

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 27, 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. 2005AP719

Cir. Ct. No. 2004SC289

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

CLOVER BELT FARM, LLC,

PLAINTIFF-RESPONDENT,

V.

LINDA RADEMACHER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Chippewa County:
FREDERICK A. HENDERSON, Judge. *Affirmed.*

¶1 CANE, C.J.¹ Linda Rademacher appeals a judgment denying her contempt motion against Clover Belt Farm, LLC. Rademacher argues that

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

Clover Belt violated a stay of a writ of restitution by attempting to evict her from the property Clover Belt owned. We disagree and affirm the judgment.

Background

¶2 Rademacher is a tenant on a portion of an 800-acre property owned by Clover Belt Farms, LLC. Rademacher used the property, in significant part, as grazing land for a large number of horses. Clover Belt served Rademacher with a notice terminating tenancy. After Rademacher failed to vacate the property, Clover Belt commenced eviction proceedings in court, which Rademacher challenged. Judgment was entered in favor of Clover Belt, and a writ of restitution was issued.

¶3 Rademacher asked for a stay of the writ pending an appeal. On September 1, 2004, this court issued an order stating: “that execution or enforcement of the writ of restitution is stayed pending the trial court’s ruling on the appellant’s request to approve her undertaking.” On September 9, the trial court held a hearing on the undertaking and issued an order staying the enforcement of the writ of restitution pending an appeal, provided Rademacher posted an undertaking in the amount of \$5,000. Rademacher posted the undertaking. After service and filing of the undertaking, a statutory automatic stay prevented enforcement of the writ of restitution pending the appeal. WIS. STAT. § 799.445.²

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 Subsequently, Rademacher filed a contempt motion arguing that Clover Belt was not maintaining the status quo as required by our September 1 order. Rademacher alleged that Clover Belt had made alterations to the property including, but not limited to, tearing down fences, turning off electricity that powered a camper she had on the property, altering the supply of water and reducing the area on the property available to her horses. The court declared that the only stay at issue was the WIS. STAT. § 799.445 automatic stay. The court went on to state:

[T]hat stay, when you read that statute simply says you can't enforce the court's writ of restitution ... there has not been one smidgen of evidence today that the plaintiffs or their agents have tried to get the Sheriff to take them off, have removed any of these horses themselves or done any of those specified acts and powers they give the Sheriff in that writ of restitution.

The court then denied the contempt motion. Rademacher appeals.

Standard of Review

¶5 The standard of review for the trial court's findings in a contempt proceeding is whether the findings are contrary to the great weight and clear preponderance of the evidence. *Currie v. Schwalbach*, 132 Wis. 2d 29, 36, 390 N.W.2d 575 (Ct. App. 1986).

Discussion

¶6 Rademacher argues that Clover Belt is in contempt because it violated this court's September 1 order that the status quo be maintained, and it evicted her from the property. We agree with the trial court that our September 1 stay was no longer in effect, and the only stay at issue is the WIS. STAT. § 799.445 automatic stay.

¶7 WISCONSIN STAT. § 785.01 provides that contempt includes “[d]isobedience, resistance or obstruction of the authority, process or order of a court.” The September 1 order stated “that execution or enforcement of the writ of restitution is stayed pending the trial court’s ruling on the appellant’s request to approve her undertaking.” Thus, our order expired with the trial court’s ruling on the undertaking on September 9. The September 9 stay then expired in favor of the automatic stay after service and filing of the undertaking. WIS. STAT. § 799.445.

¶8 The automatic stay does not require that the status quo be maintained. *Id.* Although we are somewhat sympathetic to problems that Rademacher is experiencing due to the actions Clover Belt is allegedly taking, the automatic stay does not require that Clover Belt leave the property untouched throughout the appeals process. Thus, Clover Belt was not in contempt.

¶9 We also do not agree, as Rademacher contends, that she was evicted from the property. First, there is nothing in the record that indicates the Sheriff or Clover Belt attempted to enforce the writ of restitution. Second, Rademacher was not constructively evicted from the property. The elements of constructive eviction are clear:

It is now well established that any disturbance of the tenant’s possession by the landlord, or someone acting under his authority, which renders the premises unfit for occupancy for the purposes for which they were demised or which deprives the tenant of the beneficial enjoyment of the premises, causing him to abandon them, amounts to a constructive eviction, *provided the tenant abandons the premises within a reasonable time.*

Kersten v. H.C. Prange Co., 186 Wis. 2d 49, 57, 520 N.W.2d 99 (Ct. App. 1994) (emphasis added). Rademacher was not constructively evicted from the property

because there is no evidence that she had abandoned the property at the time of the contempt motion.³ Clover Belt was not in contempt of the automatic stay because it did not attempt to enforce the writ of restitution.

¶10 Finally, Clover Belt argues that Rademacher’s appeal is frivolous. We disagree. WISCONSIN STAT. § 809.25(3)(c)1 and (c)2 provides that an appeal is frivolous when either of the following is found:

1. The appeal or cross-appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
2. The party or the party’s attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

Clover Belt contends that the appeal is frivolous under either element. We are satisfied that the appeal is not frivolous because nothing in the record indicates that the appeal was furthered solely to harass or injure Clover Belt, and there is a reasonable basis for the appeal.

By the Court.—Judgment affirmed. No costs to either party.

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

³ Rademacher indicates in her brief that “[s]ince [she] has moved out of the premises some of the demands in her motion are now moot.” However, there is no indication that she abandoned the premises at the time of the contempt motion.

