COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1387 **Cir. Ct. No. 2011SC2629**

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

MICHAEL MARKWORTH AND SUSAN MARKWORTH,

PLAINTIFFS-RESPONDENTS,

V.

KATHRYN L. MCMASTERS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed*.

¶1 BROWN, C.J.[1] Kathryn McMasters appeals from the order of the circuit court dismissing her counterclaim in the eviction action that Michael and

[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.

Susan Markworth filed against her. In the eviction proceedings, the Markworths claimed that McMasters owed them over $10,000 in damages for past due rent and the costs of restoring the home to habitable condition after her eviction. McMasters, in turn, claimed that the Markworths owed her over $35,000 in damages for her personal property that the Markworths either threw out or withheld, allegedly in violation of WIS. STAT. §§ 799.45 and 704.05(5)(bf).[2] McMasters also continues to press her arguments that she did not receive proper notice of her eviction and that she had an enforceable contract to purchase the home.

¶2 We find no basis to reverse the circuit court's determinations that McMasters' eviction was proper, that she had no enforceable contract to purchase the home, and that the parties' respective damages claims cancelled each other out. We affirm.

Facts

¶3 In 2008, the Markworths rented a property on Oakland Avenue in Sheboygan to McMasters, under a written lease that stated McMasters could make "an offer to purchase the home with a $500.00 down payment by March 31."

¶4 In November 2011, the Markworths sued to evict McMasters on the basis that McMasters "was served with a Notice Terminating Tenancy on September 12, 2011," but failed to vacate "on or before October 28, 2011," as

[2] Note that subsequent to McMasters' eviction, WIS. STAT. § 704.05 was amended such that the notice and opportunity to retrieve personal property is no longer required. Instead, the landlord may, subject to certain limited exceptions, "dispose of … abandoned personal property in any manner that the landlord, in its sole discretion, determines is appropriate." § 704.05(5)(a)1.

required. The Markworths sought past-due rent, double damages for unpaid rent per WIS. STAT. § 704.27, and other damages.

¶5 McMasters was served with a summons and complaint in the eviction action when the notice was posted conspicuously at the Oakland property, her last known mailing address. She appeared in person at the initial hearing on November 28, 2011. The Markworths' attorney filed a "letter of appearance" in the action but did not attend the hearing. McMasters filed her answer and counterclaim with the court, alleging that she didn't "owe anything," and complaining that she was being wrongfully evicted because she had a "verbal agreement to purchase the home." She also made a counterclaim for $4800, based upon a "down payment" and portions of the rent that were, she alleged, to be going toward the purchase of the home.

¶6 The case was set for a trial on December 5, 2011. In her appellate brief, McMasters asserts that the December 5, 2011 hearing date must have been set "after [she] left" the November 28 hearing, and claims that she never received the mailed notice. The minute sheet, however, indicates that a notice of the December hearing was issued on November 28, 2011, and the answer and counterclaim McMasters filed that same day lists the Oakland property as her address.

¶7 McMasters testified that she moved out of the Oakland property at "the end of November" and into a new apartment on December 1. She further testified that in early December, before the locks were changed, she returned to the Oakland property to retrieve some of her belongings.

¶8 The next hearing in the eviction action took place on December 5, as scheduled. McMasters failed to appear, so a default judgment of eviction was

granted in favor of the Markworths. At the hearing, the Markworths asserted that McMasters had left her personal property and her cat at the Oakland property, and the court commissioner held the case open for determination of damages.

¶9 McMasters appeared at the January pretrial conference and requested that her counterclaim be reopened. She asserted that her failure to appear in December "was not intentional" but happened because she "had not put in a change of address yet," and asserted that the Markworths "sent the [notice of hearing] back" to the court so she would not receive it. The Markworths opposed reopening the default judgment on the grounds that McMasters was properly notified of the December 5 hearing by mail to her last known address.

¶10 A status conference in the case was set for March 6, 2012. In advance of that hearing, McMasters sent correspondence to the court about her counterclaim, asserting that the Markworths had not permitted her to get her personal property. The Markworths responded by repeating their objection to reopening McMasters' counterclaim, because, they argued, the default judgment was proper.

