COURT OF APPEALS
DECISION
DATED AND FILED

November 10, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP3007 **Cir. Ct. No. 2009SC1776**

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

PAULA J. GROSS AND PAM E. KOSKI,

PLAINTIFFS-RESPONDENTS,

V.

BARBARA SCHEHR,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Wood County: TODD P. WOLF, Judge. *Affirmed*.

¶1 HIGGINBOTHAM, J.[1] Barbara Schehr appeals a judgment of eviction entered against her for her failure to pay rent and the dismissal of her

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

counterclaim. Schehr argues that the circuit court erred when it rejected her contention that she was entitled to withhold rent due to the landlords' failure to fulfill their promise to clean up the yard of the rental property and to make certain repairs. We disagree and affirm.

BACKGROUND

¶2 The following facts are taken from testimony and evidence presented at the eviction hearing held on November 11, 2009. Paula Gross and Pam Koski jointly own a residential rental property located in Wisconsin Rapids (the "Premises"). In April 2009, Gross and Koski entered into an agreement to lease the Premises to Barbara Schehr. In October 2009, Gross and Koski commenced this action, alleging Schehr had failed to pay rent as set forth under the lease. Schehr filed a counterclaim asserting that Gross and Koski failed to keep promises to remove debris from the outdoor areas of the Premises, repair a broken sump pump and other issues. Schehr sought $2,573.50 in damages for: Schehr's labor in removing the debris herself, two weeks missed work, medical costs incurred from Schehr's exposure to poison ivy while removing the debris, and veterinarian bills for her poisoned cat.

¶3 At the hearing, Koski testified as follows: that Schehr had paid rent through September 2, but had failed to make any payments since then and owed rent in the amount of $1750, including late fees as set forth in the lease; that Schehr told her that the sump pump was broken in the unit, and that Schehr refused to pay rent until it was fixed; that, after receiving Schehr's complaint about the sump pump, she immediately dispatched a contractor to repair it the next morning; and that Schehr would not allow the contractor to enter the Premises' residence when he arrived at 9:00 a.m. because it was too early in the morning.

Koski also said that she and Gross had difficulty setting up another time for the contractor to return to finish the work because Schehr did not have a phone, and she would "yell[] and scream[]" and would not let them into the residence when they came to the Premises in person. Koski testified that she was "a little bit concerned about [her] safety" during these visits, and that the sump pump was ultimately repaired.

¶4 Regarding the alleged promise to clean debris from the grounds of the Premises, Koski testified that they had hired a contractor who had been to the Premises in March 2009 to do so. Koski testified that she and Gross had also personally done some work cleaning up the Premises' grounds. In her testimony, Koski also referred to a letter from the contractor she had hired stating that he (1) was hired in March 2009 to clean up the Premises' grounds, (2) had fixed the Premises' garage door in June, and (3) had repaired the sump pump in October, after being turned away by Schehr in September when he had first come to make the repair.

¶5 Schehr then had an opportunity to cross-examine Koski. During cross-examination, Schehr asked Koski a number of questions relating to the condition of the Premises and clean up efforts, as well as questions regarding lease provisions and Schehr's conversations with Koski relating to Schehr's ability to pay rent. Specifically, Schehr questioned Koski about the garage door. Koski testified the garage door, though not a repair promised at the time of the lease, was repaired in June and Schehr then acknowledged this fact to be true. At the conclusion of Koski's testimony, the lease, the contractor's letter, photos and a statement of rental account were admitted into evidence with Schehr's affirmative agreement.

¶6 Schehr then offered the following testimony. Schehr testified that Koski and Gross promised her, upon moving in, that they would clean up the Premises' grounds and make other repairs, including replacing the garage door. However, Schehr testified that she took it upon herself to clean up the debris, which caused her to develop poison ivy and thereby incurring medical and other costs. She testified that the promised repairs were either never done or done in an untimely fashion, that her cat became poisoned by insect traps in the house, and that she eventually had to euthanize the cat, causing her to incur veterinarian bills.

¶7 Koski then questioned Schehr on the lease's animal policy prohibiting cats, Schehr's outstanding rent, and the fact that some repairs had been made to the Premises. While Gross had first offered to testify, she did not do so. The court specifically asked Schehr if she had any other witnesses she intended to call or any additional exhibits and Schehr responded "No."

¶8 At the conclusion of the trial, the court granted the eviction and denied Schehr's counterclaim. The court found that Schehr owed back rent and late fees in the amount of $1710, which included late fees only for October and November 2009, the months in which she had paid no rent, and concluded that Schehr did not have a legal justification for withholding rent. As to Schehr's counterclaim, the court found that Schehr was "obviously well aware when she rented the property what the conditions of the ground were," and that Koski and Gross had cleaned up the grounds of the Premises within a reasonable period of time. Therefore, the court ruled, Schehr was not justified in demanding payment for her partial efforts in removing the debris. The court also found that Koski and Gross had made a reasonable effort to repair the sump pump by sending a contractor the morning immediately following Schehr's report of the problem, and that it was Schehr's actions that caused the repair to be delayed. Finally, the court

denied Schehr's counterclaim for medical and veterinarian expenses, concluding that it was Schehr's own actions and not any unreasonable action or inaction on the part of Koski and Gross, that caused her to incur these expenses. Based on these findings, the court entered a judgment of eviction against Schehr, ordered her to move out of the Premises by November 30, 2009, and to pay $1710, plus court costs.

