

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 11, 2013

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2012AP2206

Cir. Ct. No. 2011SC9857

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

RICHARD HAMRE,

PLAINTIFF-APPELLANT,

V.

CESAR PONTIDORO AND JILLIAN PONTIDORO,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
C. WILLIAM FOUST, Judge. *Affirmed.*

¶1 BLANCHARD, J.¹ Richard Hamre appeals a circuit court order dismissing his rent and damages claim against respondents Cesar and Jillian

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Pontidoro. The claim arises in the context of an eviction action Hamre brought against the Pontidoros. Hamre argues that the circuit court erred by failing to give effect to a prior eviction judgment in this same action, that the circuit court further erred by declining to apply issue preclusion in the context of the rent and damages claim, and that Hamre is entitled to holdover damages under WIS. STAT. § 704.27. For the following reasons, I reject Hamre’s arguments and affirm the circuit court’s order.

BACKGROUND

¶2 On November 21, 2011, Hamre filed a small claims summons and complaint seeking to evict the Pontidoros from a residential property. Attached to the complaint was a five-day termination notice informing the Pontidoros that they owed \$1,200 per month in rent for September, October, and November 2011, for a combined total of \$3,600. The notice informed the Pontidoros that they had until November 13, 2011, to either pay the rent or vacate the property.

¶3 The Pontidoros filed an answer admitting that they resided at the property but denying that they owed \$3,600 in rent to Hamre. As an affirmative defense, they alleged that they had no written or oral lease with Hamre, that all of their rent payments to date had been in the amount of \$900 per month to Leonardo D’Amico, and that they had no prior indication that Hamre was their landlord.

¶4 An eviction hearing was held in the circuit court before Judge William E. Hanrahan on January 20, 2012. Both Hamre and the Pontidoros appeared in person with counsel. The court took no testimony but heard factual assertions, at times regarding what counsel were “prepared to prove,” and legal arguments by counsel. Counsel for the Pontidoros stipulated that Hamre “owns”

the property, although there was no stipulation as to when Hamre came to own the property.

¶5 Hamre’s counsel asserted that Hamre was “the landlord” and that “[t]hey have a verbal month-to-month lease.” However, it is not clear from a reading of the record whether counsel was referring to a landlord-tenant relationship between Hamre and D’Amico, between Hamre and the Pontidoros, or some combination of the two. Hamre’s counsel conceded that he could not prove the terms of the alleged lease, including the process used for rent payments, before September 2011. He asserted that, in any case, a letter that counsel had sent to the Pontidoros in October 2011 on Hamre’s behalf established new lease terms that required the Pontidoros to pay Hamre \$1,200 per month in rent starting at that time. The letter proposed that the Pontidoros “pay the September rent immediately, October rent by October 15, 2011, and then plan on paying the November rent on time.”

¶6 The Pontidoros’ counsel asserted that: the Pontidoros had resided at the property for fourteen years; during that time, they had timely paid \$900 per month in rent to D’Amico, who was Cesar Pontidoro’s father; and D’Amico in turn paid Hamre. Counsel asserted that D’Amico previously owned the property, and that the Pontidoros did not know that D’Amico transferred ownership to Hamre until they received Hamre’s October 2011 letter. “Until they received this letter, they never had one contact ever with Mr. Hamre,” counsel for the Pontidoros asserted. According to the Pontidoros’ counsel, when they received that letter, they had already paid September and October rent to D’Amico. They told D’Amico about the letter, and he said he would take care of it. Counsel asserted that the Pontidoros paid \$900 in rent to D’Amico for November, apparently before they received the five-day termination notice. Counsel for the

Pontidoros argued that any lease the Pontidoros had was with D'Amico, not Hamre, and that if anyone was liable to Hamre as Hamre's tenant it was D'Amico. The Pontidoros did not concede that the October 2011 letter established new lease terms requiring the Pontidoros to pay Hamre \$1,200 per month in rent starting at that time. Counsel acknowledged that the Pontidoros were "\$900 or \$600 behind" in rent payments, though it was not clear what the basis for this calculation was.

