

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 23, 2008

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. 2006AP3008

Cir. Ct. No. 2005CV1480

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

MEADOW VILLAGE, LTD.,

PLAINTIFF-RESPONDENT,

v.

CHRISTINE JACKSON SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Christine Jackson Smith appeals from a judgment for \$6240 plus interest entered against her in favor of Meadow Village, Ltd., for breach of contract and for intentional misrepresentation of her income on a rent subsidy application. We conclude that the trial court properly exercised its

discretion in denying Jackson Smith's motion to dismiss the complaint or adjourn the trial and that she has failed to preserve the right to review the dismissal of her counterclaim. Therefore, we affirm.

¶2 Meadow Village rented an apartment to Jackson Smith below market rental rates pursuant to a governmental rent subsidy program, whereby the United States Department of Housing and Urban Development subsidized Meadow Village for the difference between the rent Jackson Smith paid and the market rental rate for that apartment. Jackson Smith applied for this rental subsidy without fully disclosing her financial interests. Had she fully disclosed her financial interests as required, she would not have been eligible for the subsidy.

¶3 Meadow Village sued Jackson Smith for the amount of the Departmental subsidy it received based on her incomplete financial disclosure. Jackson Smith denied those allegations and counterclaimed for \$195 for food she claimed spoiled during Meadow Village's renovations of the apartment's kitchen, and her loss of funds and use of those funds from Meadow Village's failure to timely return the entirety of her security deposit. Following a bench trial, the trial court entered judgment against Jackson Smith in the amount of \$6240, the amount of the governmental subsidy for which the trial court found her to have been ineligible.¹ Jackson Smith appeals, alleging that the trial court erred in denying her motion to adjourn the trial to allow her to recall Tom Kroscher, a witness who previously testified for Meadow Village (and was cross-examined by Jackson Smith's defense counsel). Jackson Smith's second appellate claim is that the trial

¹ The monthly governmental subsidy for the apartment rented to Jackson Smith was \$624 and was erroneously paid to Meadow Village for ten months on her behalf.

court failed to consider the damages from her spoiled food and from the failure to timely return all of her security deposit.

¶4 At trial, Meadow Village called Tom Kroscher, its property manager, as a witness. Kroscher testified and was cross-examined by Jackson Smith's counsel. Following Kroscher's re-cross examination, defense counsel told the trial court he had "[n]o further questions." Meadow Village's counsel then rested its case, reserving Kroscher as a potential rebuttal witness.

¶5 The next day, Jackson Smith told the trial court that she preferred to continue without counsel. Defense counsel explained to the trial court that he and Jackson Smith disagreed on strategy, and Jackson Smith concluded that it would be in her best interests to proceed *pro se*.

¶6 Jackson Smith told the trial court that she was prepared to proceed, and sought to re-call several of Meadow Village's witnesses, including Ezell Taylor and Tom Kroscher. Jackson Smith then called Ezell Taylor, Meadow Village's manager and maintenance supervisor. The trial court asked Kroscher to leave the courtroom during Taylor's testimony as Jackson Smith requested. Taylor testified for the remainder of the afternoon. The trial court then adjourned the trial for approximately one month because it was taking far longer than expected, and was conflicting with other previously scheduled matters.

¶7 The trial resumed one month later. When the trial court inquired whether Jackson Smith had any further evidence to present, she claimed that she had "reserved" Tom Kroscher as a witness. Kroscher was not in the courtroom that day. Jackson Smith asked to adjourn the trial to allow Kroscher to testify on a future date, or to dismiss Meadow Village's complaint for its failure to produce Kroscher for testimony at that time. The trial court denied her requests.

¶8 WISCONSIN STAT. § 906.11(1) (2005-06) entrusts the trial court with the discretion to control the mode and order of interrogation and presentation of witnesses at trial.²

906.11 Mode and order of interrogation and presentation. (1) CONTROL BY JUDGE. The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to do all of the following:

- (a) Make the interrogation and presentation effective for the ascertainment of the truth.
- (b) Avoid needless consumption of time.
- (c) Protect witnesses from harassment or undue embarrassment.

Section 906.11(1) empowers the trial court to control the presentation of witnesses as long as that control is exercised “reasonabl[y,]” the truth is sought to be ascertained, time is not wasted, and the witnesses are protected “from harassment.” *Id.* “Trial courts have broad discretion to admit or exclude evidence and to control the order and presentation of evidence at trial; [the appellate court] will upset their decisions only where they have erroneously exercised that discretion.” *State v. James*, 2005 WI App 188, ¶8, 285 Wis. 2d 783, 703 N.W.2d 727.