DISCUSSION

¶9 On appeal, Schehr continues to dispute certain facts relating to her conversations with Koski, Gross and the contractor they hired to make repairs and clean up the Premises. However, the facts she disputes were part of the testimony and evidence presented at the hearing and upon which the court made its findings. When a court bases its decision on certain credibility determinations and factual findings, we defer to the court's findings and determinations on review unless they are clearly erroneous. *See* ***Fidelity & Deposit Co. of Md. 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).

¶10 Schehr first argues that the court erred in dismissing her counterclaim, contending that she was entitled to recover the costs of her partial clean up of the property. In support of this claim, Schehr cites cases relating to nuisance and civil liability for injuries caused by defects to property. However, Schehr's argument ignores the court's factual findings. The trial court found that Schehr executed the lease in late March 2009 and moved in effective April 1, 2009. The court concluded from this short time period that Schehr sought to move

into the property as soon as possible, and was willing to do so despite seeing the debris on the grounds of the Premises. Based on Schehr's own willingness to assume the lease given the Premises' condition, the fact that it was winter at the time of the move in, that Gross and Koski had hired a contractor in March to clean up the grounds surrounding the Premises and that the grounds were cleaned up two months after Schehr moved in, the court concluded that Schehr incurred her cleanup costs unnecessarily and therefore was not entitled to payment by Koski and Gross. On appeal, Schehr provides no legal authority to support her position that the court erred in finding that the two months it took Koski and Gross to have the debris cleaned up was not reasonable. Based on the above, we conclude that the court's determination that the two-month clean up time was reasonable is supported by the record and is not unreasonable as a matter of law. We therefore affirm the trial court's decision to dismiss Schehr's counterclaim.

¶11 Schehr next argues that the trial court erred when it admitted the contractor's letter into evidence and then based its decision, in part, on that letter. Schehr argues that the letter is inadmissible hearsay and should only have been admitted into evidence if she had had the opportunity to question the contractor at the hearing.

¶12 First, there is nothing in the record that establishes that Schehr had subpoenaed or otherwise sought to bring the contractor to the hearing. Pro se litigants are required to abide by the same procedural rules governing attorneys, including the requirement to call one's own witnesses. ***Waushara Cnty. v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992). Second, Schehr did not object to the admission of the letter during the hearing, but rather, affirmatively agreed to its admission. Additionally, in Wisconsin, small claims proceedings are informal and "shall not be governed by the common law or statutory rules of evidence .... The

court … shall admit all other evidence having reasonable probative value, but may exclude irrelevant or repetitious evidence or arguments," except that an "essential finding of fact may not be based solely on a declarant's oral hearsay statement unless it would be admissible under the rules of evidence." WIS. STAT. § 799.209(2).

¶13 The court's ruling demonstrates that it did not rely on the contractor's letter in making its findings relating to Schehr's counterclaim. Specifically, the court held:

> The Court would not allow any of the counterclaim into any of those amounts nor does the Court find that any debris that she took it upon herself to clean up is something that … was given any reasonable time for the landlord or the person they hired to come out and attempt to correct … because of this quick rental agreement there was the understanding that it would be cleaned up as quickly as possible, and it appears that there was some work done, but not as quickly or to the satisfaction of Ms. Schehr. So as far as the counterclaim is concerned, the Court's going to deny any counterclaim here finding there was nothing unreasonable that has been shown here to the Court as far as what the landlord's [sic] attempted to do here to rectify the situation.

From the above, it is apparent that the court made its factual determination regarding the reasonableness of the time that passed between Schehr's move-in date and the time the debris was cleaned up from the in-court testimony and the lease, and it did not rely solely on information set forth in the contractor's letter. Accordingly, we conclude the court did not err in admitting the letter into evidence, *see* WIS. STAT. § 799.209(2), and that the court's findings regarding the reasonableness of Koski's and Gross's cleanup efforts are not clearly erroneous.

¶14 Relatedly, Schehr argues that the court prohibited her from questioning Gross during the hearing and therefore, she was denied a fair hearing.

We disagree. Schehr was permitted to cross-examine Koski regarding: the lease and the initial rental of the Premises, the issues of the debris, the sump pump and other repairs, and the payment of rent and arrearages. After Schehr had an opportunity to testify and respond to Koski's questions on cross, the trial court asked Schehr if she had any additional evidence or witnesses that she wanted to present. Schehr answered "No." Because the court provided Schehr with an opportunity to present her evidence and because Schehr responded in the negative to a direct question from the court asking her if she wanted to question any other witness, Schehr's argument that she was denied a fair hearing because she was not permitted to question Gross fails.

