

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 14, 2009

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. 2008AP1009

Cir. Ct. No. 2007CV358

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

BERNARD SEIDLING, D/B/A RAINTREE ENTERPRISES,

PLAINTIFF-RESPONDENT,

V.

DORI L. STEPAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Douglas County:
GEORGE L. GLONEK, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Dori Stepan appeals a judgment granting her request to rescind a land contract with Bernard Seidling and returning the money Stepan paid on the contract minus a setoff for her possession and use of the

property. She argues: (1) she was entitled to a jury trial; (2) she is entitled to attorney fees under WIS. STAT. § 100.18¹ (false advertising); and (3) the court erred when it offset her damages by the value of her use of the property.² We conclude the trial court properly denied Stepan a jury trial and attorney fees, but we reverse the setoff and remand the matter for the trial court to award Stepan the return of all of the money she paid on the contract.

¶2 Seidling and Stepan entered into a contract conveying a house, garage and several acres of land to Stepan. The contract required Stepan to pay \$9,000 down and \$990 monthly until the obligation was fulfilled. After making several payments and improvements to the property, Stepan stopped making payments. She never moved into the house.

¶3 Seidling brought a small claims eviction action that was amended to a foreclosure action after trial on the eviction commenced. Stepan counterclaimed for rescission and false advertising under WIS. STAT. § 100.18. At an initial status conference, the court considered whether Seidling's claim should proceed as an eviction or foreclosure action. The court determined it would proceed with the eviction claim and set a trial date. At the eviction trial, the court terminated the proceedings because it determined Seidling's proper claim was foreclosure, not eviction. Shortly after the aborted trial, Stepan requested a jury trial, which the court denied.

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

² Stepan also requests reversal in the interest of justice. We do not separately address that argument because it merely reiterates other arguments addressed in this opinion.

¶4 Following a bench trial, the court found overwhelming evidence that Seidling materially breached the real estate contract for misrepresentations including not having clear title to the property. The court granted rescission and held the contract void and indicated it would place the parties in the same position had no contract been entered. It awarded Stepan \$20,735 for her payments and improvements. The court offset that amount by \$19,305, the amount it found Stepan benefitted from having exclusive use of the property. The \$19,305 amount is based on \$990 per month multiplied by the nineteen and one-half months the contract was in effect.

¶5 Stepan was not entitled to a jury trial for two reasons. First, a demand for a jury trial must be made at or before the scheduling conference or pretrial conference, whichever is held first. WIS. STAT. § 805.01(2). Stepan contends the initial status conference did not constitute a scheduling conference because the court did not issue a formal scheduling order. We conclude the initial conference was a pretrial conference under WIS. STAT. § 802.10(5) because the court considered formulation of the issues and scheduled trial. By failing to request a jury trial at the status conference, Stepan waived her right to trial by jury.

¶6 Second, the claims and counterclaims presented in this case do not include entitlement to a jury trial. Foreclosure and rescission claims are equitable actions tried to the court. *Norwest Bank Wis. Eau Claire, N.A. v. Plourde*, 185 Wis. 2d 377, 386, 518 N.W.2d 265 (Ct. App. 1994). Stepan was not entitled to a jury trial on her false advertising claim. When a statute is silent with regard to the right to a jury trial, no jury trial is required unless the right is preserved by the WIS. CONST. art. I, § 5. *Harvot v. Solo Cup Co.*, 2009 WI 85 ¶47, ___ Wis. 2d ___, 768 N.W.2d 176. WISCONSIN STAT. § 100.18 does not provide for a jury trial, and the right to a jury trial for false advertising is not protected by the

Wisconsin Constitution. *See State v. Ameritech Corp.*, 185 Wis. 2d 686, 698, 517 N.W.2d 705 (Ct. App. 1994).

¶7 Stepan is also not entitled to attorney fees under WIS. STAT. § 100.18. The entitlement to attorney fees does not apply in an action against a real estate broker or salesperson while the person is engaged in real estate practice. *See* WIS. STAT. § 100.18(11)(b)2. Because Seidling was a licensed real estate agent engaged in real estate practice at the time of this transaction, Stepan is not entitled to attorney fees.

¶8 We reverse the setoff of Stepan's damages for two reasons. First, Stepan correctly notes that Seidling presented no evidence of the rental value of the property or other evidence to justify the setoff. By failing to respond to the argument, Seidling concedes the issue. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1997). Second, the setoff does not restore the parties to the position they would have occupied had no contract been entered. In effect, the court awarded Seidling the periodic payments due on the rescinded contract. The payments due under the voided contract are not necessarily identical to the value of possession. Therefore, on remand, the court shall amend the judgment to remove the setoff.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions. No costs on appeal.

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

