COURT OF APPEALS
DECISION
DATED AND FILED

February 8, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP502 **Cir. Ct. No. 2004SC8250**

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

MOLLY TODD,

PLAINTIFF-RESPONDENT,

V.

APEX PROPERTY MANAGEMENT, INC.,

DEFENDANT-APPELLANT.

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

¶1 LUNDSTEN, P.J.[1] In this landlord-tenant dispute, Apex Property Management appeals a circuit court judgment awarding damages and attorney's

[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.

fees to a former tenant, Molly Todd. The circuit court concluded that Todd was constructively evicted and that Apex failed to timely provide her with a security deposit report. Apex seeks reversal on three grounds. Apex contends that (1) Todd was not constructively evicted; (2) the security deposit report was timely; and (3) the circuit court's award of attorney's fees was unreasonable. We affirm the circuit court.

Background

¶2 Todd rented an apartment from Apex under a one-year lease commencing August 15, 2003. Soon after moving in, Todd began experiencing problems with her downstairs neighbors, a mother and her teen-aged son, named Carol and Jeff. In September 2003, Todd informed Apex of the problems, including extremely high noise levels, fights, drug dealing and use, and underage drinking parties.

¶3 In December 2003, Todd wrote a letter to Apex. She explained that, after she had moved in,

> there was near-daily drug-dealing and -consumption as well as drinking both inside and out on the front porch. While the weather was nice, at any given time of day or night, in order to get to my front door, I had to walk through a group of three to ten teenagers who were tripping and/or drunk…. On multiple occasions, I was offered drugs, asked to "go in on" deals, or asked for supplies.
>
> There were also frequent violent explosions between Carol and Jeff, as well as between Carol and her boyfriend. On average, this happened at least five times a week. Perhaps once or twice a week … these fights became so violent that I would hold the telephone in my hand, ready to dial 9-1-1 if need be.
>
> In fact, on several occasions I have called the police ….

Todd described one incident where Jeff had "cornered" her on the porch, using threatening body language.

¶4 In her December letter, Todd also explained that, at some point in late October or early November, Jeff had left town, and the major problems subsided. In early December, however, Jeff returned and the problems resumed. Todd, a graduate student who did much of her work from home, explained that with Jeff back in town she was unable to work at home in the evenings because of the noise and fights. She was forced to perform her work between 4 a.m. and 8:30 a.m. Todd also said in her letter:

> I write all this mostly to keep you updated on the situation. In my September conversation with [one of Apex's employees], he made it clear to me that if things did not improve, something could be worked out—either I could move to another Apex property, or I could be released from my lease or sublease the flat. I do not want to make any decisions about this now, but I do want you to know that the problems with my neighbors continue and that I may need to move.

¶5 Todd kept a detailed log of events involving her neighbors, and it shows that she again informed Apex of the problems with her neighbors in January 2004.

¶6 In February 2004, Todd wrote to Apex again. She described ongoing problems with unacceptable noise levels at all hours of the day and night. She further wrote:

> I would also like to call your attention to the fact that the door between the downstairs living room and my entryway still has not been replaced. I first broached this with Apex shortly after moving in last fall. I have been told several times since then that the situation was being "looked into," yet no action has been taken. I urge Apex to take direct action on this, for several reasons. First, the door is made of a thin veneer and does not provide

> sufficient separation between their apartment and mine. Given that I do not feel safe due to their behavior in general, combined with the fact that Jeff threatened me after the last time I called the police, this door does nothing to provide me with a sense of security. Second, a thicker, stronger door will block at least some of the noise and smoke that wafts through to permeate my apartment.

Todd concluded her letter by stating that, given the situation, she had decided to begin searching for another place to live.

¶7 On March 22, 2004, Todd wrote Apex to inform Apex that she would move out of the apartment on April 16.

