

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 26, 2010

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. 2009AP2451-FT

Cir. Ct. No. 2009SC4218

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

BRISTOL COURTS, LLP.,

PLAINTIFF-RESPONDENT,

V.

JAMES DONNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
RALPH M. RAMIREZ, Judge. *Affirmed.*

¶1 SNYDER, J.¹ James Donner appeals from a judgment of eviction in favor of Bristol Courts, LLP. Donner contends that that circuit court erred when it

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

denied him the opportunity to testify regarding his physical disability, which thereby prevented him from asserting a defense of “reasonable accommodation” to avoid eviction. We disagree and affirm.

¶2 Donner lives in a federally subsidized housing development owned by Bristol Courts. Donner has lived there since September 2001. Under the terms of his lease, Donner is to pay his utility bills directly to the utility company. Donner receives a utility reimbursement from the Department of Housing and Urban Development (HUD) to assist him with his utility bills.

¶3 The record indicates that on two occasions, Donner’s electricity was turned off for failure to pay his utility bill. On July 21, 2008, Bristol Courts’ on-site manager, Gloria Hastings, gave Donner a five-day notice to cure or quit, stating that Donner was to “have the electricity turned back on in [Donner’s] name.” The notice advised Donner that he had violated the terms of his lease by allowing the electricity in his apartment to be disconnected and required that he “not allow any reoccurrence of this lease violation.” A subsequent notation by Hastings indicated that Donner’s electricity was back on by July 28, 2008.

¶4 On June 22, 2009, Hastings served a fourteen-day termination notice with no right to cure, stating that Donner had again allowed the electricity to be disconnected. Donner did not vacate the premises. On July 31, 2009, Bristol Courts filed an eviction action against Donner, alleging repeated breach of the lease and seeking immediate eviction.

¶5 Donner, by his attorney, filed an answer alleging that the breach of the lease was not material. He also asserted that the “subject premises is subsidized under the federal Project Based Section Eight Program. Termination of

tenancies is governed by 24 CFR Part 247. The plaintiff failed to comply with Part 247.”²

¶6 At the eviction hearing, Donner testified that his electricity had been turned off in June 2009 because his most recent payment on his payment plan to the electric company had been twenty-five dollars short. He stated that the electricity was turned back on as of July 1, but he had already received the termination notice. Hastings testified that the Bristol Courts town homes are “in a line and they are connected that way. Our smoke alarms are all hard wired into the electrical system so if there is a break in one, it [a]ffects the others”

¶7 During the hearing, the court noticed Donner had some trouble taking the witness stand. The following exchange took place:

THE COURT: Mr. Donner, when you walked up the steps I was watching you because you have a cane and I wanted to make sure you were going to make it up safely. You appear to be wincing or to be in pain; is that correct, sir?

[DONNER]: Yes.

THE COURT: Have you taken any medication or anything?

[DONNER]: Yes, I’m on pain medication.

THE COURT: Does the medication in any way interfere with your ability to understand what is going on here at all?

[DONNER]: Right now, no.

² 24 CFR § 247.3(a) (2007) states in relevant part: “The landlord may not terminate any tenancy in a subsidized project except upon the following grounds: (1) Material noncompliance with the rental agreement.” 24 CFR § 247.4(a)(2) states in relevant part that the landlord must state the reasons for eviction “with enough specificity so as to enable the tenant to prepare a defense.” 24 CFR § 247.4(b) states in relevant part that service must be made by first-class mail and by serving a copy of the eviction notice on any adult person opening the door to the unit or by affixing the copy to the door.

The court then asked whether Donner had understood what the witnesses had said earlier in the proceedings and Donner confirmed that he did. Donner's attorney then began to question Donner about his physical condition and elicited testimony that Donner suffers from degenerative disc disease and is unable to work.

¶8 Bristol Courts objected to further testimony about Donner's medical condition. Donner's attorney responded that the testimony was relevant to whether Bristol Courts had made a reasonable accommodation for Donner's disability. He argued that his electricity had been disconnected because he was occasionally short of funds and that the situation was related to his disability. The court held that the testimony concerning Donner's medical condition was not relevant to the eviction proceeding and sustained Bristol Courts' objection to further testimony on the issue.

¶9 At the close of the proceedings, the circuit court held that: (1) Bristol Courts properly served Donner with notice, (2) the notice was sufficiently specific to allow Donner to present a defense, and (3) eviction was appropriate under the facts presented. The court also addressed Donner's question of reasonable accommodation, stating that "the responsibility for paying the bills is between Mr. Donner and We Energies, the utility company, not the landlord [or] the agency which oversees or supervises the building." The court held that reasonable accommodation was not an issue in the eviction proceeding and was "improperly raised."

¶10 On appeal, Donner asks whether the circuit court improperly excluded evidence relating to the need for a "reasonable accommodation" for Donner's disability. He asserts that the court erred when it did not allow the

evidence to support a defense to this eviction action. For the reasons set forth below, we disagree.