¶15 Schehr next contends that she is entitled to relief from the provisions of the lease under WIS. STAT. §§ 704.07 and 704.45. WISCONSIN STAT. § 704.07 provides the minimum duty that both landlords and tenants have regarding repairs. Specifically, one of a landlord's duties is to "[k]eep in a reasonable state of repair portions of the premises over which the landlord maintains control." WIS. STAT. § 704.07(2)(a)1. WISCONSIN STAT. § 704.45 prescribes the scope of retaliatory conduct by a landlord against a tenant. The application of a statute to a given set of facts is a question of law subject to our de novo review. ***Olivarez v. Unitrin Prop. & Cas. Ins. Co.***, 2006 WI App 189, ¶13, 296 Wis. 2d 337, 723 N.W.2d 131.

¶16 The court found, based upon Koski's and Schehr's testimony, that the debris had been cleaned up and the sump pump repaired within a reasonable period of time. The court found, based upon the timing of the rental, that two months—April to June—was reasonable for the cleanup of the Premises' grounds. The court also found that less than a day after being informed that the sump pump was not working, Koski and Gross had contracted with a professional to repair it, and it was only Schehr's refusal to allow the contractor to make the repair that

caused the delay. Additionally, as noted by the trial court, enforcement of any promise to repair must be in writing, as part of the lease or a separate contract. *See* WIS. ADMIN. CODE § ATCP 134.07(2).[2] There is no dispute that no such written agreement exists here. Based upon these findings, we affirm the circuit court's determination that none of the actions taken by Koski and Gross constitute a violation of WIS. STAT. § 704.07.

¶17 Schehr's argument for relief based on WIS. STAT. § 704.45 also fails because there is no evidence in the record that Koski and Gross initiated eviction procedures based on a desire to retaliate. Rather, the evidence shows that there is no dispute that Schehr did not pay rent for October and November 2009 and § 704.45 expressly permits a landlord to bring an action for possession of the property if the tenant has failed to make rental payments. WIS. STAT. § 704.45(2). Schehr has pointed to no evidence in the record, nor do we find any, that Koski and Gross initiated the eviction for purposes other than Schehr's failure to pay rent.

¶18 Schehr next argues that Section 12 of the lease entitles her to rent abatement. "Interpretation of a written contract, such as this lease, is a question of law which we review de novo." ***Foursquare Props. Joint Venture I v. Johnny's Loaf & Stein, Ltd.***, 116 Wis. 2d 679, 681, 343 N.W.2d 126 (Ct. App. 1983). Section 12 of the lease states that "[i]n the event the Premises are destroyed or rendered wholly untenantable by fire, storm, earthquake, or other casualty not caused by the negligence of Lessee, this Agreement shall terminate from such time

[2] WISCONSIN ADMIN. CODE § ATCP 134.07(2) states: "**(2)** INITIAL PROMISES IN WRITING. All promises made before the initial rental agreement shall be in writing with a copy furnished to the tenant."

…." "Casualty" has been defined as "[a] serious or fatal accident." BLACK'S LAW DICTIONARY 247 (9th ed. 2004). Schehr has presented no evidence in the record, nor has she claimed, that either the debris on the Premises' grounds or the broken sump pump rendered the Premises "wholly untenantable" such that Schehr was forced to move out due to its condition. Schehr also provides no evidence or authority to support her claim that either the outdoor debris or the sump pump breakdown constituted "other casualty." Rather, from the testimony at the hearing, the debris was present at the time Schehr signed the lease and moved into the Premises. Additionally, Schehr's actions surrounding the broken sump pump—turning away the repair person because he came too early in the morning—demonstrates that she did not consider the broken sump pump to be either serious or fatal so as to invoke Section 12. Based on the clear language of the lease and the evidence presented at hearing, Schehr's claim for rent abatement under Section 12 of the lease also fails.

¶19 At several points in her brief, Schehr accuses Koski of lying. As noted above, it is the trial court's responsibility to make determinations of credibility, and we will not overturn those determinations unless there is unequivocal evidence that no finder of fact could believe a witness's testimony. *See* ***State v. Garcia***, 195 Wis. 2d 68, 75-76, 535 N.W.2d 124 (Ct. App. 1995); ***Fidelity & Deposit Co.***, 98 Wis. 2d at 485. Schehr provides no such unequivocal evidence; we, therefore, do not disturb the trial court's credibility determinations.

¶20 Schehr asserts several additional arguments in her appeal. However, several of these issues and arguments do not appear in the trial court record, such as new assertions relating to the contractor's alleged criminal history and questioning of statements found in evidence. Generally, this court will not review issues that were not first raised to the trial court, and we will not do so here. ***State***

v. Caban, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). The remainder of Schehr's arguments are not sufficiently developed, and are not based upon any legal theory. We will not address undeveloped arguments. ***Techworks, LLC v. Wille***, 2009 WI App 101, ¶28, 318 Wis. 2d 488, 770 N.W.2d 727.

By the Court.—Judgment affirmed.

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