¶8 On April 7, Todd left her apartment for the night at approximately 2:00 a.m. in response to a disturbance downstairs. She returned to her apartment the next day, April 8, and that night a more serious incident involving Jeff occurred. In an April 9 letter to Apex, Todd detailed the April 8 incident as involving a number of law enforcement officers and a violent encounter between the officers and Jeff. Todd explained that Jeff was arrested and she had to be escorted from the premises by police. She also stated that she considered her responsibilities under the lease terminated, and requested her security deposit. Todd also obtained a temporary restraining order against Jeff on April 9 and used a police escort to move her possessions. Approximately one week after the April 8 incident, she returned her keys to Apex with a letter stating that she was no longer living at the apartment.

¶9 On May 18, 2004, Apex provided Todd with a security deposit report showing charges for unpaid rent and for various fees related to re-renting the apartment. In light of the charges, Todd received none of her $625 security deposit.

¶10 Todd sued Apex *pro se* in small claims court for damages, including triple her security deposit. After a decision by a court commissioner, Todd demanded a trial *de novo* in the circuit court and retained counsel. The circuit court concluded that Todd was constructively evicted and that Apex failed to timely provide her with a security deposit report. The court awarded Todd approximately $1500 in damages and $4160 in attorney's fees. Apex appeals the resulting judgment.

¶11 We will reference additional facts as needed in our discussion below.

Discussion

Constructive Eviction

¶12 Apex first contends that Todd was not constructively evicted. Apex makes several sub-arguments in support of this contention. We address each of them in turn, after first briefly reciting the basic legal standards applicable to constructive evictions. Whether such standards are met on a given set of facts is a question of law for our *de novo* review. ***Waage v. Borer***, 188 Wis. 2d 324, 328, 525 N.W.2d 96 (Ct. App. 1994).

¶13 A lease such as Todd's includes an implied covenant of quiet enjoyment. *See* ***Hannan v. Harper***, 189 Wis. 588, 595, 208 N.W. 255 (1926) ("[T]here is an implied covenant for quiet enjoyment in every lease for a term of less than three years."). A constructive eviction occurs when that covenant is breached by some condition, rendering the premises unfit for occupancy for the purposes for which it was leased, or that deprives the tenant of the beneficial enjoyment of the premises. ***First Wisconsin Trust Co. v. L. Wiemann Co.***, 93 Wis. 2d 258, 267-68, 286 N.W.2d 360 (1980). The condition must be "substantial

and of such duration that it can be said that the tenant has been deprived of the full use and enjoyment of the leased property for a material period of time." ***Id.*** at 268 (citations omitted). In addition, the landlord must have notice of the condition, and must have a reasonable time after notice to remedy it. ***Id.*** at 268, 270. Finally, the tenant must abandon the premises within a reasonable time. ***Id.*** at 268 (quoting ***Schaaf v. Nortman***, 19 Wis. 2d 540, 543, 120 N.W.2d 654 (1963)).

¶14 Apex first argues that Todd was not deprived of the full use and enjoyment of the premises. In other words, Apex is arguing that Todd's problems with her neighbors were insufficient to form the basis for a constructive eviction. We disagree and rely, as did the circuit court, on ***Bruckner v. Helfaer***, 197 Wis. 582, 222 N.W. 790 (1929).[2]

¶15 In ***Bruckner***, which also involved neighboring residential apartments, the circumstances were these:

> [T]he partitions between defendant's apartment and the adjoining apartment were thin and without any deadening material. Noises in such adjoining apartment could be plainly heard in defendant's apartment. Such adjoining apartment was used by tenants thereof for revelry by night and by day. Radio and victrola music was played during all hours of the night. There was drinking, dancing, and drunkenness. Loud, profane, and foul language was used…. Empty liquor bottles were strewn in the halls. The defendant and his wife could get little rest or sleep.

Id. at 584. Based on these facts, the court in ***Bruckner*** concluded: "[T]his was a case of constructive eviction of the tenant." ***Id.*** The ongoing conditions confronting Todd were at least as severe.

