COURT OF APPEALS
DECISION
DATED AND RELEASED

June 27, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2698

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

MANOR PARK VILLAGE,
BELOIT INVESTORS LIMITED PARTNERSHIP,
OGDEN & COMPANY, INC. (receiver),

Plaintiffs-Respondents,

v.

ROBIN SPODEN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Rock County: J. RICHARD LONG, Judge. *Reversed and cause remanded*.

EICH, C.J.[1] Robin Spoden appeals a judgment of eviction. Spoden argues that the trial court improperly evicted her from her apartment without a trial of the issues as required by § 799.01, STATS. Because we conclude that the

[1] This appeal is decided by one judge pursuant to § 752.31(2)(a), STATS.

trial court did not hear evidence on Spoden's affirmative defenses before ordering the eviction as required by statute, we reverse.

BACKGROUND

Ogden & Company, Inc., the receiver and management company for the Manor Park Village apartment complex, filed a summons and complaint for eviction against Robin Spoden, alleging that Spoden had failed to pay one month's rent of $141 and a late fee of $40. Spoden appeared before the trial court on the return date of August 28, 1995. She informed the court that she was raising the affirmative defenses of rent abatement and constructive eviction because of an alleged cockroach infestation, and that she planned to vacate the apartment by September 1, 1995.

The trial court then ordered the eviction, citing Spoden's stated intention to leave the apartment before the end of the month and her failure to file a written answer prior to the hearing. Spoden objected to the judgment of eviction, arguing that an eviction without a trial was contrary to statute. *See* § 799.20(4), STATS. After hearing the objection, the trial court held that it would "order the eviction as of the end of the month," but would also set a trial date on the eviction action for September, conditioned on Spoden's vacating the apartment by August 31, 1995, and filing a written answer by September 5, 1995.

Spoden filed an answer on that date, pleading three affirmative defenses: (1) she was entitled to abate rent and vacate the premises because of a cockroach infestation; (2) Ogden had failed to comply with the provisions of her lease, the housing assistance contract with the Beloit Housing Authority, and the Section 8 federal housing assistance regulations; and (3) under her Section 8 tenancy, Spoden cannot be evicted except for good cause or violation of law. Two days later Spoden also filed several counterclaims alleging that: (1) Ogden had breached the implied warranty of habitability; (2) the presence of cockroaches constituted a hazardous condition; and (3) the infestation ruined her property and household furnishings. Spoden claimed damages of $4,000.

On September 8, 1995, the trial court held a hearing on the counterclaims. Spoden again raised her objection to the trial court's previous order of eviction and asked it to "revisit" the issue at the hearing. After determining that Spoden had vacated the apartment, the trial court stated that it was "not going to revisit that."

The parties proceeded to try the counterclaims. At the conclusion of the trial, the trial court denied Spoden's counterclaims and ruled that her affirmative defenses failed for lack of evidence. Spoden has appealed the trial court's judgment of eviction but has not appealed its denial of the counterclaims.

ANALYSIS

Spoden argues that the trial court erred in ordering her to vacate the premises and refusing to hear evidence on her affirmative defenses to the eviction action.

Actions for eviction are subject to the procedure for small claims actions.[2] This appeal involves the application of the small claims statute, Chapter 799, STATS., to the facts of the case. The application of a statute to a set of facts is an issue we decide de novo, without deference to the trial court's determination. ***State v. P.G. Miron Constr. Co.***, 181 Wis.2d 1045, 1052, 512 N.W.2d 499, 503 (1994).

[2] Section 799.01, STATS., provides:

> **Applicability of chapter.** EXCLUSIVE USE OF SMALL CLAIMS PROCEDURE. Except as provided in ss. 799.02(1) and 799.21(4) and except as provided under sub (2), the procedure in this chapter is the exclusive procedure to be used in circuit court in the following actions: (a) *Eviction actions*. Actions for eviction as defined in 799.40 regardless of the amount of rent claimed therein.

Section 799.02(1), STATS., governs counterclaims not related to the eviction action. Section 799.21(4), STATS., governs actions where there is a demand for a jury trial. Neither exception applies in this case.

Section 799.20, STATS., allows the defendant to answer or otherwise respond to the summons and complaint at the return date. Section 799.43, STATS., permits the defendant to answer orally: "The defendant may plead to the complaint orally or in writing [unless] ... the plaintiff's title is put in issue ...." If the defendant in an eviction action appears on the return date, the trial court is required to determine whether the defendant claims a defense to the action. Section 799.20(4), STATS. If the trial court determines that the defendant does claim a defense, it must schedule a trial of the issues in the action. ***Id.***[3]

We conclude that the trial court's entry of the judgment of eviction was erroneous. After Spoden appeared at the return date and stated that she was raising affirmative defenses, the trial court was required to "schedule a trial of all the issues involved in the action." While Ogden was entitled to possession of the apartment, in light of Spoden's statement that she intended to vacate the premises, we conclude that § 799.20(4), STATS., plainly contemplates a procedure by which a defendant is entitled to "a trial of all the issues involved in the action," including any affirmative defenses, before the trial court may order an eviction.

