

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 16, 2009

David R. Schanker
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. 2008AP359

STATE OF WISCONSIN

Cir. Ct. Nos. 2007SC2750
2007SC2764

**IN COURT OF APPEALS
DISTRICT IV**

WINTERFIELD PROPERTIES LLC,

PLAINTIFF-RESPONDENT,

v.

DALE WOODS,

DEFENDANT-APPELLANT.

DALE WOODS,

PLAINTIFF-APPELLANT,

v.

WINTERFIELD PROPERTIES LLC,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County:
RAMONA A. GONZALEZ, Judge. *Affirmed.*

¶1 VERGERONT, J.¹ This appeal arises out of a dispute between Winterfield Properties LLC and its former tenant, Dale Woods. Woods appeals the circuit court's judgment of eviction and award of \$2,101.86 plus costs against Woods and the dismissal of her action for damages against Winterfield Properties. We issued an opinion on February 26, 2009, affirming the circuit court. In response to Woods' motion for reconsideration, we withdrew that opinion on March 19, 2009, pending a decision on the motion.

¶2 We now grant the motion for reconsideration to the extent that we have changed our analysis of Woods' argument that the eviction was unlawful because she was entitled to sixty-days advance notice before Winterfield Properties could raise her rent. *See* paragraphs 10 to 15, *infra*. However, this different analysis does not affect our conclusion that the eviction was lawful. We are satisfied that this conclusion, as well as our analysis and conclusion on all other points, remains correct. Accordingly, we affirm the circuit court.

BACKGROUND

¶3 Dale Woods is a participant in the United States Department of Housing and Urban Development (HUD) Section 8 Voucher Program under which a portion of her rent is paid by the federal government. She first entered into a lease with Winterfield Properties LLC for a term running from October 1, 2004 through September 30, 2005. The lease at issue in this case was for the term October 1, 2006 to September 30, 2007. The rent was \$540 per month, due on the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) and (3) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

first day of each month, and this amount was approved by the public housing authority administering the program. In addition to rent, the lease provided that Woods was responsible for one-third of the sewer and water bill, which was to be billed quarterly.

¶4 According to Woods' submissions and testimony in the circuit court, Jeff Winterfield came to her on September 29, 2007, and asked her to sign a lease for the next year. He stated to her that the public housing authority would not allow an increase in the rent so he was raising her share of the water bill to 50%. She felt this was unfair and declined to sign the lease. She stated she was not going to pay 50% until he got separate water meters.² According to Winterfield Properties' submissions, Winterfield then offered her a six-month lease with the current one-third share for the utilities, but she declined to sign this. Both parties agree that Winterfield offered her a one-month lease with the current one-third share, for the utilities, but she declined to sign this.

¶5 It is undisputed that on October 1, 2007, Winterfield Properties served a twenty-eight-day notice on Woods, informing her that her tenancy would terminate on October 30, 2007, "the last day of the rental period," and she was required to vacate the premises on or before that date. Winterfield Properties also served a five-day notice to quit or pay rent on Woods on October 16, 2007. *See* WIS. STAT. § 704.17(1)(a), (2)(a) (if month-to-month tenant fails to pay rent when due, the tenancy is terminated if the landlord gives the tenant notice requiring the

² According to Winterfield Properties' submissions, Winterfield first mentioned to Woods the possible need to increase her share of the utilities on August 5, 2006, and in early September provided her with a note attached to the utility bill stating he would like to increase her share of the utilities to 50%.

tenant to pay rent or vacate on or before a date at least five days after the giving of the notice and if the tenant fails to pay rent accordingly; the same is true for a lease of one year). Woods did not vacate the premises and did not pay her share of the rent for October, which was \$279, although the public housing authority paid its share.

¶6 On November 1, 2007, Winterfield Properties filed a small claims action seeking Woods' eviction and unpaid rent and related charges. On the same date Woods filed a small claims action against Winterfield Properties seeking \$5,000 in damages. Her complaint alleged that the lease required Winterfield Properties to advise her sixty days prior to raising her rent and it did not do so; therefore the eviction was illegal. She also alleged that there was mold in her apartment.