¶9 The trial court denied Jackson Smith’s requests to adjourn the trial or dismiss the complaint against her because of Kroscher’s unavailability, and explained why it denied her requests.

Mr. Kroscher was named by the plaintiff, not by the defendant. He was called as a witness. He was available

² All references to the Wisconsin Statutes are to the 2005-06 version.

for questioning by the defendant. She wasn't represented by counsel at that point but he was available to her.³ At the end of his testimony, [Kroscher] was not ordered to remain under subpoena. He was not told to return on any particular date. He was apparently not subpoenaed for any further testimony. He's not here today and [the trial court] ha[s] to decide whether to delay this protracted proceeding further or perhaps grant a dismissal.

The motion for dismissal is denied. Absent naming a witness, or at least subpoenaing him at the last moment or requesting an order from the Court that he return on a certain date, he's not obligated to be here. And the sanction of dismissing a case, which is a pretty dramatic sanction, is not simply appropriate for a party who may not have gone out of its way to assist, may not have gone out of its way to help but was not obligated to help prove the defense case. So the Motion[] to Dismiss is denied. Ms. Smith, do you wish to present any further evidence?

(Footnote added.) The trial court then swore Jackson Smith as a defense witness. Jackson Smith, at the end of that day in response to the trial court's calendaring inquiries, sought to recall Kroscher on the next trial date. The trial court denied the request, explaining that it did "not intend to prolong these proceedings simply because we haven't been able to finish them in order to bring back a witness who testified, who was cross-examined by [Jackson Smith's] lawyer. So [the trial court is] not going to entertain further testimony from Mr. Kroscher."

¶10 The trial court properly and patiently exercised its discretion in denying Jackson Smith's request to allow her to recall Kroscher. She had not identified Kroscher as a defense witness prior to trial as required by the scheduling order. She could have recalled Kroscher when he was in the courtroom while she

³ The trial court was presumably referring to Kroscher's availability during the defense case because he had already testified (and was cross-examined) during the plaintiff's case-in-chief. On the first afternoon of the defense case, although Jackson Smith was proceeding *pro se*, her recently discharged counsel remained in the courtroom available to her in a standby capacity.

was presenting her defense *pro se*. She could have subpoenaed Kroscher to compel his appearance during the month-long adjournment of the trial. The trial court denied her request because she failed to compel Kroscher's testimony by the foregoing means available to her. Denial did not compromise the interests of ascertaining the truth or fairness to both parties because Kroscher had already testified, and Jackson Smith's counsel had already cross-examined him. *See* WIS. STAT. § 906.11(1). Moreover, the trial court declined to prolong this trial, which had consumed over ten hours in more than five days of court time to recall a witness who had already testified and been cross-examined by her counsel. *See* § 906.11(1)(b). The trial court's reasons were reasonable, accommodating the statutory considerations and its major objective of being fair to the parties. We will not interfere with the trial court's proper exercise of discretion in denying Jackson Smith's motions.

¶11 Jackson Smith also contends that the trial court erred by failing to consider her counterclaims against Meadow Village—for the belated return of part of her security deposit and for her spoiled food—to offset the amount of her liability. We deny her claim for a variety of reasons.

¶12 Preliminarily, Jackson Smith's failure to move for reconsideration of her counterclaim pursuant to WIS. STAT. § 805.17(3) constitutes a waiver of her right to appellate review of this claim. *See Schinner v. Schinner*, 143 Wis. 2d 81, 93 & n.4, 420 N.W.2d 381 (Ct. App. 1988). We also deny review of the dismissal of Jackson Smith's counterclaim because it is inadequately briefed on appeal. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). In its oral decision, the trial court “found that none of the counterclaims have been supported by evidence that would satisfy the elements of a legal claim and those are dismissed,” explaining that “[t]here may or may not have been some spoilage

of food related to renovation, related to some kitchen cabinet problems, but [the trial court] find[s] nothing here to support a claim against the landlord for that damage.” In her appellate brief, Jackson Smith does not, as required by WIS. STAT. RULE 809.19(1)(d), cite to any reference during the trial where her counterclaim damages were presented. Consequently, the counterclaim issue (to the extent there was any counterclaim evidence) is inadequately briefed, and we decline to review it. *See Pettit*, 171 Wis. 2d at 646-47.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