¶7 The Pontidoros' counsel stated both that eviction was not contested because "they're moving out" by the end of January 2012, but also that entry of a judgment was contested because "there was no contractual relationship ever" between the Pontidoros and Hamre. It appears that counsel was arguing that eviction was not necessary because the Pontidoros were about to physically vacate the property, but also that entry of a judgment of eviction was inappropriate because of the lack of proof of a lease.

¶8 The Pontidoros' counsel further asserted that Hamre and the Pontidoros had entered into a stipulation under which the Pontidoros paid Hamre \$1,200 "for the privilege of being there until the end of" January 2012. Counsel asserted that Hamre then demanded additional rent and damages that the Pontidoros could not afford, and then refused to drop the eviction action. Counsel indicated that the Pontidoros nonetheless would continue to agree that they would vacate the property by the end of the month. Counsel requested that the court decline to enter a judgment of eviction on this basis and address the issue of damages at a later date.

¶9 At this juncture in the proceedings, before the circuit court heard further from Hamre's counsel, the court stated that "[t]here's no defense raised to the eviction," and it then ruled: "I do grant the writ [of eviction]." At the same

time, the court also stated: “I’m dealing with a very small slice of the controversy here today, obviously, and that is the eviction.”

¶10 When the Pontidoros’ counsel requested a stay of the issuance of the writ until the end of the month, the court turned to Hamre’s counsel for his position. Hamre’s counsel appeared to disagree as to the existence or terms of a stipulation between the parties. Hamre’s counsel first characterized the \$1,200 as “exactly one month’s rent,” but then asserted that the \$1,200 the Pontidoros paid Hamre was consideration for “an agreement to try to work out a stipulation” as to back rent, or perhaps an agreement for a tenancy on a going-forward basis. According to Hamre’s counsel, the parties failed to reach any stipulation. Hamre’s counsel stated: “[W]e would like a writ issued, and I have no objection to it being stayed until the 31st.” The court again ruled, stating, “So ordered.”

¶11 The Pontidoros’ counsel requested that the court “withh[o]ld” the writ until the end of the month, or have it “cancelled,” assuming that the Pontidoros vacated by that time, so that the eviction would not be “on their record.” The court denied this request, stating that “the eviction was granted today.”

¶12 The circuit court’s reasoning for granting a writ of eviction appeared to be that the terms of whatever lease agreement (or agreements) existed were not a defense to the eviction, given that Hamre owned the property, that the Pontidoros resided there, and that Hamre gave the Pontidoros a five-day notice to terminate. In addition, the court appeared to implicitly conclude either that there was no stipulation between the parties or that any such stipulation was not a defense to eviction.

¶13 A form “Judgment/Notice of Entry of Judgment” was electronically signed by the clerk of court on January 20, 2012, and filed on January 23, 2012. It states that “[a] Judgment for Eviction was entered on January 20, 2012.” The form further states that “THIS IS A FINAL JUDGMENT FOR PURPOSES OF APPEAL.” The Pontidoros did not seek an appeal, and it appears undisputed for purposes of Hamre’s appeal that they vacated the property by January 31, 2012.

¶14 In February 2012, as part of the same action, Hamre filed a rent and damages claim against the Pontidoros, seeking a total of \$9,320 plus costs. The Pontidoros re-alleged their previous denials and affirmative defense, and further denied that they owed Hamre \$9,320.

¶15 On September 24, 2012, after Hamre’s rent and damages claim had been dismissed by a court commissioner, the claim came before the circuit court, Judge C. William Foust, for a trial de novo. Hamre, the Pontidoros, and D’Amico testified.

¶16 Hamre testified, in part, that he owned both the house in which the Pontidoros lived and the house next door, in which D’Amico lived. Hamre acquired both properties from D’Amico or D’Amico’s mortgage lender when D’Amico was having financial problems. Hamre acquired the house in which the Pontidoros lived in 2006. Hamre testified that the Pontidoros and D’Amico “both paid” him rent, but he did not produce documentation showing payments to him from the Pontidoros. Rather, the documentary evidence showed payments to him from D’Amico.

