COURT OF APPEALS DECISION DATED AND FILED

June 14, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2011AP2311

Cir. Ct. No. 2011SC613

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

INVESTMENTS UNLIMITED, LLC,

PLAINTIFF-RESPONDENT,

V.

BENJAMIN CRANDALL,

DEFENDANT-APPELLANT,

ASHLEY LECHMAN,

DEFENDANT.

APPEAL from a judgment of the circuit court for Jefferson County: JENNIFER L. WESTON, Judge. *Affirmed.*

¶1 LUNDSTEN, P.J.[1] Benjamin Crandall appeals a circuit court judgment in favor of Crandall's former landlord, Investments Unlimited. The issue here is whether Crandall was constructively evicted from his apartment when Investments Unlimited's owner made a threatening phone call to Crandall. Crandall argues that the circuit court incorrectly concluded that multiple requirements for constructive eviction were not met. I reject Crandall's argument, and affirm.

Background

¶2 Investments Unlimited rented an apartment to Benjamin Crandall. Although this case began with Investments Unlimited bringing suit to evict Crandall and recover past due rent, this appeal solely concerns Crandall's assertion in his answer that he was constructively evicted.

¶3 Crandall asserts he was constructively evicted when Investments Unlimited's owner, Maureen Toohey, left him a "threatening" phone message on April 12, 2011. Toohey made the call after Crandall was late in paying rent. Toohey stated in the message:

> Ben [Crandall], this is Maureen Toohey calling. I sure hope you're on your way out. I understand the police have been there several times. I've got police on watch for your prostitution ring that you're running out of the apartment.
>
> You know, you are just causing yourself a lot of damage because I will help out with your divorce. I will make sure you have no children.

[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.

¶4 On April 13, 2011, the day after Toohey left the message, Crandall called the police and complained about the phone call. The same day, the police spoke to Toohey and warned her to stop harassing Crandall. There is no evidence of further harassment by Toohey after the April 12 phone message. Crandall paid the April rent on April 13.

¶5 As of April 14, 2011, Crandall only stayed in the apartment periodically. More specifically, the circuit court found that, starting on April 14: "Crandall maintained all his personal belongings at the apartment, stayed there periodically, but mostly lived at his mother's home because there were 'a lot of family things going on.'" Crandall turned over the keys to the apartment on May 2, 2011.

¶6 At a court trial, Crandall testified that the prostitution ring allegation was false. Crandall nonetheless testified that the phone message made him fear that continuing to stay in the apartment meant that Toohey would interfere with his divorce and, further, that Toohey would pursue the prostitution allegations. Crandall stated that he feared the allegations could lead to revocation of a "deferred prosecution" agreement that he was subject to. The circuit court rejected Crandall's argument that the circumstances constituted constructive eviction. The court entered judgment in favor of Investments Unlimited for unpaid May 2011 rent, late fees for April 2011, and attorney fees and costs.

Discussion

¶7 Crandall contends that he was constructively evicted by the threatening message on April 12, 2011, and, thus, did not owe rent for May 2011. In rejecting this argument, the circuit court concluded that three requirements for constructive eviction were not met. For Crandall's argument to succeed, Crandall

must show that all three requirements were met, but Crandall's argument falls short on at least two of them.

¶8 In ***First Wisconsin Trust Co. v. L. Wiemann Co.***, 93 Wis. 2d 258, 286 N.W.2d 360 (1980), our supreme court explained that "[a] constructive eviction constitutes a breach of the covenant for quiet enjoyment." ***Id.*** at 267. A constructive eviction occurs when an act "so disturbs the tenant's enjoyment of the premises or so interferes with his possession of the premises as to render them unfit for occupancy for the purposes for which they are leased." ***Id.*** at 267-68. The circuit court concluded that Toohey's threatening message could, as a general matter, form the basis for constructive eviction. For purposes of this opinion only, I make the same assumption in Crandall's favor.

¶9 Even though the circuit court concluded that three requirements for constructive eviction were not met here, to reject Crandall's argument I need only conclude that one requirement was not met. I nonetheless choose to address the following two requirements: first, that the disturbance must be "'substantial and of such duration that it can be said that the tenant has been deprived of the full use and enjoyment of the leased property for a material period of time,'" ***id.*** at 268 (citation omitted), and, second, that the tenant must abandon the premises within a reasonable time, ***id.***

¶10 As to the material-period-of-time requirement, the circuit court concluded that the disturbance was temporary because, after April 12, the date on which Crandall asserts the relevant disturbance occurred, Toohey did not further harass Crandall. Because there was only one harassing message, the court concluded that the disturbance did not last for a material period of time.