¶7 At the first hearing held in this matter on December 7, 2007, the only issue the court considered was the lawfulness of the eviction. At that hearing Woods contended that Winterfield Properties was required to give her a sixty-day advance notice before raising the rent and Winterfield told her only the day before the lease expired. She also argued that the eviction was retaliatory but, as we read the transcript, it is not clear what conduct of hers she believed Winterfield Properties was retaliating against. The court understood her to argue that the eviction was in retaliation for her complaint about the mold. The court determined that the lease was for a term of one year and there was no provision for automatic renewal and no agreement for a new lease. The court also determined that the complaint about mold was not a defense to the eviction because she did not make that complaint until October 2, 2007, after the lease expired. Accordingly, the court ordered her to vacate the premises.

¶8 Woods moved to reopen the order to vacate the premises. At this hearing she repeated her argument that she was entitled to a sixty-day advance notice before Winterfield Properties increased her rent under the federal regulations. Winterfield Properties contended that this sixty-day notice requirement was part of the contract between the public housing authority and the landlord, not between the landlord and the tenant. In the alternative, Winterfield Properties argued that, even if the sixty-day notice requirement were enforceable by a tenant against a landlord, Winterfield did not ask Woods to pay an increase in rent in the new lease term, but only a greater share of the utilities, with the rent remaining unchanged. The court concluded that Woods had not established a grounds for reopening the order to vacate the premises.

¶9 The case filed by Winterfield Properties and the case filed by Woods were consolidated in the circuit court for purposes of hearing Winterfield Properties' claim for unpaid rent and other charges and Woods' claim for damages. That hearing was held January 28, 2008. The court determined that Woods owed \$2,101.86, which included unpaid October rent, late fees under the lease, unpaid utilities, and double damages under WIS. STAT. § 704.27 from November 1, 2007 to December 31, 2007. The court also concluded that Woods had not established that she had been damaged as a result of mold in the apartment or otherwise, and it dismissed her claim against Winterfield Properties.³

³ After the court ordered her to vacate the premises, Woods filed a document entitled "Counterclaim," which sought compensatory damages, punitive damages, and attorney fees, for a total of \$29,796. The record shows that this document was considered a filing in both actions and was considered by the circuit court at the January 28, 2008 hearing as a statement of the relief Woods was seeking in her action—in essence, an amendment to her complaint. Therefore, the court's dismissal of Woods' "counterclaim" was the equivalent of a dismissal of her complaint.

DISCUSSION

¶10 In her main brief Woods renews her argument that the twenty-eight-day notice was unlawful and that she was entitled to a sixty-day notice before rent was increased. She also contends that her case should have been heard at the same time as the eviction action.⁴

¶11 The construction and application of a lease to a given set of facts involves a question of law, *Chase Lumber & Fuel Co. v. Chase*, 228 Wis. 2d 179, 191, 596 N.W.2d 840 (Ct. App. 1999), as does the construction and application of federal regulations, *Williams v. Integrated Cmty. Servs.*, 2007 WI App 159, ¶12, 303 Wis. 2d 697, 736 N.W.2d 226, and state statutes. *Cambier v. Integrity Mut. Ins. Co.*, 2007 Wis. App. 200, ¶12, 305 Wis. 2d 337, 738 N.W. 2d 181. An appellate court independently reviews questions of law decided by the circuit court. *See id.*

¶12 According to the form Housing Assistance Payments Contract required by the federal regulations, *see* 24 C.F.R. § 982.451(a)(1), it appears Woods is correct that the “tenancy addendum” to that contract is a part of every lease in the Section 8 voucher program and the tenant has the right to enforce it against the owner. *See* HUD HANDBOOK 7420.8, Form HUD-52641, Part

⁴ In her main brief Woods states that there are a number of issues she feels this court should address but “these issues are so numerous it would be asking the appellate [court] literally to retry the case.” However, it is Woods’ responsibility as the appellant to identify each error she believes the circuit court made and explain why that was an error. This is her responsibility even if she is proceeding without an attorney and is not able to explain the errors in the same way an attorney could. Therefore we consider only the errors that she identifies, although, as we explain later, *see* paragraph 16, *infra*, we also choose to address arguments she makes in her reply brief.

B.2.d.(1) (2007),⁵ available at <http://www.hud.gov/offices/adm/hudclips/forms/files/52641.pdf>. According to the addendum itself, if there is any conflict between its terms and the terms of the lease, the addendum controls. *Id.*, Part C.14.b. The addendum provides that good cause for termination of the tenancy is, after the initial lease term, “the tenant’s failure to accept the owner’s offer of a new lease or revision.” *Id.*, Part C.8.d.(3)(a).⁶

¶13 The provision of the tenancy addendum on which Woods relies is Part C.15.b.-d. This provides as follows:

- b. In the following cases, tenant-based assistance shall not be continued unless the PHA [public housing authority] has approved a new tenancy in accordance with program requirements and has executed a new HAP [housing assistance payment] contract with the owner:
 - (1) If there are any changes in lease requirements governing tenant or owner responsibilities for utilities or appliances;
 - (2) If there are any changes in lease provisions governing the term of the lease;

....

