COURT OF APPEALS
DECISION
DATED AND RELEASED

June 8, 1995

No. 95-0270

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

DWIGHT ZIETLOW
AND RACHEL ZIETLOW,

Plaintiffs-Appellants,

v.

DAVID STOKES
AND ANN STOKES,

Defendants-Respondents.

APPEAL from an order of the circuit court for Monroe County: JAMES W. RICE, Judge. *Cause remanded*.

VERGERONT, J.[1] Dwight and Rachel Zietlow appeal from an order requiring that they deed to David and Ann Stokes certain property provided that the Stokes pay the sum of $2,049. They claim that the Stokes' counterclaim was not properly before the court in the Zietlows' eviction action, that the trial court did not have the authority to determine interests in real

[1] This appeal is decided by one judge pursuant to § 752.31(2)(a), STATS.

property in a small claims action, and that the writing the trial court relied on violates the statute of frauds. We conclude the Zietlows have waived the first two issues. As to the statute of frauds issue, we remand to the trial court as explained below.

The Zietlows, pro se, filed a small claims summons and complaint against the Stokes stating:

> On April 20, 94, we verbally asked David and Ann to be off the property, because 12 months had passed and there were no payments received for 1 year. We reimbursed them $917.25 plus $550.48 (in electricity). On June 23rd we gave them a written letter stating termination as of that date, and asked them to be moved by July 21, 94.

The Stokes, pro se, filed an answer stating: "We dispute this matter and wish for a trial date."

A trial was held to the court on September 6, 1994. The Zietlows and the Stokes both appeared without counsel. Rachel Zietlow testified that the Zietlows had an agreement to rent some land to the Stokes with an option to buy. The Stokes were to pay $240 a month until the note at the bank was paid off and then the Stokes would get a deed. The Stokes moved onto the property, living in a trailer they brought, in August 1992. Rachel Zietlow testified that the Stokes made payments for ten months and then stopped in May 1993. The Zietlows, hoping to get the Stokes to move, paid them $917, which represented the amount of principal paid out of the $2,400 minus an electric bill of $550.48 which the Zietlows paid for electricity used by the Stokes. The Zietlows asked the court to evict the Stokes and order them to pay $650 plus court costs. The Zietlows arrived at the $650 figure by calculating rent at $50 per month for the thirteen months the Stokes had lived on the property without paying rent until the Zietlows sent them the eviction letter.

David Stokes produced copies of checks showing payments to the Zietlows that, the trial court found, totaled $2,510. He also produced a writing

that Rachel Zietlow agreed was the agreement between the parties. The writing was unsigned and undated, and states:

> Lease/Option to Buy
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> 10 acres. All of which is east of the existing road with the exception [of] a small amount of land at the north end of the property (the 10 acres) which will be west of the road.
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> Possession of the land will go like this. Will [sic] will start on one acre. Once you have paid $800.00 on the principal of my bank note then you own it. Then when you pay the second $800.00 principal on my bank note then you may take possession of the second acre. And the same for the 3rd, 4th, etc. until 3 years is up. On August 1, 1995, you will have to decide whether you want to buy any more acreage or if you are happy with what you have. If you want the remainder of the 10 acres, then you will have to pay us in full at that time and we will get you a deed for the 10 acres. If you wish to not own any more, we will at that time give you a deed for what you have paid for.

David Stokes also testified regarding improvements he made on the property. The court made findings as to the cost of those and the amount of interest the Stokes had paid. The court concluded that there was a contract to sell the property to the Stokes and it was enforceable notwithstanding the statute of frauds. It ordered the Zietlows to deed two acres of land to the Stokes if the Stokes within thirty days paid to the clerk of courts $2,049. This figure included court costs and back rent of $650. If the Stokes did not pay within that time, a writ of restitution was to issue for removal of the Stokes and their trailer. In the event the parties could not agree on the description of the property, a hearing was scheduled for November.

The Stokes, through counsel, moved on October 6, 1994, for a clarification of how the $2,049 was computed and how a legal description of the two acres was to be determined. On October 31, 1994, the Zietlows, through

counsel, requested that the court enter a written order, enter judgment as of October 6, 1994, and issue a writ of restitution because the bank would not cover the check deposited by the Stokes on October 6 with the clerk of courts. A hearing was held on the Stokes' motion on November 3, 1994, by which time the Stokes had paid a money order in the amount of $2,049 to the clerk of courts.

The court determined that $2,049 was the amount due, that the Stokes had complied with the order, and that the Zietlows had to provide the deed. No decision was made on the description of the property to be deeded pending availability of the transcript from the September hearing. The Zietlows appeal from the order, dated December 19, 1994, which directed them to deed to the Stokes two acres of land on which the trailer house and addition rests if the Stokes pay $2,049 to the clerk of courts by October 6, 1994.

As an initial matter, we note that the December 19, 1994 order states "if the parties cannot agree on the two acres to be deeded, a hearing will be held ... to address the property to be transferred." While neither party has questioned the finality of the order, this court must inquire into its jurisdiction. ***State ex rel. Teaching Assistants Ass'n v. Univ. of Wisconsin-Madison***, 96 Wis.2d 492, 495, 292 N.W.2d 657, 659 (Ct. App. 1980). This language in the order indicates that the trial court contemplated further proceedings in order to resolve the dispute. The order, therefore, is not a final order appealable as of right. *See* ***Radoff v. Red Owl Stores, Inc.***, 109 Wis.2d 490, 326 N.W.2d 240 (1982). However, a nonfinal order may be reviewed as a permissive appeal under § 808.03(2), STATS. Under the circumstances of this case, we conclude that discretionary review should be granted. Therefore, we proceed to address the merits of the appeal.