¶11 Crandall argues that the circuit court ignored a lingering effect on Crandall from the message. More specifically, Crandall asserts that the threats about reporting a prostitution ring to the police and about interfering with Crandall's divorce were not undone by Toohey's subsequent silence, but rather continued to "cast a permanent pall over Crandall's tenancy." Accordingly, Crandall asserts, the disturbance was ongoing.

¶12 Crandall, however, fails to appreciate that this is a factual assertion. Where the circuit court acts as the fact finder, as here, I defer to its fact finding. *See* ***Lessor v. Wangelin***, 221 Wis. 2d 659, 667-68, 586 N.W.2d 1 (Ct. App. 1998) (when the circuit court is the fact finder, this court defers to its fact finding unless it is clearly erroneous). The circuit court here necessarily rejected a "permanent pall" factual inference and, in particular, rejected as not credible Crandall's assertions that he felt an ongoing threat. *See* ***id.*** (the fact finder is the ultimate arbiter of credibility). The rejection of Crandall's "permanent pall" assertion is supported by Crandall's testimony that *he* contacted the police about Toohey's false prostitution allegations and that, because the prostitution allegations were false, he had "no problem with the police knowing about false allegations."

¶13 With regard to the divorce, Crandall again comes up short. Crandall refers to the statement in the message that: "You know, you are just causing yourself a lot of damage because I will help out with your divorce. I will make sure you have no children." Crandall, however, does not show that the circuit court was required to find a lingering effect on Crandall based on this statement, standing alone. Toohey did not follow up with further threats or actions directed at the divorce, and, for that matter, these vague statements give no indication of how Toohey could, as a practical matter, impact the divorce. Thus, I affirm the circuit court's rejection of Crandall's "permanent pall" argument.

¶14 Turning to the abandonment requirement, I agree with the circuit court's determination that Crandall did not abandon the premises within a reasonable time. The circuit court found: "Crandall may have removed himself from the property after [April 14, 2011], but did not actually abandon the premises. He had all his belongings there, and he stayed there periodically, when convenient for him." Crandall concedes that he did not fully abandon the premises until May 2, twenty days after Toohey's phone message.

¶15 Crandall makes two main assertions on this topic. First, Crandall asserts that the circuit court did not apply the correct "reasonable time" measure, but rather required immediate abandonment. However, this is merely an assertion by Crandall. He does not point to any place in its decision where the court applied an immediate abandonment requirement. To the contrary, the court stated the correct "reasonable time" requirement in its decision.

¶16 Second, Crandall asserts that, under his particular circumstances, the twenty days to abandon was reasonable. Crandall points to the circumstances that the apartment was "his home" and that it necessarily takes time to secure a new home, that he was in the middle of a divorce, and that Toohey's false accusation about the prostitution ring made it harder for him to find another apartment. At bottom, Crandall essentially contends that he should not have been expected to find alternative housing sooner and, thus, should not have been expected to abandon the apartment sooner.

¶17 However, this line of argument leaves unaddressed an additional circumstance. Crandall does not account for the fact that he "mostly" ceased staying at the apartment beginning on April 14. This is because Crandall *had found* alternative living arrangements, specifically, he moved in with his mother.

What Crandall leaves unaddressed is why, given that he had other living arrangements prior to the running of the twenty days, the circuit court was required to find that the twenty days to abandon was reasonable.

¶18 Thus, Crandall's contentions also fail as to the abandon-within-a-reasonable-time requirement.

¶19 Finally, I note that Crandall may mean to raise an alternative argument about the circuit court's award to Investments Unlimited. The circuit court awarded Investments Unlimited a full month's rent for Crandall's unpaid May 2011 rent. Near the end of his brief-in-chief, Crandall asserts that "[a]t best Crandall is responsible for the prorated rent for the first two days of March." Crandall seemingly means to refer to the first two days of *May*, as Crandall vacated the apartment on May 2. In any event, if Crandall means to raise an argument regarding proration, it is not accompanied by a developed argument or citation to the record showing that this topic was preserved. I decline to address the topic.

Conclusion

¶20 For the reasons discussed, I affirm the circuit court.

By the Court.—Judgment affirmed.

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