¶17 The Pontidoros testified, in part, that they had always paid rent to D’Amico and that they had no idea that Hamre owned the house in which they resided until they received the October 2011 letter from Hamre’s counsel. Jillian

Pontidoro testified that D’Amico filled out certificates as their landlord for purposes of a homestead credit on their taxes. The Pontidoros produced copies of some such certificates. D’Amico testified, in part, that he did not tell the Pontidoros that he sold the house in which they lived to Hamre, that he had been paying Hamre \$3,000 per month for both houses, and that, to his knowledge, the Pontidoros never paid Hamre.

¶18 After the close of evidence, Hamre argued that much of the testimony, and many of the issues that the Pontidoros raised, were irrelevant based on issue preclusion (also known as collateral estoppel). He argued that the eviction judgment, along with the five-day termination notice, had the effect of terminating “the tenancy” as of the November 13, 2011 date specified in the notice. Hamre argued that the Pontidoros were “holdover tenants” after that date, and that any other conclusion would be an impermissible collateral attack on the eviction judgment.

¶19 The Pontidoros argued that they had no legal obligation to Hamre and that, if Hamre had a claim for damages, it could be against D’Amico only. They also argued that they never received proper notice that their rent was being raised to \$1,200 per month and that they paid all the rent that they had agreed to pay.

¶20 The circuit court first noted that there was no written lease, and that there was no written stipulation showing what the parties had or had not agreed to as of the date of the eviction hearing. The court had before it the eviction hearing minutes but not a transcript of that hearing. The court questioned whether there was a valid eviction judgment. It found that Judge Hanrahan took no testimony and “didn’t sign anything.” The court concluded that the hearing minutes were

unclear as to whether the parties reached some form of agreement at the hearing and as to whether Judge Hanrahan had granted a writ of eviction. The court stated:

[The minutes] read[] to me like it was, “We agree we’ll move out by the end of the month.” The way that is typically handled is, okay, there is an agreement ... they’ll move out by the end of the month. Normally, you dismiss the case. If they don’t move out by the end of the month, you reopen saying, “Hey, they didn’t leave.” You get your judgment, you get your writ. That’s not what happened here.

The court acknowledged that the record contained a form eviction judgment electronically signed by the clerk of court but concluded that this document was not dispositive.

¶21 Regarding the lack of a transcript of the eviction hearing, the court informed Hamre as follows:

Now if you want to go get a transcript of what happened January 20th[, 2012, at the hearing before Judge Hanrahan,] and show me that Judge Hanrahan actually said, “I grant the judgment—I find in favor of the plaintiff, I order a judgment of eviction,” you can bring that back to me.

But, I’m the one that has this lawsuit today.

¶22 The circuit court proceeded to make findings that credited the Pontidoros’ testimony and documentation over contradictory testimony by Hamre, which included Hamre’s testimony suggesting that he believed one or both Pontidoros were aware that he owned the property prior to October 2011 and that they had sometimes paid him rent. The court concluded that there was some type of lease agreement between Hamre and D’Amico, but that there was no landlord-tenant relationship between Hamre and the Pontidoros. The court further

concluded that if anyone owed rent or damages to Hamre it would be D'Amico, not the Pontidoros. The court therefore dismissed Hamre's rent and damages claim against the Pontidoros.

¶23 At the conclusion of the hearing, Hamre's counsel returned to the issue of the lack of an eviction hearing transcript, asking the court, "Your Honor, can I get a transcript from that ... and submit a motion for reconsideration?" The court informed Hamre's counsel that he could contact Judge Hanrahan's court reporter, provided counsel with the court reporter's name, and advised counsel to "do whatever your lawyerly judgment says you should do."

DISCUSSION

¶24 Hamre first argues that the circuit court, Judge Foust, erred by failing to give effect to the eviction judgment. Hamre further argues that, if Judge Foust made a finding of fact that no eviction judgment exists, that finding was clearly erroneous given the transcript of the eviction hearing and the form judgment signed by the clerk of court.

