COURT OF APPEALS
DECISION
DATED AND FILED

February 23, 2006

Cornelia G. Clark
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. 2005AP1384 **Cir. Ct. No. 2005SC1388**

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

MIKE BROLIN,

PLAINTIFF-RESPONDENT,

V.

KIM BAUERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed.*

¶1 DYKMAN, J.[1] Kim Bauers appeals from a judgment of eviction. Bauers contends that the trial court erred because it did not consider evidence that

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

the eviction was retaliatory or determine whether retaliation was the actual reason for the eviction. Because we conclude the trial court's factual findings were not clearly erroneous and that it applied the correct legal standard to the facts of the case, we affirm.

Background

¶2 From 1988 to 2005, Kim Bauers lived in a rental apartment at 1926 Sheridan Street in Madison. Mike Brolin has owned the property for the past sixteen years. Bauers has called city inspectors on numerous occasions about the condition of the building and grounds over the past several years. As a result of these calls, city personnel made several inspections of the property and ordered Brolin to remedy numerous building code violations. Bauers made no complaints to city inspectors in the first six months of 2004.

¶3 In July 2004, Bauers contacted city inspectors. They inspected the property on July 13 and issued Brolin an order to remedy code violations on July 15. By a letter dated July 14, Brolin threatened termination of Bauers' lease if she did not remedy several problems, including, among others, cleaning up after her dog and removing personal items from the common area of the basement. On July 21, Brolin sent Bauers' attorney a lease termination notice, then posted the notice on Bauers' door a week later. After some negotiation between the parties regarding a lease termination date, Brolin provided Bauers two additional eviction notices. The last notice, dated December 27, stated Bauers was to vacate the premises by January 31, 2005. In February 2005, Brolin brought this small claims action to evict Bauers. After a trial to the court, the court decided in favor of Brolin.

¶4 In its decision, the trial court considered Bauers' retaliation defense. It noted that MADISON GENERAL ORDINANCE § 32.15 prohibits landlords from retaliating against tenants who complain about building conditions.[2] It observed that § 32.15 creates a presumption of retaliation that a landlord must rebut by showing by a preponderance of the evidence that an eviction was based upon good cause.

¶5 The court, applying a presumption of retaliation, considered whether Brolin met his burden of showing by a preponderance of the evidence that the eviction was based upon good cause. Reviewing Brolin's testimony and his correspondence with Bauers, the court detailed the problems Brolin had with Bauers during her tenancy. These problems included: storing personal property in common areas of the building; leaving windows open for several days in cold weather; permitting her dog to defecate in the front yard and failing to dispose of

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[2] MADISON GENERAL ORDINANCE § 32.15 provides in part:

> (1) No person or tenant shall be retaliated against for complaining of violations of Secs. 32.05, 32.07, 32.11, 32.12 or 32.13 of the Madison General Ordinances or for complying with those sections.
>
> (2) Retaliation shall include, but not be limited to, eviction or threats of eviction, inconsistent rent payment increases, failure to perform promised repairs or other harassment of the tenant committed by the landlord or his or her agents. Any such acts shall be presumed to be retaliatory if committed within six months after the tenant has complained to any state or local investigatory or enforcement agency of violations of Secs. 32.05, 32.07, 32.11, 32.12 or 32.13 of the Madison General Ordinances or their statutory or administrative code equivalents. In order to overcome the presumption that such acts are retaliatory, the landlord must show by a preponderance of evidence that such acts were based upon good cause, as that term is used in this Chapter.

its feces; having a dog whose barking disturbed other tenants; doing laundry after allowed hours in the evening; and not removing trash from common areas of the building. Finally, the court evaluated the testimony of Bauers and Brolin and found Brolin to be a more credible witness. The trial court ordered an eviction and Bauers appeals.

Analysis

¶6 Bauers contends that the trial court erred by failing to determine whether Brolin's actual motive for the eviction was retaliation and by neglecting to consider evidence of retaliation in making its factual findings. We review Bauers' first contention de novo because it alleges the trial court did not apply the correct legal standard. *See* ***Gallagher v. Grant–Lafayette Elec. Co-op***, 2001 WI App 276, ¶15, 249 Wis. 2d 115, 637 N.W.2d 80 (citation omitted) (whether circuit court applied correct legal standard subject to de novo review). Bauers' second contention concerns the factual findings of the trial court, which we may not set aside unless they are clearly erroneous. WIS. STAT. § 805.17(2). The rules of evidence do not apply in small claims court. *See* WIS. STAT. §§ 911.01(4)(d) and 799.209(2).

¶7 WISCONSIN STAT. § 704.45(1)(a) prohibits a landlord from bringing an action to evict a residential tenant who makes a good faith complaint about a defect in the premises to local authorities.[3] Similarly, MADISON GENERAL

[3] WISCONSIN STAT. § 704.45(1) provides in part:

(continued)

ORDINANCE § 32.15(1) provides that no one "shall be retaliated against for complaining of violations of Secs. 32.05, 32.07, 32.11, 32.12 or 32.13 of the Madison General Ordinances or for complying with those sections." Under § 32.15(2), retaliation includes, but is not restricted to, "eviction or threats of eviction, inconsistent rent payment increases, failure to perform promised repairs or other harassment of the tenant committed by the landlord or his or her agents." Because § 32.15 is more protective of tenant rights than § 704.45(1)(a), the trial court correctly applied the local ordinance rather than the state statute.

