

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 25, 2005

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. 04-0706
STATE OF WISCONSIN**

Cir. Ct. No. 04SC003394

**IN COURT OF APPEALS
DISTRICT I**

MARK CIMBALNIK AND SUE CIMBALNIK,

PLAINTIFFS-RESPONDENTS,

v.

PATRICIA GUY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Judgment and order reversed; writ of restitution vacated.*

¶1 FINE, J. Patricia Guy appeals, *pro se*, from an order and a judgment of eviction. She contends that the trial court improperly decided contested facts despite her request and payment for a jury trial. We agree, reverse, and vacate the writ of restitution.

I.

¶2 Mark and Sue Cimbalnik started this eviction action, *pro se*, against Guy in connection with an apartment Guy occupied in a building that the Cimbalniks contended they owned. According to their short-hand explanation in the eviction complaint, they “[r]ecently purchased building, moving all tenants so building can be renovated.” They also alleged that Guy owed \$550 in unpaid rent, and that she had been served with a twenty-eight-day notice to vacate the apartment.

¶3 Guy answered the complaint, and denied owing the Cimbalniks “\$550.00 for rent” or “any amount of money.” Guy also contended in her answer that she was “the legal owner of the building” as a result of her deceased mother’s will, and she attached what purports to be a certified copy of a one-page will wherein “Mary E. Guy” leaves to “my daughter Patricia” “an even share of my apartment building, one apartment for her” and “an even share” of a specified sum of money. Her answer also claimed that the Cimbalniks improperly conspired with Maurice Pulley, whom the answer says is her brother-in-law, to defraud her. Her answer requested a jury trial, and she also filed a separate demand for a jury trial.

¶4 The parties, all *pro se*, appeared before the trial court on February 17, 2004. That hearing, denominated on the cover of the transcript as an “eviction hearing,” was adjourned so Guy could bring proof that she had paid the jury fee. Before adjourning the case, however, the trial court heard the respective positions of the parties—none of whom were sworn. The only sworn testimony the trial court heard was that of Pulley, who was the Cimbalniks’ witness. (Sue Cimbalnik was not at the hearing.) Pulley testified that he had been part owner of

the building with his mother-in-law, and that when she died “we took ownership of the property.” He told the trial court that “[t]here had been no payments on the property and so it went into foreclosure,” and that before the sheriff’s sale he “sold the home to protect my name and interest in the home to Mark.” He also testified that the will that Guy attached to her answer “was brought up in probate and found by Judge Kitty Brennan to be not valid.” He further testified that “[t]hey told her [Guy] in probate flat out that we own the property. She [Guy] has not owned up to that and it’s just been an ongoing task and it continues to this day.” Pulley said that the closing on the property was on January 8, 2004. The transcript of the probate proceedings referred to by Pulley is not in the record.

¶5 In response to the trial court’s inquiry as to whether she had any questions to ask Pulley, Guy said that the property had been foreclosed but that the proceedings were, in her view, improper and that, according to her, her appeal was pending. The trial court then tried to call Judge Brennan, but she was not available. As noted, the hearing was adjourned so Guy could bring proof that she had paid the jury fee.

¶6 The hearing resumed on February 20, 2004, and the trial court acknowledged that Guy had paid the requisite jury-trial fee. Nevertheless, the trial court asked whether Mr. Cimbalnik had brought proof with him that a United States Department of Housing and Urban Development Housing Assistance Payment Contract lease that Guy had produced at the earlier hearing and that showed that the lease did not expire until “02/29/04” was, as phrased by the trial court, “no longer valid.” The transcript indicates that Cimbalnik replied that he had and that the document was “shown to the Court.” The trial court described the document to Guy as establishing that “the lease was suspended effective July 31, 2003 due to the – in essence, the potential foreclosure that was going to occur.”

The trial court also indicated that it had checked the docket entries in connection with the will that Guy had proffered and that the “case was in probate court and [] was dismissed because the Court found that that alleged will was actually a forged or false document.”

¶7 The trial court then indicated that, despite Guy’s demand for a jury trial and her payment of the jury-trial fee, it was, based on what it had discovered from the court files and the document that Cimbalnik showed him and that he summarized, going to grant Cimbalnik’s request for judgment and evict Guy. The trial court explained to Guy:

Given this information, Miss Guy, there really isn’t any basis on which to grant your request for a jury trial because there are no issues of material fact.

MS. GUY: Well can I –

THE COURT: No, no. Mr. Cimbalnik purchased the property. The lease that you are putting forth expired on July 31st. He bought the property, so you really have no interest in the property.

MS. GUY: Well, when I talked to my specialist up at Section 8 [of the Housing and Urban Development program] she said my lease doesn’t expire, which was signed by mother, until February 29, 2004.

THE COURT: But your mother passed away June of 2003, and they suspended the lease.

MS GUY: July 2003? I didn’t receive anything saying it was suspended.

THE COURT: At this time based on the submissions that have been presented to the Court, documentation that was filed, the Court will grant judgment in favor of the plaintiff for restitution of the premises. Miss Guy, how soon can you move out of the property?

MS. GUY: Well, I need at least until the first of March or the second week in March. But I would like to be

properly served, because I did not know of the suspension
or –

At this point, the trial court discussed with Cimbalnik the mechanics of Guy's moving out of the apartment. Based on Cimbalnik's representations, it indicated that it was going to "issue an immediate writ."

II.

¶8 As noted, Guy complains on appeal that the trial court violated her right to a jury trial, *see* WIS. STAT. § 799.21(3) (entitlement to jury trial in eviction actions), with all of the protections afforded by the trial process, *see, e.g.*, WIS. STAT. RULE 911.01(4)(d) (rules of evidence apply in actions under WIS. STAT. ch. 799 that are tried to juries). We agree.

¶9 The trial court may not find facts where those facts are disputed and a party has properly reserved his or her right to a jury trial. *See* WIS. CONST. art. I, § 5 ("The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law."); *Schauer v. Baker*, 2004 WI App 41, ¶4, 270 Wis. 2d 714, 718, 678 N.W.2d 258, 259 ("Summary judgment is appropriate when there is no material factual dispute and the moving party is entitled to judgment as a matter of law."). Further, there is no indication in the record that any of the documents proffered by either of the parties, upon some of which the trial court relied, was properly authenticated under WIS. STAT. ch. 909. Moreover, the trial court accepted unsworn statements from the parties, in addition to Pulley's sworn testimony, in resolving the dispute in the Cimbalniks' favor.

¶10 It may very well be that the Cimbalniks will be able to prove their case against Guy; by the same token, perhaps they cannot. Whatever the outcome, however, it must be after the path established by our system for the fair resolution of disputes has been followed: sworn testimony, authenticated documents, and factual disputes resolved by juries when a jury trial has been properly requested. That path was not followed here and, accordingly, we must reverse.¹

By the Court.—Judgment and order reversed; writ of restitution vacated.

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

¹ Although both parties have, in their *pro se* briefs, attached and referenced various documents in their attempt to argue the merits of the dispute, we are not a fact-finding court and may not resolve disputed facts. *Sterman v. Hornbeck*, 156 Wis. 2d 556, 567, 457 N.W.2d 874, 878–879 (Ct. App. 1990).

