

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 15, 2006

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. 2005AP2836

Cir. Ct. No. 2005SC2724

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

WWF COMPANY, LLP,

PLAINTIFF-RESPONDENT,

V.

JAMES HODGELL,

DEFENDANT-APPELLANT,

COLORADO CHRISTIAN CHURCH,

DEFENDANT.

APPEAL from a judgment of the circuit court for Sheboygan
County: TERENCE T. BOURKE, Judge. *Affirmed.*

¶1 BROWN, J.¹ James Hodgell appeals from a judgment of eviction. Hodgell entered into a commercial lease with WWF Company, LLP, and stored vehicles on the leased property. Over three years after first signing the lease agreement, Hodgell stopped paying rent, citing as justification WWF's failure to obtain an occupancy permit required by local ordinance. WWF brought an eviction action and the small claims court evicted Hodgell and awarded WWF damages for back rent and costs. Hodgell appeals, renewing his claim that he is not liable for back rent because of WWF's failure to obtain the occupancy permit. We disagree and affirm. There is no law in this state under which Hodgell was entitled to continue to occupy the premises without paying rent.

¶2 WWF owned a commercial building at 1560 N. 17th Street in Sheboygan, of which Hodgell leased approximately 20,000 square feet of space to store vehicles. Hodgell accepted WWF's offer to lease the premises in January 2002 and housed forty vehicles at the facility. On November 18, 2004, the city of Sheboygan cited WWF for a violation of SHEBOYGAN, WIS., MUNICIPAL CODE § 26-42(a) (2004),² for failing to acquire an occupancy permit required for

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

² SHEBOYGAN, WIS., MUNICIPAL CODE § 26-42 (2004), reads in relevant part:

Sec. 26-42. Occupancy permit.

(a) It shall be unlawful to use or permit the use of any commercial building or premises, or part thereof hereafter erected, altered or converted wholly or partly in its use from previous occupancy or where the premises or any portion thereof have become vacant for more than one year, until an occupancy permit has been obtained from the building inspection department.

....

(continued)

Hodgell's storage of vehicles on the premises. William Wessing, manager of WWF, was ordered to pay a \$215.60 fine on March 7, 2005. Hodgell first learned of WWF's violation as early as October 2002. Beginning in April 2005, Hodgell ceased rent payments but continued to store vehicles on the premises. Hodgell states that he began removing the vehicles in March, but he still had twenty vehicles on the property in October 2005 and ten in November. Hodgell states that he removed the last vehicle from the property in January 2006.

¶3 On August 24, 2005, WWF sold the premises to Willard Quasius, LLC. The contract stipulated that WWF would remove Hodgell and his property from the premises on or before October 15, 2005 and that WWF would retain all rights related to the eviction action.

¶4 WWF filed an action for eviction and damages for delinquent rent totaling \$2410 in small claims court on August 24, 2005. After trial on November 15, 2005, the court entered judgment against Hodgell for eviction, imposing back rent and costs totalling \$4224.68.³ Hodgell appeals.

(i) If the conditional occupancy permit is issued the applicant agrees to have all violations corrected within 45 days. A reinspection will be scheduled after 45 days to check for compliance. If any violations still exist a penalty of \$25.00 per day will be assessed until all violations are corrected.

(j) The building inspection department may revoke any permit of approval issued if any violation of this article is found upon inspection or in the case there has been any false statement in the application or plans on which the permit or approval was based.

³ This higher number presumably reflects additional back rent for the time between the filing of the claim and the judgment.

¶5 Our review of this case is limited by the fact that the record does not contain a transcript of the trial. Hodgell states that he is unable to pay for the transcription; he requested that the fee be waived, but the circuit court denied his petition on the ground that his appeal did not present sufficient merit. When an appeal is brought upon an incomplete record, we assume that all facts essential to sustain the decision of the court below are supported by the record. *Suburban State Bank v. Squires*, 145 Wis. 2d 445, 451, 427 N.W.2d 393 (Ct. App. 1988). We view the relevant facts in this case as undisputed; the application of the law to such facts is a question of law that we review de novo. See *City of Muskego v. Godec*, 167 Wis. 2d 536, 545, 482 N.W.2d 79 (1992).

¶6 Further, because Hodgell is proceeding pro se, we are in our discretion liberally construing his arguments in order to address the legal merits of his case. See *Waushara County v. Graf*, 166 Wis. 2d 442, 451-53, 480 N.W.2d 16 (1992) (court of appeals not required to deal liberally with non-incarcerated pro se litigants, but may in its discretion address issues not raised by the parties).

