

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 22, 2011

A. John Voelker
Acting 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. 2010AP3056

Cir. Ct. No. 2010SC10255

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

FIDUCIARY REAL ESTATE DEVELOPMENT, INC.,

PLAINTIFF-RESPONDENT,

V.

DIANA GOODAVAGE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
SARAH B. O'BRIEN, Judge. *Affirmed.*

¶1 SHERMAN, J.¹ Diana Goodavage, arguing pro se, appeals a judgment of eviction in favor of her landlord, Fiduciary Real Estate Development, Inc. This court affirms.

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

BACKGROUND

¶2 Goodavage entered into a twelve-month lease on a rental apartment, which commenced at 12:00 noon on November 1, 2009, and terminated at 12:00 noon on October 31, 2010. Prior to the termination of her twelve-month lease, Fiduciary offered Goodavage a renewal of that lease. That renewal agreement provided that the lease would commence at 12:00 noon on November 1, 2010, and terminate at “12:00 noon on the last day of October, 2011.” Fiduciary offered Goodavage \$150.00 in incentives if she signed and returned the lease by August 15, 2010. Goodavage signed the lease renewal agreement on August 10. However, Goodavage modified the lease’s termination date and time to provide that the lease would terminate at “11:49 a.m. on the first day of November, 2011.” Fiduciary did not sign the modified lease renewal agreement.

¶3 On August 17, 2010, Goodavage inquired with the manager of her apartment complex about receiving the incentive payment. The property manager for Goodavage’s apartment building informed Goodavage that Fiduciary was not prepared to renew Goodavage’s lease until Goodavage’s apartment passed inspection by the Dane County Housing Authority, which was required for Goodavage’s participation in the Section 8 rent assistance program administered by the Dane County Housing Authority.² The property manager informed Goodavage that once the apartment passed inspection, Fiduciary would sign the renewal and would get Goodavage her incentives. Goodavage’s apartment did not

² Section 8 is a low income housing/rental assistance program under the United States Housing Act of 1937, as amended, at 42 U.S.C. § 1437f. The Section 8 program falls under the U.S. Department of Housing and Urban Development and is administered by state or local governmental entities called public housing agencies. *See* 24 C.F.R. pt. 982 (Section 8 Tenant Based Assistance: Housing Choice Voucher Program); § 982.1(a)(1) (West 2011).

pass the annual inspection by the Dane Counting Housing Authority on August 5 due to damage to the carpet from her cat(s). The apartment was re-inspected in September.³

¶4 Following the re-inspection, Fiduciary sent Goodavage a letter stating that it and the Dane County Housing Authority were willing to renew her lease effective November 1, 2010 on a month-to-month term, but that she needed to sign and return the renewal agreement by November 1, 2010. Fiduciary also informed Goodavage that she would receive the renewal incentive when she signed the month-to-month lease agreement.⁴ Goodavage did not sign the month-to-month lease agreement.

¶5 In the interim, in August 2010, Goodavage filed a small claims action against Fiduciary for the incentive payment. That case was dismissed following a hearing before a commissioner. The day after the small claims hearing, Fiduciary sent a letter to Goodavage notifying her that she would become a holdover tenant on November 1, 2010, if Fiduciary did not receive her signed lease renewal. Fiduciary stated in this letter that it did “not want [Goodavage] to be a holdover tenant” and that Goodavage would receive the \$150 in incentives once Fiduciary received the signed renewal. Goodavage did not sign the month-to-month lease.

³ Fiduciary and Goodavage disagree as to whether Goodavage’s apartment passed the September inspection.

⁴ In the letter, Fiduciary also identified seven things that needed to be done, at Fiduciary’s expense, to remedy damage caused by cat urine.

¶6 Goodavage did not vacate her apartment following the termination of her twelve-month lease on October 31, 2010, and attempted to pay Fiduciary rent for the month of November 2010. Fiduciary declined to accept Goodavage's payment, and brought the present eviction action against her, alleging that she was a holdover tenant. The court found that Goodavage and Fiduciary had never entered into a valid lease together and that Goodavage was therefore a holdover tenant. The court also rejected Goodavage's defense that Fiduciary declined to renew her twelve-month lease in retaliation for her bringing a small claims action against it. Goodavage appeals the judgment of eviction entered against her.

DISCUSSION

A. Lease Changes

¶7 Goodavage contends that the circuit court erred because it failed to find that she had a valid twelve-month lease which was to commence on November 1, 2010 and terminate on October 31, 2011. Goodavage argues that her modification of the lease's end date and time was not a rejection of the renewal lease because the change was not substantive. Modern day leases are regarded as contracts. *Pagelsdorf v. Safeco Ins. Co. of America*, 91 Wis. 2d 734, 743, 284 N.W.2d 55 (1979). A contract is formed upon a mutual meeting of the minds as to terms, manifested by the expressed intent of the parties. *Household Utils., Inc. v. Andrews Co. Inc.*, 71 Wis. 2d 17, 28-29, 236 N.W.2d 663 (1976); *Bong v. Cerny*, 158 Wis. 2d 474, 481, 463 N.W.2d 359 (Ct. App. 1990). The law is well settled that the terms of a contract cannot be modified without the consent of all parties to the contract. *Schaefer v. Dudarenke*, 89 Wis. 2d 483, 492, 278 N.W.2d 844 (1979). Where an acceptance varies from the terms of an offer, no matter how slight the difference, the variance amounts to a rejection of the offer

and is a counteroffer. *Todorovich v. Kinnickinnic Mut. Loan & Bldg. Ass'n*, 238 Wis. 39, 42, 298 N.W. 226 (1941); *Hess v. Holt Lumber Co.*, 175 Wis. 451, 455, 185 N.W. 522 (1921). No contract is formed unless the counteroffer is accepted. *Todorovich*, 238 Wis. at 42.