⁵ The form contract provisions we cite in this opinion are either identical to or substantially the same as the federal regulations on which they are based. *See* 24 C.F.R. §§ 982.308(d), (f), (g), 982.310(a), (d). Because Woods provided a copy of the form we refer to and presumably has a copy herself, we will cite to the form instead of the federal regulations.

⁶ It appears Woods may be correct that the affidavit of the executive director of the City of La Crosse Public Housing Authority, submitted by Winterfield Properties, is incorrect insofar as the director avers that the “tenant and landlord are subjected to no additional federal rules and regulations beyond the lease and the applicable sections of the Wisconsin Statutes.” That is, by federal regulation the tenancy addendum is part of the lease and controls if the lease conflicts with the addendum. 24 C.F.R. § 982.308(f)(2).

- c. PHA approval of the tenancy, and execution of a new HAP contract, are not required for agreed changes in the lease other than as specified in paragraph b.
- d. The owner must notify the PHA of any changes in the amount of the rent to owner at least sixty days before any such changes go into effect, and the amount of the rent to owner following any such agreed change may not exceed the reasonable rent for the unit as most recently determined or redetermined by the PHA in accordance with HUD requirements.

¶14 Woods contends in her motion for reconsideration that “rent to owner” in Part C.15.d includes utilities because that term is defined in 24 C.F.R. § 982.4(b) as: “The total monthly payment to the owner under the lease for the unit. Rent to owner covers payment for any housing services, maintenance and utilities that the owner is required to provide and pay for.” As we understand her argument, Woods is asserting that Winterfield Properties was obligated to continue to rent to her on the same terms, including the same percentage for her share of utilities, even after the end of the lease term on September 30, 2007, and even if she did not sign a new lease, until at least sixty days after Winterfield Properties notified the housing authority of the increased percentage of utilities it wanted her to pay.

¶15 We need not decide whether Woods is correct in her understanding of the definition of “rent to owner.” Even if we assume she is correct, and assume that Winterfield Properties did not notify the public housing authority of the increase in the utility share at least sixty days before October 1, 2007, and assume that therefore Woods had the right to remain in the apartment under the terms of the expired lease without signing a new lease for some period of time beyond October 30, 2007, (the end date of the twenty-eight-day notice), none of these assumptions give Woods the right to remain without paying the rent and utilities required under the lease for October 1, 2006 to September 30, 2007. Whether

Woods was a month-to-month tenant beginning October 1, 2007, or was a tenant under the lease for a new term—even if the term was another year—her tenancy was terminated when she failed to pay all the rent that was past due for October within five days of the October 16, 2007 notice. *See* WIS. STAT. § 704.17(1)(a) and (2)(a). Thus the eviction was lawful.⁷

¶16 In her reply brief Woods argues that the existence of mold made the apartment uninhabitable and justified her withholding rent. In addition, she asserts, the existence of the mold entitled her to damages. We ordinarily do not address issues raised for the first time in a reply brief. *See Schaeffer v. State Personnel Comm’n*, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989). In this case Winterfield Properties discussed the issue of the mold in its brief. We therefore choose to address the issue.

¶17 Woods’ submissions at the January 28, 2008 hearing showed that the County of La Crosse Health Department responded to her complaint about mold with a letter, dated October 3, 2007, to Winterfield Properties directing it to clean or remove all surfaces contaminated with mold inside the dwelling and to repair any defect that allows water to accumulate inside the dwelling within thirty days. The City of La Crosse Building and Inspection Department conducted an investigation and issued an order dated November 2, 2007, citing the following violations: “repair water leak in ceiling above bathroom. Clean all mold from bathroom walls. Repair broken windows in garage and south side basement.”

⁷ Although Winterfield Properties waited until the expiration of the twenty-eight-day notice period to initiate this action and did not treat Woods as a holdover tenant for purposes of double damages under WIS. STAT. § 704.27 until after October 30, 2007, it could have initiated the action and sought double damages after October 23, 2007, the expiration of the five-day notice period.