¶11 The minutes of the March pretrial conference hearing indicate that both parties wished to make claims for damages, and that the Markworths had discarded all of McMasters' property. A trial to the court was set for May 4, 2012, with the court putting the parties on notice that it would first take up the issue of the alleged rent-to-own agreement.

¶12 At the outset of the May 4 trial, the court heard and granted the Markworths' motion for summary judgment against McMasters' rent-to-own claim, because McMasters conceded that the agreement was a verbal one, and

Wisconsin law requires such agreements to be in writing. *See* WIS. STAT. § 706.02.

¶13 The court proceeded to hear evidence and argument from both sides concerning their competing damages claims. The Markworths presented their case first, alleging that McMasters left the property in poor condition, with furnishings and clothing "piled high to the ceiling," cat urine and feces on walls and furniture, a "punched out" wall, broken windows, and "things that were trashed" and had to be disposed of. Testimony also indicated that McMasters received notice that her property would be stored at her expense and then disposed of after thirty days, as permitted by law. Some property, though, the Markworths argued, "wasn't savable" and so was disposed of during the thirty-day period. With respect to McMasters' assertions that she was not allowed to get her belongings, the Markworths claimed that McMasters once showed up with a moving van but failed to take her items from the front porch, on another occasion failed to show up as planned, and another occasion requested a time that did not work for the Markworths. In all, the testimony and documents submitted by the Markworths sought to document more than $10,000[3] in costs incurred for past-due rent, damages, and cleaning and repairing the home.

¶14 In her testimony, McMasters insisted that the Markworths disposed of property that was salvageable without giving her the chance to retrieve it, and that "whether [they] thought the items were of no value … it wasn't [their] call to make." She also testified that she tried to make arrangements to retrieve her

[3] Testimony revealed that a portion of those claimed damages were for labor that was not actually paid, however.

property but "was not able to" get an agreement for a mutually convenient time to do so. Regarding the day she came with a moving van, McMasters contradicted the Markworths' account, testifying that instead she was "chased … off the porch" and told to leave the property. She submitted photos documenting her visit that day.

¶15 McMasters also contradicted the Markworths' characterization of the state of the property when she left it, asserting that they, not she, stacked her belongings and created much of the mess. She also protested that she had been checking in on and cleaning up after the cat. She admitted, however, that she did not pay full rent in September, October, or November. Finally, she asserted that the personal property she had left in the home, which the Markworths disposed of, was worth about $35,000. She also testified that she made a $500 security deposit at the outset of the lease, as well as paid an additional $500 when she made an offer to purchase per the alleged oral agreement. She also presented additional witnesses who testified concerning her attempts to retrieve her property, the nature of the property, and the Markworths' disposal of it.

¶16 After the Markworths had a chance to rebut some of McMasters' assertions, the parties made their arguments to the court. Immediately following those arguments, the court gave its ruling, stating its view that the parties' respective damages claims cancelled each other out. Specifically, the court explained its finding that the Markworths had proven damages amounting to $4418.48 in total, against which the court would offset the security deposits of $1000 and the money the Markworths made by selling some of McMasters' property, just over $700. So, the court held, there remained a balance due the Markworths "of $2700."

¶17 With respect to McMasters' claims, the court found that the Markworths had violated the law when they disposed of property belonging to McMasters without permitting McMasters "to decide whether it [was] junk or not." The court was not convinced that the property was worth the $35,000 that McMasters claimed, but instead concluded that the "reasonable value of the property that was junked before the 30-day period was $2700."

¶18 After making those findings, the court held that both claims were dismissed and that neither party was entitled to damages from the other. McMasters filed this appeal.

Analysis

¶19 In an eviction action, the issues are "(1) whether the relation of landlord and tenant exists between the plaintiff and defendant; (2) whether such tenant holds over after the term of his lease has expired ... and (3) whether the proper notice has been given before the action is commenced." ***Clark Oil & Ref. Corp. v. Leistikow***, 69 Wis. 2d 226, 235, 230 N.W.2d 736 (1975) (citation omitted). On appeal, we review the court's legal decisions de novo but must uphold its factual determinations unless they are clearly erroneous. ***Tufail v. Midwest Hospitality, LLC***, 2013 WI 62, ¶¶22-23, ___ Wis. 2d ___, ___ N.W.2d ___.