[2] Apex relies on ***Bruckner v. Helfaer***, 197 Wis. 582, 222 N.W. 790 (1929), for one of its sub-arguments, which we discuss below.

¶16 Apex argues that the facts here are like those in ***First Wisconsin***, a case in which the supreme court rejected a claim of constructive eviction. *See* ***First Wisconsin***, 93 Wis. 2d at 269-70. ***First Wisconsin***, however, involved a commercial lease for a term of twenty-eight years, and we think the facts in that case are so obviously distinguishable from Todd's situation that our time is not well spent discussing it. *See* ***id.*** at 262-63, 265-66.

¶17 Apex next argues that Todd failed to give Apex sufficient notice of the problems she was having with her neighbors or to give Apex a reasonable period of time to remedy the problems. But Todd's trial testimony, her log, and her letters to Apex, which we have described above, amply demonstrate otherwise. Todd provided very clear notice of the problems she was encountering and her expectation that Apex would remedy the situation. Apex had ample time to respond before Todd vacated.

¶18 Apex seems to assume that there was not a substantial breach of the covenant of quiet enjoyment until the April 8 incident, when Jeff was arrested and Todd was escorted from her apartment by police. True, that incident was particularly egregious and an obvious tipping point for Todd. But, under ***Bruckner***, Apex had substantially breached its obligation under the lease well before April 8.

¶19 Apex argues that Todd herself "admitted" she did not consider the apartment uninhabitable until April 8. As far as we can tell from Apex's incomplete record citations and our own review of the record, Apex believes Todd made this admission because she did not vacate her apartment until at least April 8 and because her April 9 letter to Apex indicated that she believed she had been constructively evicted as a result of the April 8 incident. This argument is

meritless for two reasons. First, Apex has not supported its factual assertion that Todd "admitted" she did not consider the apartment uninhabitable until April 8.[3] Second, and more to the point, whether the elements of a constructive eviction are present here is a matter for the court to decide, not Todd.

¶20 Apex next argues that, under ***Bruckner***, a tenant must "request relief" before a constructive eviction may occur. By "request relief," Apex means the tenant must request that the landlord take a particular action. Apex argues that Todd never requested any particular action on her behalf. Apex argues that Todd instead gave it "directives" *not* to take action, including that Apex not directly contact the neighbors that were causing her problems. This argument fails for at least two reasons.

¶21 First, even assuming that Apex initially took no action because of a request Todd made during a discussion with an Apex employee about her neighbors in September 2003, the record does not show that Todd repeated this request after that date.[4]

[3] WISCONSIN STAT. RULE 809.19(1)(d) calls for appropriate references to the record. This court is not bound to sift the record for facts to support a party's argument. *See* ***Keplin v. Hardware Mut. Cas. Co.***, 24 Wis. 2d 319, 324, 129 N.W.2d 321 (1964).

[4] We disagree with Apex's characterization of the record on this topic. Apex asserts that Todd "acknowledged" in her December 2003 letter to Apex "that she was aware of the actions Apex was willing to take to help." Apex then asserts that Todd nonetheless "requested that no actions be taken at that time, writing, 'I do not want to make any decision about this now.'" We do not read Todd's letter as requesting no action. Rather, Todd is stating that, for whatever reason, she was not prepared to move out of her apartment at that time. The letter was not a directive that Apex take no action. At most, the record shows that Todd told an Apex employee in September 2003 that she "preferred" that Apex not contact her neighbors for fear of retaliation or that the situation would become uncomfortable.

¶22 Second, we reject Apex's assertion that ***Bruckner*** requires tenants to "request relief." The court in ***Bruckner*** observed that the complaining tenant had "requested relief," but the court did not say that a tenant's request for particular relief is required. *See* ***Bruckner***, 197 Wis. at 584-85. Rather, the relevant element is that the tenant must give the landlord notice of the condition causing a breach. *See* ***First Wisconsin***, 93 Wis. 2d at 270. Furthermore, we agree with the circuit court's analysis on this point:

> Apex claims that it offered certain remedies to Todd and that she did not want Apex to take those steps, i.e. speaking to the neighbors or beginning an eviction. It was not Todd's job, though, to tell Apex how it ought to manage the property and protect her right to quiet enjoyment of the premises.