Winterfield Properties' submissions showed that an inspection of Woods' apartment had occurred on July 30, 2007, and showed that the premises passed the inspection. The comment section of two items stated specifically "okay per resident," suggesting that Woods was present during the inspection. There is no indication on the inspection report that Woods complained about mold. On January 10, 2008, the City of La Crosse Building and Inspection Department issued an inspection record of the premises stating

owner has removed ceiling tile in kitchen and opened wall in bathroom and all soft sheetrock removed. Saw no signs of mold visible where sheetrock had been removed in bathroom or on the ceiling of the kitchen. Owner will have ceiling in this weekend. New windows were ready to go back in.

Winterfield Properties represented to the circuit court that it appeared that the walls of the bathroom got moldy from moisture and simply needed to be cleaned.

¶18 In response to the circuit court's questions, Woods stated that she did not have any documentation or bills to show damages, but that she wanted damages for emotional distress. The court stated that it could not award damages for emotional distress and determined that Woods had not established a claim for damages based on the mold.

¶19 When we review a circuit court's findings of fact, we accept the facts found by the circuit court unless they are clearly erroneous. WIS. STAT. § 805.17(2). We also accept the credibility assessments and reasonable inferences drawn from the evidence by the circuit court. *Rivera v. Eisenberg*, 95 Wis. 2d 384, 388, 290 N.W.2d 539 (Ct. App. 1980).

¶20 The circuit court here found that the mold was surface only and that Woods had established no damages resulting from the mold. We conclude these findings are not clearly erroneous.

¶21 Woods also claimed that there was a leak in the kitchen ceiling that entitled her to damages. She submitted an affidavit from the tenant above stating that the tenants prior to Woods “had a leak in their ceiling about the same area where Dale Woods had a leak.” In addition, Woods submitted a report from the La Crosse Fire Department indicating that on December 11, 2007, it responded to a call from Woods complaining of water dripping from a ceiling light fixture in the kitchen area. They referred the matter to the building inspector, thinking it might be the roof leaking “with a possible ice dam problem.” The City of La Crosse Building and Inspection Department issued an order dated December 12, 2007, to “repair leak above kitchen ceiling.”

¶22 Winterfield Properties’ counsel represented that in response to the notification from the city, Winterfield Properties had a contractor come out and determine that the problem was “an ice dam,” which Winterfield Properties resolved. He stated Winterfield Properties had not had prior notice of this and water had simply backed up “during the melt,” and it was not “an ongoing thing.” According to Winterfield Properties’ counsel, this did not have anything to do with the mold, which was the issue before the court.

¶23 Although the circuit court did not expressly state that it was finding Woods was not entitled to an abatement in the rent she owed because of mold or because of the kitchen ceiling leak, this is implicit in the court’s award of unpaid rent and related charges to Winterfield Properties and its dismissal of Woods’ claim. We conclude this implicit finding is not clearly erroneous. Woods simply

introduced no evidence to show that either the mold or the kitchen ceiling leak was significant enough to “deprive[] [her] of the full normal use of the premises” and thus entitle her to an abatement of rent. *See* WIS. STAT. § 704.07(4). We note that this statute specifically does not “authorize rent to be withheld in full if the tenant remains in possession.”

¶24 It is not clear to us whether the court found the kitchen ceiling leak was irrelevant because it did not relate to the mold or found that Woods did not establish any damages resulting from the kitchen ceiling leak. Either finding is not clearly erroneous. Woods did not explain how the kitchen ceiling leak caused the mold and she did not explain what damages resulted from the leak.

¶25 Because the arguments and evidence Woods presented at the second hearing did not constitute a defense to the eviction action, the court did not err in holding a separate hearing on those matters.

CONCLUSION

¶26 We conclude the circuit court did not err factually or legally in entering an order of eviction, awarding \$2,101.86 plus costs to Winterfield Properties, and dismissing Woods’ claim for damages against Winterfield Properties.⁸

⁸ In its brief, Winterfield Properties seeks attorney fees pursuant to WIS. STAT. RULE 809.25(3) on the ground that this appeal is frivolous. However, with certain exceptions not applicable here, such a request must be made by motion filed no later than the filing date of the respondent’s brief. RULE 809.25(3)(a). Because Winterfield Properties did not comply with this requirement, we do not consider the request.

By the Court.—Judgment affirmed.

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