¶8 The twelve-month renewal agreement originally provided that the lease would terminate at “12:00 noon on the last day of October, 2011.” Goodavage modified that provision to provide that the lease would terminate at “11:49 a.m. on the first day of November, 2011.”⁵ No matter how slight Goodavage’s changes were to the lease, those changes constituted a rejection of Fiduciary’s offer and a counteroffer, which Fiduciary had to agree to in order for there to be a valid contract. Fiduciary did not agree to Goodavage’s modifications, thus a contract for a renewal of Goodavage’s twelve-month lease was not formed.

B. Retaliation

¶9 Goodavage contends that Fiduciary declined to renew her twelve month lease in retaliation for her filing a small claims action against it, and that the circuit court erred in finding otherwise. WISCONSIN STAT. § 704.45(1)(c) provides that a landlord may not refuse to renew a lease “if there is a preponderance of evidence that the action or inaction would not occur but for the landlord’s retaliation against the tenant” for “[e]xercising a legal right relating to [the] residential tenanc[y].” The dispute between the parties in this case is whether Fiduciary’s decision not to renew Goodavage’s twelve-month lease would have

⁵ This court assumes, without deciding, that the changes Goodavage made to the twelve-month renewal lease were not substantive.

occurred but for the small claims action Goodavage filed against it. This presents a question of fact, for which this court will apply the clearly erroneous standard of review. See *State v. Turner*, 136 Wis. 2d 333, 343-44, 401 N.W.2d 827 (1987).

¶10 The circuit court allowed Goodavage to present her position and found that Fiduciary did not retaliate against her. The court observed that the day after Goodavage's small claims suit was dismissed, Fiduciary sent Goodavage a letter which provided: "As discussed in court yesterday, your current lease ends October 31st. You will become a holdover tenant. We don't want you to be a holdover tenant, and we are asking you again to please sign and return the attached month-to-month renewal before November 1st." The court also observed that Fiduciary informed Goodavage that once she signed the month-to-month lease, they would pay her the incentive bonus. The court found this letter "pretty ironclad proof" that fiduciary did not retaliate against Goodavage for bringing the small claims lawsuit, noting that Fiduciary offered to renew her lease and was willing to have her as a tenant. The court found that the eviction was not the product of retaliation, but instead a consequence of Goodavage's failure to sign a valid lease with Fiduciary, making her a holdover tenant following the termination of her lease on October 31, 2010. We can discern no error in the court's reasoning. Accordingly, this court concludes that the circuit court did not err in its finding that Fiduciary did not establish defense of retaliatory eviction.

C. Testimony

¶11 Goodavage contends the circuit court erroneously exercised its discretion when it declined to allow her son to testify at trial because the issue of whether Goodavage's son could testify was not raised at the beginning of trial.

Goodavage argues that the court was incorrect when it stated she had not raised the issue at the beginning of trial.

¶12 Regardless of whether Goodavage is correct that she raised the issue at the beginning of trial, Goodavage has not made an offer of proof showing what her son would have testified to. It is incumbent upon a party challenging the exclusion of testimony “to make an offer of proof as to the rejected testimony as a condition precedent to [an appellate] court passing on [the] alleged erroneous ruling on evidence.” *Findorff v. Findorff*, 3 Wis. 2d 215, 226, 88 N.W.2d 327 (1958). Error may not be predicated on the exclusion of evidence unless there was an offer of proof of what the evidence would show. WIS. STAT. RULE 901.03(1)(b). Furthermore, Goodavage was offered the opportunity to present the testimony of witnesses, but did not do so. The court asked Goodavage if her witnesses knew something which she had not already told the court, to which Goodavage responded that they did not. Accordingly, this court cannot conclude that the court erroneously exercised its discretion by excluding the testimony of Goodavage’s son.

D. Remaining Issues

¶13 Goodavage raises numerous other arguments in her brief, that either were not raised before the circuit court or have not been fully developed. We therefore do not address those arguments. See *Segall v. Hurwitz*, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983) (failure to raise below); *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (insufficient development). To the extent that we have not addressed any other arguments raised on appeal, those arguments are deemed rejected. *State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) (“An appellate court is

not a performing bear, required to dance to each and every tune played on an appeal.”) Although Goodavage is a pro se litigant and is afforded some leniency, she is “bound by the same rules that apply to attorneys” and neither the trial court nor this court “has a duty to walk [her] through the procedural requirements or to point [her] to the proper substantive law.” *Waushara County v. Graf*, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992).

CONCLUSION

¶14 For the reasons discussed above, this court affirms.

By the Court.—Judgment affirmed.

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

