to award double damages and attorney fees, remain precedential or are distinguishable.

¶11 Although the circuit court did find that the entire amount of the security deposit should be returned to Swaine, the court did not find that the amounts withheld were withheld wrongfully. In order to establish that this was error, as Swaine claimed that it was (utilizing only prior law), Swaine would have to develop an argument that this action by the circuit court violated current law. Relying on prior law without explanation of how that prior law would apply after a substantial statutory change, Swaine has not developed any such argument. I affirm the circuit court on that basis.

B. Constructive Eviction

¶12 Swaine contends the circuit court erred in rejecting her claim for constructive eviction. She argues that, when she did not fully vacate the premises on March 8, 2017, she became a holdover tenant and that when the Wengers changed the locks the following morning, she was constructively evicted.

¶13 The circuit court determined that Swaine had agreed in court to "be out by [March] 8th, so that isn't a lock-out." Swaine does not challenge the circuit court's finding that Swaine agreed to be out of the leased premises by March 8, 2017. Nor does she develop an argument as to why she was a holdover tenant. Instead, Swaine meticulously documents why changing the locks is constructive eviction and that self-help eviction is not permitted. Swaine points out that in WIS. ADMIN. CODE § ATCP 134.02(12), the definition of tenant includes a holdover tenant; that the provisions of WIS. STAT. ch. 799 authorize only a sheriff to enforce a writ of restitution, and she directs this court to the provision for the

taxing of costs, along with a case from 1933 regarding how the sheriff enforces eviction.

¶14 Swaine's claim for constructive eviction is entirely dependent upon her being a holdover tenant on March 9, 2015. In the absence of that, the rest of her argument described in the previous paragraph goes nowhere. Swaine does not present this court with a developed argument that she was, under these facts, a holdover tenant. Swaine's claim that she was is totally conclusory and unsupported by authority. Again, this court does not consider conclusory assertions and undeveloped arguments. *See* ***Brown***, 258 Wis. 2d 915, ¶4 n.3. I will, therefore, not consider this issue further.

C. Swaine's Apparent Abandonment

¶15 The circuit court determined that the Wengers acted reasonably with respect to Swaine's aborted move on March 8, 2017. The court found that it was reasonable for the Wengers to conclude on March 9 that Swaine had moved out of the leased premises on the 8th, as she had agreed before the court to do, and that any personal property remaining on the premises was abandoned. The court stated as follows:

> Now[,] as to the defendant's claims. She claims that there was a constructive eviction, well there was an agreement here in court that she would be out by the 8th, so that isn't a lock-out provision. She had committed that she will be moving on that day. The landlord had every right to believe that anything she left was abandoned.
>
> As we all know many ten[]ants abandoned property in a premises. Was he to wait 30 days, 90 days, year and a half before he removes it. It's ridiculous. But as soon as he had heard that she had intended to take them out, though he was in the hospital, so was his wife, they made arrangements and in a very short period of time she was able to remove it.

¶16 Swaine first argues that the circuit court has applied an incorrect legal standard in making that determination. Swaine argues that the court incorrectly looked to the landlord's belief, but should have looked to whether Swaine had an intent to abandon. Whether the court applied a correct standard of law is an issue of law that I review de novo. ***Gallagher v. Grant-Lafayette Elec. Coop.***, 2001 WI App 276, ¶15, 249 Wis. 2d 115, 637 N.W.2d 80.

¶17 Swaine cites ***Thon v. Hamilton***, No. 2013AP2063, unpublished slip op., ¶12 (WI App Feb. 19, 2014), apparently for the proposition that the landlord's good faith belief in the propriety of changing the locks is not sufficient to overcome a clear legal duty. Under WIS. STAT. § 809.23(3), ***Thon*** may be cited to this court as persuasive authority. However, Swaine does not explain how or why ***Thon*** should be relied upon in this case. Consequently, I do not address it further.

¶18 Swaine also argues that prior case law has defined abandonment as: "an absolute relinquishment of the premises by a tenant, [] consist[ing] of [an] act or omission and [an] intent to abandon." *See* ***Sporleder v. Gonis***, 68 Wis. 2d 554, 557, 229 N.W.2d 602 (1975), and ***Rapids Assocs. v. Shopko Stores, Inc.,*** 96 Wis. 2d 516, 519, 292 N.W.2d 668 (Ct. App. 1980), and that the court should therefore have looked to whether she intended to abandon the premises, not to whether the Wengers reasonably believed she had abandoned them.

¶19 I will assume, without deciding, that Swaine is correct. I conclude, however, that she has not established that she did not intend to abandon the premises.

¶20 Swaine does not argue that there was no act or omission by her, nor could she. Swaine removed at least part of her property and herself from the

premises by the agreed upon date. Instead, Swaine only argues that the evidence does not support a determination that she had an intent to abandon.

¶21 Swain promised to move out of the leased premises by March 8, 2017. The circuit court found that the Wengers could reasonable infer from Swaine's promise that Swaine did not intend on remaining at the leased premises after that date. When the Wengers arrived on the 9th, Swain and at least some of her property were gone. Swaine's absence from the premises on the day following the date on which she promised to vacate was evidence of her intent, or at least evidence from which her intent could reasonably be inferred. Therefore, applying the definition of abandonment asserted by Swaine, there is no reason to believe that the court applied an incorrect standard of law.

¶22 Swaine's final argument is that, whether or not the court applied a correct standard of law, the circuit court erroneously concluded that the Wengers reasonably believed that Swaine had abandoned her rental unit. Since reasonableness is a finding, as Swaine concedes, Swaine would have to establish that the court's finding was clearly erroneous in order to prevail on this issue. *See* WIS. STAT. § 805.17(2). While Swaine argues that there are facts in the record that she interprets as contradicting the court's finding, that does not establish that the finding is clearly erroneous. A circuit court's factual finding is not clearly erroneous if it is supported by any credible evidence in the record, or any reasonable inferences from that evidence. *See* ***Insurance Co. of N. Am. v. DEC Int'l, Inc.***, 220 Wis. 2d 840, 845, 586 N.W.2d 691 (Ct. App. 1998). It is the circuit court's function to weigh evidence, judge credibility and draw reasonable inferences. Here, Swaine herself points to credible evidence in the record that supports the finding: "The only evidence the court referred to in support of its finding of reasonableness was that Swaine had said in court that she would be out

on March 8th." That, as explained above with respect to the previous issue, is enough to raise an appropriate inference of intent and, in combination with her obvious absence from the premises, demonstrate the reasonableness of the Wengers' belief that the Wengers had abandoned. Accordingly, I reject this argument.

CONCLUSION

¶23 For the reasons discussed above, I affirm.

By the Court.—Judgment affirmed.

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