It would have been readily apparent to Apex that Todd was concerned about her safety or at least her relationship with the offending neighbors. Understandably, she did not want their ire directed at her. But Apex's view of the law would create an untenable Catch-22. Tenants in the worst situations would need to either suffer an unfit environment or endure the fear of or an actual reprisal. Thus, we conclude that even if Apex could not cure its breach without violating Todd's request, Apex was nonetheless in breach. Simply put, Apex did not deliver what it was required to deliver.

¶23 Apex next argues that Todd waived or is estopped from asserting a constructive eviction. This argument, however, amounts to nothing more than a different way of arguing that Apex was justified in its course of inaction because Todd gave it directives not to act. Thus, we address it no further.

¶24 In sum, we reject Apex's arguments that Todd was not constructively evicted.

Security Deposit Report

¶25 Apex was required to provide a security deposit report within twenty-one days of the date that Todd surrendered her apartment. Apex provided the report on May 18, 2004. The disputed issue is the date of "surrender" under Madison General Ordinance § 32.07(8). As relevant here, the ordinance provides:

> (8) A tenant surrenders the premises under Subsection (7) on the last day of tenancy provided under the rental agreement, except that:
>
> (a) If the tenant vacates before the last day of tenancy provided under the rental agreement, and gives the landlord written notice that the tenant has vacated, surrender occurs when the landlord receives the written notice that the tenant has vacated.

¶26 We apply the ordinance to the facts as found by the circuit court. We will not set aside the circuit court's findings of fact unless they are clearly erroneous. ***Mudrovich v. Soto***, 2000 WI App 174, ¶14, 238 Wis. 2d 162, 617 N.W.2d 242. The question of whether the facts fulfill the legal standard is a question of law we review *de novo*. ***Id.***

¶27 The circuit court found that on April 17, 2004, Todd delivered the keys to her apartment to Apex, along with a letter informing Apex that she had moved out of the apartment. This finding is supported by evidence in the record and, therefore, is not clearly erroneous. Based on this finding, the circuit court correctly concluded that the surrender date was April 17 and, therefore, that Apex failed to provide the report within twenty-one days of surrender because Apex provided the report on May 18.

¶28 Apex argues that Todd did not surrender the premises until April 30, 2004, the last day for which she had paid rent. The ordinance, however, makes no reference to rent, but instead to whether the tenant vacated and gave notice.

¶29 Apex also argues that it acted reasonably in relying on the April 30 date as the only "definite" date in the face of what Apex views as conflicting notifications from Todd. According to Apex, Todd first informed Apex in March that she would vacate the premises on April 16; she later claimed that she had vacated on April 8 and returned the keys to Apex on April 9; and still later dropped off a letter with the keys indicating that the date she vacated the apartment was April 19. According to Apex, these conflicting notifications created confusion as to when Todd actually vacated her apartment. However, to the extent there may have been ambiguity, it does not support Apex's argument that the surrender date was April 30. Under the facts recited by Apex, the last possible date of surrender was April 19. Even assuming confusion prior to April 19, on that date Apex had plain notice of surrender; nothing occurred thereafter to suggest a later date.

Attorney's Fees

¶30 Apex argues that the circuit court awarded Todd an unreasonable amount of attorney's fees. The circuit court awarded Todd a total of approximately $4160 in attorney's fees, using an hourly rate of $135.

¶31 Our standard of review for this issue was summarized in ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2004 WI 112, 275 Wis. 2d 1, 683 N.W.2d 58:

> When a circuit court awards attorney fees, the amount of the award is left to the discretion of the court. We uphold the circuit court's determination unless the circuit court erroneously exercised its discretion. We give deference to

> the circuit court's decision because the circuit court is familiar with local billing norms and will likely have witnessed first-hand the quality of the service rendered by counsel. Thus, we do not substitute our judgment for the judgment of the circuit court, but instead probe the court's explanation to determine if the court "employ[ed] a logical rationale based on the appropriate legal principles and facts of record."