The Zietlows contend that the Stokes' counterclaim for title to the Zietlows' property was not properly before the court because the Stokes' written answer did not state that the Zietlows' title was in dispute.[2] The Zietlows did not raise this objection at the September hearing. Although they did question why title was an issue when what they wanted was eviction, they did not ask to have the hearing rescheduled; they did not state they wanted to talk to a lawyer before proceeding. Instead, they participated in the hearing at which the issue

[2] Section 799.43, STATS., permits a defendant to plead orally or in writing "except that if the plaintiff's title is put in issue by the defendant, the answer shall be in writing and subscribed in the same manner as the complaint."

of title was heard and decided. Then, when they did retain counsel, they did not move for reconsideration or relief from judgment on this or any other ground. On appeal, the Zietlows claim in general terms that the lack of written notice of the title dispute was unfair, but they do not explain how they were prejudiced by it.

Failure to object at trial generally waives those objections for purposes of appeal. *See* ***State v. Fawcett***, 145 Wis.2d 244, 256, 426 N.W.2d 91, 96 (Ct. App. 1988). As a general rule, we do not consider issues not raised before the trial court, although we may do so in the proper case. ***County of Columbia v. Bylewski***, 94 Wis.2d 153, 171-72, 288 N.W.2d 129, 138-39 (1980). We see no compelling reasons to address this issue since the Zietlows have not shown they were prejudiced by the Stokes' failure to state in their answer that they were putting title in issue.

For the same reason, the Zietlows have waived their objection that the matter should have been tried under the procedures of chs. 801 to 847, STATS., not small claims procedures.[3] It is clear that the question of the landlord's title may be raised in an eviction action. ***Scalzo v. Anderson***, 87 Wis.2d 834, 847-48, 275 N.W.2d 894, 899 (1979). The Zietlows do not dispute this. Their only point here is that the regular rules of civil procedure, not small claims procedure, should have governed the proceedings before the trial court. The Zietlows did not raise this issue at the September hearing. Their counsel did not raise this issue at any time before the trial court. And the Zietlows do not explain how they were prejudiced by the application of small claims procedures. Under these circumstances, we will not address this issue.

The Zietlows also contend that the writing produced by David Stokes at the hearing was void under the statute of frauds. We agree that the writing does not contain the formal requisites of § 706.02, STATS. However, § 706.04, STATS., provides:

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[3] Section 799.02, STATS., provides that if a counterclaim is filed that arises out of the same transaction and is beyond the types of actions specified in § 799.01, STATS., the person filing the counterclaim shall pay the fee prescribed under § 814.62(3)(b), STATS., and the matter, with certain exceptions, will be tried under the procedure in chs. 801 to 847, STATS.

> A transaction which does not satisfy one or more of the requirements of s. 706.02 may be enforceable in whole or in part under doctrines of equity, provided all of the elements of the transaction are clearly and satisfactorily proved and, in addition:
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> (1) The deficiency of the conveyance may be supplied by reformation in equity; or
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> (2) The party against whom enforcement is sought would be unjustly enriched if enforcement of the transaction were denied; or
>
> (3) The party against whom enforcement is sought is equitably estopped from asserting the deficiency. A party may be so estopped whenever, pursuant to the transaction and in good faith reliance thereon, the party claiming estoppel has changed his or her position to the party's substantial detriment under circumstances such that the detriment so incurred may not be effectively recovered otherwise than by enforcement of the transaction, and either:
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> (a) The grantee has been admitted into substantial possession or use of the premises or has been permitted to retain such possession or use after termination of a prior right thereto; or
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> (b) The detriment so incurred was incurred with the prior knowing consent or approval of the party sought to be estopped.

Section 706.04, STATS., as it plainly states, is an equitable provision. The standard of review on matters of equity is whether the findings of the trial court are against the great weight and clear preponderance of the evidence. ***John v. John***, 153 Wis.2d 343, 353, 450 N.W.2d 795, 800 (Ct. App. 1989), *cert. denied*, 498 U.S. 814 (1990).[4]

[4] This standard is essentially the same as the "clearly erroneous" standard. ***Noll v.***

The trial court recognized that the writing did not meet the requirements of the statute of frauds, but concluded it was nevertheless enforceable because the Stokes had changed their position in reliance on the agreement and the Zietlows had knowingly permitted that to happen. These findings are not against the great weight and clear preponderance of the evidence. We conclude that § 706.04(3), STATS., is met.

The Zietlows are correct that in addition to meeting the requirements of either subsecs. (1), (2) or (3), "the elements of the transaction must be clearly and satisfactorily proven." This does not mean, as the Zietlows suggest, that the description of the property must be included in the writing.[5] But it does mean that the court must be able to find by clear and satisfactory evidence the property subject to the transaction. Because the trial court contemplated doing this after the entry of the December 19 order, we are unable to determine on this record whether this requirement of § 706.04, STATS., is met. We therefore remand to the trial court in order for it to determine whether this requirement is met.

By the Court.—Cause remanded.

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

(..continued)
Dimiceli's, Inc., 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983).

[5] The cases cited by the Zietlows deal with the requirements of the statute of frauds. *See* ***Wadsworth v. Moe***, 53 Wis.2d 620, 193 N.W.2d 645 (1972); ***Trimble v. Wisconsin Builders, Inc.***, 72 Wis.2d 435, 241 N.W.2d 409 (1976); ***Wiegand v. Gissal***, 28 Wis.2d 488, 137 N.W.2d 412 (1965). They do not deal with the application of § 706.04, STATS.