Ogden argues that the trial court's statement that it was ordering a judgment of eviction prior to a trial on the issues is moot because the actual judgment of eviction was not entered until after the trial on the counterclaims. However, the trial court did not allow Spoden to introduce evidence of her affirmative defenses at the trial, instead stating, over Spoden's objection, that it was "not going to revisit [the order of eviction]" before proceeding to take evidence on the counterclaims. As a result, Spoden was denied an opportunity to contest the judgment of eviction based on her affirmative defenses.

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[3] Section 799.20(4), STATS., provides:

> If the defendant appears on the return date ... the court ... shall make sufficient inquiry of the defendant to determine whether the defendant claims a defense to the action. If it appears to the court ... that the defendant claims a defense to the action, the court ... shall schedule a trial or all the issues involved in the action, unless the parties stipulate otherwise or the action is subject to immediate dismissal.

While the trial court's order of eviction may seem irrelevant or harmless in light of Spoden's statement that she planned to leave the apartment anyway, Spoden argues, and we agree, that the judgment of eviction should not have been ordered without an opportunity for her to present the affirmative defenses. A judgment of eviction may adversely affect an individual's credit history and his or her ability to obtain housing in the future and, as is apparent from the statute, is not to be ordered or entered without giving the tenant the benefit of an opportunity to be heard by the court.

Spoden requests that the judgment of eviction be stricken and a new trial held on her counterclaims. Although we conclude that the judgment should be reversed and a new trial ordered on the affirmative defenses, we do not order a new trial on the counterclaims. The trial court heard extensive evidence on the counterclaims before holding against Spoden, and she has not alleged any other errors in the trial of the counterclaims, with the exception of a claim of bias which we discuss below. We also note that the court effectively heard one of the affirmative defenses Spoden raises, rent abatement based on the cockroach infestation, when Spoden introduced extensive evidence on her counterclaim regarding the infestation. At the close of the trial, the trial court found that Spoden had failed to prove the existence or extent of the infestation, or that Ogden failed to take proper steps to address it.

As a result, while we reverse and remand for a new trial on the judgment of eviction, we limit the new trial to the affirmative defenses raised by Spoden and not heard by the trial court: violations of the various housing assistance leases and the Section 8 requirement of good cause for an eviction.

Ogden argues that we should affirm the judgment of eviction in any case, because Spoden's constructive eviction defense fails as a matter of law. Ogden asserts that Spoden was required to "actually abandon the premises" prior to raising the constructive eviction defense. We disagree. We have relied on ***Schaaf v. Nortman***, 19 Wis.2d 540, 543-44, 120 N.W.2d 654, 656-57 (1963), to explain the defense of constructive eviction:

> "`It is now well established that any disturbance of the tenant's possession by the landlord,... which renders the premises unfit for occupancy for the

> purposes for which they were demised or which deprives the tenant of the beneficial enjoyment of the premises, causing him to abandon them, amounts to a constructive eviction, *provided the tenant abandons the premises within a reasonable time.*'"

Quoted in ***Kersten v. H.C. Prange Co.***, 186 Wis.2d 49, 57-58, 520 N.W.2d 99, 103 (Ct. App. 1994) (emphasis added). A tenant raising a constructive eviction defense is required to abandon the premises within a reasonable time of "any disturbance," not necessarily prior to any proceedings.

Spoden makes additional arguments in her appeal. She claims that the trial court violated her due process rights when it ordered an eviction without hearing her affirmative defenses. Because we have held that the trial court improperly ordered the eviction under 799.20(4), STATS., we need not address her constitutional claim.

Spoden also argues that she was deprived of due process because the trial court was "biased" against her. She asserts that the trial court, having already ordered an eviction at the return date hearing, resisted considering any evidence at the trial which would cause it to alter its decision. Whether a judge lacks impartiality is a question of law which we review de novo. ***State v. Jackson***, 187 Wis.2d 431, 435, 523 N.W.2d 126, 128 (Ct. App. 1994). "A litigant is denied due process only if the judge in fact treats him or her unfairly ...." ***Id.*** We see no evidence of bias. While we have held that the trial court erred, an incorrect ruling alone is not proof of bias and Spoden has not directed us to any evidence in the record indicating that the trial court based its ruling on anything besides a good faith interpretation of the law.

We thus reverse and remand for a new trial on the judgment of eviction, limiting the new trial to the affirmative defenses not already heard. Finally, because possession of the premises was never an issue at the trial, and because the counterclaims have been resolved without appeal, we note that the parties may dispose of this matter themselves by agreeing to a modification of the judgment dismissing the order of eviction but leaving unaffected the remainder of the trial court's order, including the judgment on the counterclaims.

By the Court.--Judgment reversed and cause remanded with directions.

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