¶25 Although a transcript of the eviction hearing is now before this court as part of the record on appeal, the record does not show that Hamre ever moved for reconsideration before Judge Foust or otherwise attempted to bring the transcript to Judge Foust's attention. Hamre suggests no good reason why he declined to accept Judge Foust's invitation to review a transcript. I therefore conclude that Hamre did not preserve, and thus forfeited, his arguments that Judge Foust failed to give effect to the eviction judgment and that Judge Foust made an erroneous fact finding that no such judgment exists. I decline to consider these forfeited arguments. See *State v. Ndina*, 2009 WI 21, ¶¶29-30, 315 Wis. 2d 653, 761 N.W.2d 612 (failure to timely raise an issue forfeits the issue on appeal; court

need not consider forfeited issues); *Highland Manor Assocs. v. Bast*, 2003 WI 152, ¶17, 268 Wis. 2d 1, 672 N.W.2d 709 (summarizing, in an eviction case, the reasons why “public policy favors allowing a circuit court to reconsider its decisions;” reasons include that “[a] circuit court’s reconsideration may obviate the need for an appeal[,] ... spare the parties unnecessary expense, ... serve the goal of judicial economy[,] ... [or,] [e]ven if an appeal is not avoided, ... enable[] a circuit court to hone its analysis and thus expedite the appellate review process”).

¶26 Hamre next argues that Judge Foust erred by declining to apply issue preclusion at the rent and damages hearing. For the reasons that follow, I reject this argument.

¶27 An initial problem with Hamre’s issue preclusion argument is that it appears to be premised primarily on Hamre’s other, forfeited arguments above. Hamre asserts that “the primary error” by Judge Foust in declining to apply issue preclusion “was one of law in not recognizing the prior judgment.” For the reasons already explained, I decline to consider any issue preclusion argument that is premised on other, forfeited arguments.

¶28 It is difficult to discern what, if anything, remains of Hamre’s issue preclusion argument in the absence of his forfeited arguments. However, I will address what might be interpreted as a stand-alone issue preclusion argument that Hamre makes. Specifically, Hamre argues that “an analysis of the five [issue preclusion] factors shows that there is no reasonable dispute over whether issue preclusion should be applied in this case.”

¶29 The five issue preclusion factors are

(1) Could the party against whom preclusion is sought have obtained review of the judgment as a matter of law;

(2) Is the question one of law that involves two distinct claims or intervening contextual shifts in the law;

(3) Do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue;

(4) Have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; and

(5) Are matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

Estate of Rille v. Physicians Ins. Co., 2007 WI 36, ¶61, 300 Wis. 2d 1, 728 N.W.2d 693. “A circuit court’s ultimate decision on [the] fundamental fairness [of applying issue preclusion] is an exercise of discretion and is reviewed as such.” *Id.*, ¶38.

¶30 It may be true, as Hamre asserts, that the Pontidoros could have sought review of Judge Hanrahan’s grant of a writ of eviction, *see Highland Manor*, 268 Wis. 2d 1, ¶¶4, 20-26 (discussing appeal procedure for judgment of eviction). It may also be true that the legal context did not change and that there was not a shift in the burden of persuasion between the two hearings. However, the quality or extensiveness of the two hearings was significantly different.

¶31 To summarize some of the most pertinent circumstances, as recited more fully in the background section above, Judge Hanrahan heard no testimony or other evidence at the eviction hearing; appeared to conclude that the terms of any lease could not be a defense to a writ of eviction, given that Hamre owned the

property, the Pontidoros resided there, and Hamre gave the Pontidoros a five-day notice to terminate; and stated that “I’m dealing with a very small slice of the controversy here today, obviously, and that is the eviction.” Additionally, it is apparent that, consistent with the court’s “small slice” statement, the parties implicitly agreed at the eviction hearing to resolve damages at a later date, or at least Hamre did not object to doing so.

