COURT OF APPEALS
DECISION
DATED AND FILED

November 4, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP3004 **Cir. Ct. No. 2009SC5939**

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

STATE BANK OF CROSS PLAINS,

PLAINTIFF-RESPONDENT,

V.

JULIA LATIMER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: JOHN W. MARKSON, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, J.[1] Julia Latimer appeals a judgment of eviction entered following a trial to the court. Latimer argues that the trial court

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2007-2008). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

erred when it (1) failed to conduct the proper evidentiary analysis and failed to explain its decision; (2) refused to allow Latimer to obtain a statement relevant to the proceedings; and (3) refused to set terms by which Latimer could receive a stay pending appeal. We reject these arguments and affirm.

¶2 In November 2008, Latimer signed a lease for a condominium unit owned by Jillplex, LLC. The lease required Latimer to pay $1275 per month in rent and $240 per month in utilities. Latimer had a personal relationship with the principal of Jillplex, Richard Burris. Latimer and Burris have two children together.

¶3 In February 2008, Burris met with State Bank of Cross Plains, the mortgage holder of Jillplex, to discuss Burris's failure to make payments on the Jillplex mortgage. Latimer's father also attended this meeting. Latimer's father wrote State Bank a check for approximately $27,000 and noted on the check that this money was a "loan." Burris continued to default on Jillplex's payments to State Bank. State Bank initiated a foreclosure and appointed a receiver to collect rents from the Jillplex tenants in January 2009. The receiver hired Apex Property Management in February 2009.

¶4 In June 2009, Apex Property Management filed an eviction action against Latimer for failure to pay rent. At trial, Latimer did not dispute that she had not been making monthly rent payments. Instead, Latimer argued that she did not have to pay rent because she and Burris had agreed that the $27,000 check from her father to State Bank would be considered pre-payment of her rent for approximately two years. Latimer moved into evidence a document signed by her and Burris explaining this agreement. Latimer's original lease with Jillplex contained no reference to this agreement. The court found the agreement to be

incredible, determined that Latimer owed approximately $14,000 in rent, and granted the judgment of eviction.

¶5 On appeal, Latimer first argues that the trial court erroneously exercised its discretion because it failed to determine whether the agreement regarding the pre-payment of rent satisfied WIS. STAT. § 706.02(1),[2] which sets forth the requirements for a valid lease of a residential property. Latimer also argues that the circuit court failed to explain how it reached its decision granting the eviction action. We have reviewed the record and reject both of these arguments.

[2] WISCONSIN STAT. § 706.02(1) states in relevant part:

> Transactions under s. 706.001(1) shall not be valid unless evidenced by a conveyance that satisfies all of the following:
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> (a) Identifies the parties; and
>
> (b) Identifies the land; and
>
> (c) Identifies the interest conveyed, and any material term, condition, reservation, exception or contingency upon which the interest is to arise, continue or be extinguished, limited or encumbered; and
>
> (d) Is signed by or on behalf of each of the grantors; and
>
> (e) Is signed by or on behalf of all parties, if a lease or contract to convey; and
>
> (f) Is signed, or joined in by separate conveyance, by or on behalf of each spouse, if the conveyance alienates any interest of a married person in a homestead under s. 706.01(7) except conveyances between spouses, but on a purchase money mortgage pledging that property as security only the purchaser need sign the mortgage; and
>
> (g) Is delivered….

¶6 The trial court based its decision on certain credibility determinations and factual findings, to which we defer on review. *See* ***Fidelity & Deposit Co. v. First Nat'l Bank of Kenosha***, 98 Wis. 2d 474, 485, 297 N.W.2d 46 (Ct. App. 1980) (where the trial court is the finder of fact, the trial court is the ultimate arbiter of witness credibility); ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985) (appellate court will affirm trial court's findings of fact unless clearly erroneous). The trial court found that the document describing the $27,000 check as pre-payment of rent was a "self-serving agreement" made by two people "who had a personal relationship involving kids in common." The court even went so far as to suggest that Latimer and Burris had drawn up the agreement for purposes of this litigation: "[T]hey have gone back and reconstructed this, relabeled it for their own purposes, and it simply isn't consistent with reality." In concluding that the $27,000 was not pre-payment of rent, the court relied on the following evidence: the note by Latimer's father on the check indicating that the money was a "loan" to the bank for the Jillplex account; notes made contemporaneously by a State Bank employee signifying that the check was a loan to assist Jillplex; the lease requiring Latimer to pay $1275 per month in rent and $240 in shared utilities; and testimony from an Apex employee that Latimer owed approximately $14,000.

¶7 Having found the purported pre-payment-of-rent agreement to be incredible, the trial court was not required to conduct a mechanical application of WIS. STAT. § 706.02(1) to determine if the agreement was valid. The court offered a lengthy explanation of its findings, and the evidence amply supports its determinations.

¶8 Latimer also argues that the trial court abused its discretion when it failed to grant requests for a recess to obtain an affidavit signed by Latimer's

father supporting Latimer's defense. We reject this argument. A trial court's discretion to admit or exclude evidence in eviction actions is broader than its discretion in normal trial proceedings. *See* WIS. STAT. § 799.209(2). Here, the court explained that it refused to admit the affidavit at trial because the affidavit would have repeated Latimer's arguments. Based on the record, we conclude that the court acted within its discretion by refusing to admit this affidavit. Regardless, the court eventually did consider the affidavit when evaluating the motion to reconsider and found the affidavit unpersuasive because Latimer's father signed it at the time of trial, well after he had issued the check to the bank as a "loan" for the Jillplex account.

¶9 Lastly, Latimer argues that the trial court erred when it denied her motion to stay proceedings on the judgment without establishing an amount for an undertaking to be filed with Bank of Cross Plains. Under WIS. STAT. § 799.445, "[n]o appeal by a defendant of an order for judgment for restitution of the premises may stay proceedings on the judgment unless the appellant serves and files with the notice of appeal an undertaking to the plaintiff, in an amount and with surety approved by the judge who ordered the entry of judgment."

¶10 Latimer contends that WIS. STAT. § 799.445 requires a trial court to establish an amount for an undertaking, the fulfillment of which would entitle the tenant to a stay of the eviction proceedings. Assuming without deciding that the trial court was required to establish an amount for an undertaking and that it failed to do so,[3] Latimer does not suggest a remedy for this alleged error, and we are

[3] After denying the requested stay, the trial court appeared to backtrack and suggested potential terms for an undertaking:

(continued)

aware of none. The purpose of a stay under § 799.445 is to preserve the status quo until an appellate court determines whether the judgment was issued in error. However, Latimer is no longer living in the condominium, and we have addressed her appeal. We conclude that the lack of a remedy for the trial court's alleged error in denying the stay renders the issue moot, ***State ex rel. Clarke v. Carballo***, 83 Wis. 2d 349, 357, 265 N.W.2d 285 (1978) (issue was moot where no effective remedy could be given), and we therefore decline to address it. ***State ex rel. Riesch v. Schwarz***, 2005 WI 11, ¶12, 278 Wis. 2d 24, 692 N.W.2d 219 (appellate courts generally decline to address moot issues).

By the Court.—Judgment affirmed.

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

> So I guess what I'm saying is I'm not going to grant a stay. I would consider if she could post an undertaking that would represent all of the back due rent, because there is a significant amount…. And some rent into the future, for several months during the pendency of the appeal, and sufficient to cover the bank's costs and so forth, all of those things that are set out in [WIS. STAT. §] 799.445, I would consider doing that.

Latimer did not respond at the hearing to these potential terms for an undertaking, and her arguments on appeal do not acknowledge that the court suggested these potential terms.