¶7 Hodgell directs our attention to *First Wisconsin Trust Co. v. L. Wiemann Co.*, 93 Wis. 2d 258, 267-68, 286 N.W.2d 360 (1980), to argue that he was constructively evicted from the premises and was thus excused from paying rent. In *First Wisconsin Trust*, the court stated the rule that if a landlord interferes with a tenant's possession or enjoyment of the premises so as to render them unfit for occupancy for the purpose for which they are leased, the landlord constructively evicts the tenant, who is then released from any subsequent obligation to pay rent. *Id.* However, the interference must be substantial, depriving the tenant of full use and enjoyment of the premises for a material time, and must cause the tenant to abandon the premises within a reasonable time. *Id.* at 268. In *First Wisconsin Trust*, various incidents in 1962, 1965, and 1971—

including fires, an automobile crash, and a break-in—interrupted the tenant’s business operations on the premises. *Id.* at 265. However, the landlords promptly repaired the damage, causing no more than a temporary inconvenience. *Id.* at 269. Furthermore, even though the incidents occurred in 1962, 1965, and 1971, the tenant did not terminate the lease until September 1972. *Id.* Because of this substantial delay, the defendant did not abandon the premises within a reasonable time. *Id.* at 270. Thus, the court did not find a constructive eviction. *Id.*

¶8 Similarly, Hodgell cannot successfully claim a constructive eviction defense here. Even if it could be shown that WWF’s failure to obtain a permit deprived Hodgell of the full use of the premises, Hodgell continued to occupy the space during all of the months here at issue. The discussion in *First Wisconsin Trust* makes clear that his continued presence precludes a constructive eviction defense to nonpayment of rent.

¶9 Wisconsin’s untenability statute, WIS. STAT. § 704.07, enacted after the events at issue in *First Wisconsin Trust*,⁴ confirms this. The statute deals with the physical condition of property, rather than the legal or permitting status, but it likewise forbids a tenant from withholding rent in full if the tenant maintains possession of the premises. Sec. 704.07(4). Moreover, although § 704.07(1) applies the statute to both nonresidential and residential leases, § 704.07(2)(a)5. limits the statute’s application of local housing codes only to residential tenancies.

¶10 WWF relies on our supreme court’s decision in *Posnanski v. Hood*, 46 Wis. 2d 172, 174 N.W.2d 528 (1970). In *Posnanski*, the defendant tenant

⁴ WISCONSIN STAT. § 704.07 replaced the ancient and considerably less detailed WIS. STAT. § 234.17 (1967-68), effective July 1, 1971. 1969 Wis. Laws, ch. 284, §§ 3, 25, 28.

withheld rent payments and eventually vacated the premises because of defective conditions—including falling plaster, leaking oil, and broken locks—that violated the Milwaukee Housing Code. *Id.* at 175. When the landlord brought an action to collect the rent arrearage, rather than claiming untenantability under the then-effective WIS. STAT. § 234.17, the tenant defended on the basis that the code violation made the lease illegal and therefore unenforceable. *Posnanski*, 46 Wis. 2d at 174-75. The court rejected this argument, holding that as a matter of policy, regulations such as housing codes cannot be implied in landlord-tenant lease agreements when the regulations include enforcement procedures, because such an implication would lead to the courts, rather than the proper administrative agency, enforcing and interpreting the regulations. *Id.* at 182. The Milwaukee Housing Code provisions at issue in *Posnanski* included enforcement procedures that provided for inspections by the health commissioner and stipulated penalties for violating the commissioner’s orders. *Id.* Accordingly, the substantive provisions of the housing code could not be read into the lease agreement, and the tenant could not enforce the code by refusing to pay rent. *See id.* at 182-83.⁵

¶11 We believe that *Posnanski* controls this case. Hodgell, like the tenant in *Posnanski*, cannot enforce the city building code by withholding rent. Like the Milwaukee Housing Code provisions at issue in *Posnanski*, Sheboygan city ordinance sec. 26-42(2)(i)-(j) contains enforcement provisions for a building owner’s failure to address violations. The ordinance designates the building

⁵ See also *Baierl v. McTaggart*, 2001 WI 107, ¶¶ 36-37, 245 Wis. 2d 632, 629 N.W.2d 277 (holding that differing legislative intent of WIS. ADMIN. CODE ch. ATPC 134 (Apr. 1993) rendered a lease in violation of that code provision unenforceable by landlord); *Baierl*, 245 Wis. 2d 632, ¶¶42-43 (Crooks, J., concurring) (noting that even so, landlord was entitled to rent payments for the time that tenants continued to occupy the property).

inspection department—not Hodgell or the courts—as the appropriate party to enforce the building code’s provisions.

By the Court.—Judgment affirmed.

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