Id., ¶22 (citations omitted).

¶32 The parties agree that the attorney's fees in this case are calculated using the "lodestar" approach set forth in ***Kolupar***. Under ***Kolupar***, the circuit court multiplies a reasonable number of hours by a reasonable hourly rate and considers relevant factors under SCR 20:1.5(a).[5] *See* ***Kolupar***, 275 Wis. 2d 1, ¶¶23-30.

[5] The factors enumerated in SCR 20:1.5(a) are:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

¶33 Apex conceded in the circuit court that the $135 hourly rate was reasonable. Apex disputes only the number of hours, 28.5, that the circuit court used to calculate the attorney's fees award.[6]

¶34 Apex first argues that the circuit court did not properly apply the lodestar approach because it "fail[ed] to explain why 28 and one-half hours is a reasonable amount of time for an attorney to spend on a two and one-half hour de novo trial in small claims court and a post-trial brief." We disagree. The circuit court provided a well-reasoned explanation:

> [Apex]'s biggest objection … is to the large number of hours of trial preparation time….
>
> … [O]ne thing that I think makes this case different than some others is the constructive eviction is complicated. Counsel had to sift through, digest, and decide how to present factual information that covered six months of the tenancy.
>
> ….
>
> … The log ran 11 and a half single-spaced pages. And when I think of the number of hours I spent trying to digest it, I don't think [Apex]'s proposed three hours really comes close.
>
> … Given the facts and the duration of the tenancy, I think it's a reasonable number of hours.

¶35 Apex next asserts that the circuit court failed to consider the relevant factors in SCR 20:1.5, as directed by ***Kolupar***. However, with one exception we discuss below, Apex does not explain which factors the circuit court should have but did not consider that would have resulted in a downward adjustment. ***Kolupar***

[6] The circuit court awarded an additional 2.3 hours in attorney's fees for the time Todd's attorney expended on the attorney's fees issue, but Apex has not separately challenged that portion of the award on appeal.

does not say that every factor in SCR 20:1.5 must be considered in every case. Indeed, in the circuit court, Apex suggested that the court need consider only the factors that are "applicable" to this particular case. There, Apex addressed only three factors, focusing mainly on "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly." Our review of the record shows that the circuit court considered this factor.

¶36 The one factor that Apex identified as relevant in the circuit court, and that Apex now argues requires a downward adjustment, is the "amount involved" factor. *See* SCR 20:1.5(a)(4). Apex points out that Todd sued for damages totaling less than $5000. We agree with Todd, however, that we must consider the underlying purpose of fee shifting in cases like hers: to encourage attorneys to take meritorious cases they would not otherwise take because the amount at stake is not large. *See* ***Shands v. Castrovinci***, 115 Wis. 2d 352, 358, 340 N.W.2d 506 (1983) ("The award of attorney fees encourages attorneys to pursue tenants' claims where the anticipated monetary recovery would not justify the expense of legal action."). The relatively small amount of damages at issue in this case does not, by itself, justify a downward adjustment in light of the attorney's fees in dispute.

¶37 Finally, Apex challenges the format of the bill that Todd submitted in support of her request for attorney's fees. The bill consisted of an itemized listing showing the date of attorney work, the number of hours expended in one-tenth-of-an-hour increments, the name of the attorney performing the work, the general nature of the work, and the corresponding charge. Apex baldly asserts that the bill is vague and lacking in detail, such that a reduction in the fees was required. It is not, however, apparent why a bill in this format is impermissibly

vague. Apex's argument is insufficiently developed to warrant our further attention. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals may decline to review an issue that is inadequately briefed).

By the Court.—Judgment affirmed.

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