¶11 The circuit court has broad discretion in making evidentiary rulings. *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. Here, the court considered Donner’s testimony regarding his disability and measured it against the limited scope of an eviction hearing. The court concluded that the alleged impact of Donner’s disability on his failure to pay his utility bill was not relevant to the proceedings. This was a proper exercise of the court’s discretion.³

¶12 There are a very limited number of issues permissible in an eviction action. *See Clark Oil & Refining Corp. v. Leistikow*, 69 Wis. 2d 226, 234-35, 230 N.W.2d 736 (1975). Under WIS. STAT. § 799.40, an eviction action may be “commenced by a person entitled to the possession of real property to remove therefrom any person who is not entitled to either the possession or occupancy of such real property.” Accordingly, Bristol Courts had the burden of proving that: (1) the landlord/tenant relationship exists between it and Donner, (2) Donner held over after the expiration of the term, and (3) proper notice terminating the lease had been given before the action was commenced. *See Clark Oil*, 69 Wis. 2d at 235.⁴

³ Donner asserts that our review is de novo because the circuit court’s evidentiary decision rested on its determination that reasonable accommodation is not a defense to an eviction. *See State v. Budd*, 2007 WI App 245, ¶7, 306 Wis. 2d 167, 742 N.W.2d 887. Were we to employ a de novo standard of review, our conclusion would be the same. The circuit court properly construed and applied the law.

⁴ The *Clark Oil* court also stated that whether the landlord had proper title to the premises and whether the landlord was attempting a retaliatory eviction could be properly raised. *See Clark Oil & Refining Corp. v. Leistikow*, 69 Wis. 2d 226, 235, 230 N.W.2d 736 (1975). We do not read Donner to contest the eviction on either of these grounds.

¶13 The legislature has qualified the type of counterclaim permissible in an eviction action: “Within the limitation of s. 799.02 the defendant may counterclaim provided that in construing s. 799.02 as applied to eviction actions, any claim related to the rented property shall be considered as arising out of the transaction or occurrence which is the subject matter of the plaintiff’s claim.” WIS. STAT. § 799.43. Likewise, our supreme court has rejected the introduction of extrinsic counterclaims raised in an eviction action. *See Scalzo v. Anderson*, 87 Wis. 2d 834, 848, 275 N.W.2d 894 (1979). *Scalzo* teaches that “counterclaims in an eviction action are not recognizable if they are based on matters extrinsic or collateral to the lease and not arising from the same transaction or occurrence that is the subject matter of the plaintiff’s eviction suit, namely, the lease and the holdover of possession.” *Id.*

¶14 The only remaining inquiry, then, is whether reasonable accommodation of Donner’s disability is a matter that is extrinsic to the lease. Donner argues that his reasonable accommodation defense does arise from the lease because the breach of its terms and thus the grounds for termination resulted from his inability to pay his utility bill in full. His inability to pay was a result of his disability. Donner concedes that no Wisconsin case adopts the reasonable accommodation defense; however, he directs us to other jurisdictions that have allowed a defense based on some form of discrimination, for example: *Josephinium Assocs. v. Kahli*, 45 P.3d 627, 634 (Wash. Ct. App. 2002) (tenant allowed to raise unlawful discrimination defense); *Lable & Co. v. Flowers*, 661 N.E.2d 782, 786-87 (Ohio Ct. App. 1995) (counterclaim of racial discrimination properly raised in eviction proceeding).

¶15 Bristol Courts emphasizes that none of the cases supplied by Donner are controlling authority in Wisconsin. Our courts and our legislature have

defined the parameters of an eviction proceeding. *See Clark Oil*, 69 Wis. 2d at 234-35; *Scalzo*, 87 Wis. 2d at 848; WIS. STAT. § 799.43. We agree with Bristol Courts that Donner’s assertion of a reasonable accommodation defense is beyond the scope of an eviction hearing. Although the lease required Donner to pay his utility, it directed that payment be made directly to the utility company. The terms and timing of payment, the adequacy of the reimbursement from HUD, and the decision to shut off Donner’s electricity were all matters outside the control of Bristol Courts and were extrinsic to the lease agreement.⁵

¶16 We conclude that the circuit court properly considered the facts, applied the proper legal standard, and reached a reasonable conclusion; that is, the evidence regarding Donner’s disability and the impact on his ability to pay his utility bill was not relevant to the eviction proceeding. We affirm the judgment of eviction.

⁵ The circuit court suggested that Donner is not without redress if he brings his accommodation claim in the proper forum:

There may or may not be cause for an eviction today. There may or may not be a circumstance where it would be proper to make a request of the landlord to make an accommodation.

You may or may not have information and support thereof, but this isn’t negotiation day today. This isn’t a hearing on whether there [are] grounds for an accommodation, whether there’s [the] ability to ask because I’m not going to try what sounds to me like an administrative issue[.]

See, e.g., Rossow Oil Co. v Heiman, 72 Wis. 2d 696, 706, 242 N.W.2d 176 (1976) (“any claims arising out of such collateral arrangements ... are clearly severable and are to be treated in separate non-summary proceedings”).

By the Court.—Judgment affirmed.

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