¶32 Based on all the circumstances, it would not be unreasonable to conclude that the Pontidoros lacked an adequate opportunity at the eviction hearing to litigate issues that were part of Hamre’s rent and damages claim. Those issues could include: the terms of any lease; whether the Pontidoros violated any lease term; the legal effect of Hamre’s five-day termination notice; and the legal effect of any stipulation between the parties or the Pontidoros’ \$1,200 payment to Hamre in furtherance of such a stipulation.

¶33 In arguing that the Pontidoros had a full opportunity to litigate pertinent issues at the eviction hearing, Hamre appears to focus on the five-day termination notice, asserting that the Pontidoros had the opportunity to fully litigate the “validity” of that notice at the eviction hearing, and that they simply lost on this issue. However, Hamre does not adequately explain why the opportunity to litigate the validity of the notice necessarily includes the opportunity to litigate other possible defenses the Pontidoros might have had to Hamre’s rent and damages claim.

¶34 Regardless, I disagree with Hamre that the record makes clear that the Pontidoros had a full opportunity to litigate the “validity” of the notice at the eviction hearing, at least not in the way that Hamre appears to mean. Specifically, it is unclear whether the circuit court at the eviction hearing concluded that the

notice was a valid notice to terminate whatever tenancy (or tenancies) existed, or whether the court instead concluded that the notice's validity as to a particular tenancy did not need to be litigated before granting a writ of eviction. To the extent the court made the latter conclusion, the Pontidoros did not have a meaningful opportunity to litigate the validity of the notice, where there was no evidence presented on relevant issues, including the existence of a landlord-tenant relationship.

¶35 In short, I am not prepared to say, based on all the “individual circumstances involved,” *see Estate of Rille*, 300 Wis.2d 1, ¶61, that the only reasonable conclusion that Judge Foust could have reached at the rent and damages hearing is that it would have been fundamentally fair to apply issue preclusion in the context of Hamre's rent and damages claim.

¶36 Hamre's final argument is that he is entitled to holdover damages as a matter of law. The holdover damages provision, WIS. STAT. § 704.27, provides as follows:

If a *tenant* remains in possession without consent of *the tenant's landlord* after expiration of a lease or termination of a tenancy by notice *given by ... the landlord* or the tenant, ... *the landlord* shall, at the landlord's discretion, recover from *the tenant* damages suffered by *the landlord* because of the failure of *the tenant* to vacate within the time required. In absence of proof of greater damages, *the landlord* shall recover as minimum damages twice the rental value ... for the time *the tenant* remains in possession.

Id. (emphasis added) Hamre argues that all the required elements for holdover damages under this statute were either “conceded or have been proven.” I am not persuaded.

¶37 The statute on its face contemplates that liability for damages be against “the tenant” in favor of “the tenant’s landlord.” *Id.* Here, it was neither conceded nor proven that the Pontidoros and Hamre had a landlord-tenant relationship. Moreover, as indicated above, the circuit court at the rent and damages hearing concluded to the contrary.

¶38 Perhaps anticipating these points, Hamre argues that it is irrelevant under WIS. STAT. § 704.27 whether he and the Pontidoros had a “direct” contractual relationship. He argues that another statutory provision, WIS. STAT. § 704.25(5)(b), allows a landlord to recover damages from a lease “assignee or subtenant.”² However, Hamre fails to cite sufficient record evidence or legal authority demonstrating that the Pontidoros are “assignees or subtenants” of a lease between Hamre and D’Amico within the meaning of § 704.25(5)(b). Thus, Hamre has not shown that he is entitled to holdover damages against the Pontidoros as a matter of law.

CONCLUSION

¶39 For all of the reasons stated, I affirm the circuit court’s order dismissing Hamre’s rent and damages claim against the Pontidoros.

By the Court.—Order affirmed.

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

² WISCONSIN STAT. § 704.25(5)(b) provides, in pertinent part, that, “if an assignee or subtenant holds over ..., the landlord may ... recover damages from the assignee or subtenant or, if the landlord has not been accepting rent directly from the assignee or subtenant, from the original tenant.”