¶20 On appeal, McMasters makes three arguments: (1) that she had an enforceable rent-to-own contract to purchase the property, (2) that she did not receive notice of eviction, and (3) that her property was disposed of in violation of state statutes. We affirm the circuit court's decision as to each issue.

¶21 With her first argument, McMasters attempts to establish that the relationship between her and the Markworths was one of buyer and sellers instead of tenant and landlords. But as the circuit court correctly held, under WIS. STAT. § 706.02, a conveyance of real property is invalid unless it is in writing. There is no writing memorializing a conveyance of the property to McMasters by the Markworths, and to the contrary, the writing in evidence establishes that the Markworths were the landlords and McMasters the tenant. Hence, McMasters' first argument fails.

¶22 McMasters' second argument is that she did not receive the statutorily required notice of eviction.[4] The record reflects, however, that the summons and complaint in the eviction action were properly served upon McMasters. Moreover, in her arguments below, McMasters stated, "It is not my desire to live in the [property], however I do wish for my counter claim [for the lost belongings] to be heard." She also testified that she moved out of the property at the end of November and into a new residence on December 1. Having voluntarily left the residence, and having disclaimed any interest in staying in the property, McMasters may not now challenge the eviction action itself on grounds that there was no writ of restitution.

¶23 To the extent McMasters means to argue that she did not receive notice of the December 5, 2011 hearing and that the default judgment of eviction issued on that date should be reopened, the issue is a red herring. As discussed

[4] Actually, while she labels this issue "eviction notice," in her brief the substance of her argument is based upon WIS. STAT. § 799.44, which relates not to notice of an eviction action but notice that the landlord has been granted a judgment of eviction and writ of restitution. We respond to this argument as part of our resolution of the other arguments McMasters makes concerning the Markworths' actions after she vacated the property.

above, the record reflects that the notice was mailed to her at her last known address. Moreover, in any event, the circuit court implicitly did reopen the default judgment by hearing and ruling on the competing damages claims in the eviction action. In reality, McMasters' appeal concerns the way the court resolved the competing damages claims in the eviction after the trial in May 2012, not the default judgment in December.

¶24 So, we turn to McMasters' last argument, and the actual reason for her appeal: the disposal of her property. To begin with, McMasters claims that the manner in which the Markworths handled her abandoned property violated WIS. STAT. §§ 799.44 and 799.45. Those statutes set forth the procedures for the issuance and execution of a writ of restitution, which is required when a tenant holds over and refuses to vacate the premises. *See* § 799.44. McMasters, by her own admission, "moved out [at] the end of November." So the Markworths had no need to resort to having the sheriff forcibly remove her or her belongings from the property.

¶25 McMasters' real beef is with the way the Markworths handled the personal belongings that she left behind when she moved out. Unfortunately, the facts related to the events that happened after McMasters moved out, and the state in which she left the property when she moved, were in stark controversy. On one hand, the Markworths argued that McMasters left the property in a terrible state and then failed to make reasonable efforts to retrieve her abandoned belongings, which they characterized as junk; on the other hand, McMasters contended that the Markworths maliciously prevented her from retrieving her belongings and threw away valuable property worth $35,000.

¶26 On appeal, we may not set aside the circuit court's determinations concerning the facts unless they are clearly erroneous. ***Neff v. Pierzina***, 2001 WI 95, ¶39, 245 Wis. 2d 285, 629 N.W.2d 177. There was no clear error here. To the contrary, the circuit court thoroughly considered each parties' evidence and arguments as to each material dispute of facts. The court then resolved those controversies, ultimately determining that each party was entitled to only part of what it claimed. The court explained its determination carefully, and we can find no clear error of fact in any of its determinations. Thus, "we are bound to accept those findings." ***Tufail***, 2013 WI 62, ¶42.

By the Court.—Order affirmed.

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