¶8 To state a defense or claim of retaliation, a tenant must offer evidence that the alleged retaliatory conduct occurred within six months of the date that the tenant made the complaint under MADISON GENERAL ORDINANCE § 32.15(2). Conduct that occurs within the six-month timeframe is prima facie evidence of retaliation and triggers the presumption that the conduct was retaliatory. *See* ***id.*** The burden then shifts to the landlord who must "show by a preponderance of evidence that such acts were based upon good cause." Section 32.15(2). Good cause is defined elsewhere in Chapter 32 as a reason "other than one related to or caused by the operation of this ordinance, including but not limited to normal uniform rental increases due to utility increases or other

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> [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.

increased costs to landlord, or for other bona fide, nondiscriminatory business reason." MADISON GENERAL ORDINANCE § 32.04(8)(b).

¶9 As a preliminary matter, Brolin contends that the trial court erred in applying the presumption of retaliation against him because he initiated eviction proceedings against Bauers by his July 15, 2004 letter, which was sent a day before he received the city's July 16 inspection order informing him of Bauers' complaint to city inspectors. We conclude Bauers' July 2004 complaint triggered a presumption of retaliation. Whether Brolin knew of Bauers' complaint is irrelevant to whether retaliation is presumed under the ordinance. MADISON GENERAL ORDINANCE § 32.15 triggers a presumption of retaliation regardless of whether the tenant can prove that the landlord was aware of the tenant's complaint before taking the retaliatory action. Additionally, a court could reasonably infer from the sequence of events that Brolin was made aware of Bauers' complaint.

¶10 We turn now to Bauers' contention that the trial court erred because it did not determine whether the actual reason for the eviction was retaliatory. We take Bauers to mean that the trial court applied the ordinance improperly. We disagree. MADISON GENERAL ORDINANCE § 32.15 sets forth a two-step methodology for resolving claims and defenses of landlord retaliation. The tenant must first show that he or she reported a Chapter 32 violation at some time in the six months prior to the landlord's action to trigger a presumption that the action was retaliatory. If the tenant makes this showing, the landlord must then prove by a preponderance of the evidence that his or her acts were based on good cause to avoid a finding of retaliation. Here, the trial court did not address the evidence that triggered the presumption of retaliation, but nonetheless applied the presumption. It then examined the landlord's case, weighed the credibility of witnesses, and found that the landlord had demonstrated by a preponderance of the

evidence that his acts were based on good cause. Had the trial court not presumed that Brolin began a retaliatory eviction, it would not have considered whether Brolin had good cause to do so. The trial court thus properly applied § 32.15.

¶11 Bauers next contends that the trial court's findings of fact were clearly erroneous because they did not address Bauers' evidence of retaliatory motive. The trial court's decision does not explicitly address evidence of retaliation. However, under MADISON GENERAL ORDINANCE § 32.15, a presumption of retaliation cannot be triggered without a prima facie showing that a code violation was reported to city inspectors within the six months prior to the landlord's action. By applying the presumption of retaliation, the court implicitly found evidence of retaliation.

¶12 The trial court then turned to Brolin's evidence that the eviction was for good cause and found that Brolin demonstrated by a preponderance of the evidence "that the eviction was not a retaliatory act … but was based upon good cause and was reasonable." Moreover, the trial court found Brolin to be a more credible witness than Bauers: "I find the plaintiff to be a credible witness, that is more credible tha[n] the defendant. Her testimony rambled and was inconsistent. She admitted some of the violations alleged by the plaintiff and gave unconvincing explanations for others." *See* ***Gehr v. Sheboygan***, 81 Wis. 2d 117, 122, 260 N.W.2d 30 (1977) (trial court is ultimate arbiter of witnesses when there is conflicting testimony).

¶13 Finally, Bauers contends the trial court erred by basing its findings of fact on letters that she argues were prepared in anticipation of litigation, were never qualified as business records and were inadmissible hearsay. Further, Bauers finds error in the trial court's exclusion of testimony that an employee of

Brolin said that he would tell Brolin that Bauers reported code violations to city inspectors. We reject these contentions as well. Bauers cites WIS. STAT. § 908.01(4)(b)4. and ***Lager v. ILHR Department***, 50 Wis. 2d 651, 185 N.W.2d 300 (1971), as authority for her conclusion that the trial court failed to follow the rules of evidence. But because the rules of evidence do not apply in small claims proceedings, trial courts do not erroneously exercise their discretion by failing to follow them. *See* WIS. STAT. §§ 911.01(4)(d) and 799.209(2).

By the Court.—Judgment affirmed.

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