COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1084 **Cir. Ct. No. 2008SC1160**

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

GURWANT KALEKA AND PARMINDER KALEKA,

PLAINTIFFS-RESPONDENTS,

V.

DURAND SHELL, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: STEPHEN A. SIMANEK, Judge. *Affirmed*.

¶1 BROWN, C.J.[1] Durand Shell, Inc. rented a gas station for five years from Gurwant and Parminder Kaleka. A written lease agreement detailed

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

the repairs that the Kaleka's agreed to perform. They did not do these repairs. As a self-help remedy, Durand Shell stopped paying rent. The Kaleka's then brought this eviction action, alleging that the lease agreement called for the timely payment of rent and Durand Shell breached this provision. After a bench trial, the trial court found that both parties had breached the lease agreement, but ordered a judgment for eviction on the grounds that the self-help remedy of abatement was foreclosed by a specific lease provision prohibiting it. Durand Shell appeals, claiming that its self-help abatement remedy is authorized by WIS. STAT. § 704.07(4) and that the court's decision leaves it without a remedy contrary to Article I, Section 9 of the Wisconsin constitution. But we hold that the lease agreement does indeed foreclose self-help abatement as a remedy, the statute does not help Durand Shell and it had other remedies available. We affirm.

¶2 We do not need to recite the facts in detail. Suffice it to say, the written lease agreement called for the Kaleka's to repair the driveway, fix the leaky storage tanks on the property and be responsible for all structural repairs and maintenance, which would include keeping the diesel fuel stations in repair. The Kaleka's welshed on each of these promises. After trying without success to get the Kaleka's to do what they had agreed to, Durand Shell simply stopped paying rent. The Kaleka's then brought this in rem action for eviction.

¶3 The trial court was not very solicitous of the Kaleka's. Nonetheless, the trial court felt duty-bound to administer the law. The court focused on paragraph twenty-four of the written lease that says: "Independent Covenant. The obligation to pay rent is an independent covenant and no right of offset is allowed hereunder." The trial court reasoned that the plain meaning of this paragraph was to say that, irrespective of the other paragraphs outlining the Kaleka's duties, the agreement to pay rent was "independent" and had to be paid regardless. The trial

court came to this conclusion based on the clause spelling out that Durand Shell had "no right of offset". The trial court obviously equated "offset" with "abatement" and held that the self-help remedy of abatement was not allowed by the plain meaning of the written contract. So, Durand Shell breached the contract and eviction was the proper remedy.

¶4 On appeal, Durand Shell points us to WIS. STAT. ch. 704, this state's landlord and tenant legislation. More particularly, Durand Shell directs our attention to WIS. STAT. § 704.07, which is entitled "Repairs; untenantability." Without going into specifics, it is Durand Shell's theory that this statute applies in all nonresidential landlord-tenant situations unless there is a contrary provision expressed in writing. Such being the case, Durand asserts that while the lease agreement did spell out the Kaleka's repair and maintenance responsibilities in writing, it was silent regarding the remedy for breach of those responsibilities. Thus, since § 704.07(1) says that "[t]his section applies to any non-residential tenancy if there is no contrary provision in writing signed by both parties …." and there was no contrary provision about remedies in the agreement, the section therefore applies. And if the section applies, then § 704.07(4) allows a tenant to abate rent in the event of untenantability.

¶5 There are a host of problems with this theory. First, it is raised for the first time on appeal, as the Kaleka's reveal in their response brief. We are a reviewing court and that means we "review" issues that were contested and decided in the trial court. When a legal argument is raised for the first time on appeal, it can hardly be called a "review." *See* ***State v. Conway***, 34 Wis. 2d 76, 82-83, 148 N.W.2d 721 (1967) (basis for rule that courts refuse to review issues for the first time on appeal is that the trial court has not had the opportunity to give it due consideration or form a proper factual foundation). We reviewed the record

and saw no argument pertaining to the statute. Moreover, Durand Shell has not seen fit to file a reply brief addressing the Kaleka's response. So, we take that as an admission that it never raised this issue until now. Second, even if we were to address the abatement remedy of WIS. STAT. § 704.07(4), it would not help Durand Shell. That remedy is available if there is a substantial violation of WIS. STAT. § 704.07(2), which is entitled DUTY OF LANDLORD and pertains to the duties of the landlord to make repairs. This section comes into play only if repair has not been made the subject of a written landlord-tenant agreement. ***Halverson v. River Falls Youth Hockey Ass'n***, 226 Wis. 2d 105, 114, 593 N.W.2d 895 (1999). So, since § 704.07(2) does not apply, neither does § 704.07(4). Finally, the argument that the landlord-tenant agreement is silent as to remedy is simply not so. The agreement may not have described the remedies *available* to Durand Shell in the event of the Kalekas' repair and maintenance breaches, but it certainly made plain what remedy was *not available*. For all of these reasons, Durand Shell's argument fails.

¶6 Durand Shell complains that, if things are left the way they are, it is without a remedy. It cites our state constitution, Article I, Section 9 for the proposition that every right has a remedy. Like the first issue, this constitutional argument was not raised before the trial court and is waived. *See* ***Conway***, 34 Wis. 2d at 82-83. But more to the point, Durand Shell is simply wrong about alternative remedies not being available. It can sue for damages for breach of contract. Now, it may be that Durand Shell did not want to be evicted, but wanted the place fixed. They could have accomplished that very easily by paying their rent on time and suing for specific performance. The availability of that particular remedy has long passed by virtue of Durand Shell's choice to use a remedy that the written agreement said it could not use. So, a breach of contract action is what

would still be available, assuming it can get past issue preclusion. We uphold the trial court.

By the Court.—Judgment affirmed.

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