COURT OF APPEALS
DECISION
DATED AND FILED

January 23, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1545 **Cir. Ct. No. 2007SC315**

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

JANE SCHUSTER-KARTES,

PLAINTIFF-APPELLANT,

V.

CRAIG SCHOENBECK,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed.*

¶1 BROWN, C.J.[1] This is an appeal from a contempt and purge order in a small claims matter. It all began with a dispute involving a contract to sell a truck. The seller, Jane Schuster-Kartes, brought a replevin action seeking return

[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.

of the truck plus repair of damages from the buyer, Craig Schoenbeck, due to alleged nonpayment—and Schoenbeck contested it. In rendering judgment following trial, the court allowed Schoenbeck to keep the truck, ordered that he have title to it subject to Schuster-Kartes' lien for amounts due, and set ground rules for payment of some of the loan. But Schuster-Kartes instead swiped the truck from Schoenbeck while he was inside a bar and had it retitled in her name. The court found Schuster-Kartes in contempt and set purge rules. She appeals, alleging that she had a right under the self-help repossession statute, WIS. STAT. § 409.609(2)(b), to do what she did and that the purge order was an abuse of discretion. We affirm. A circuit court has the power to carry into effect its judgment. Schuster-Kartes was duty-bound to follow that judgment and had absolutely no right to use the self-help statute in contravention to that judgment. Plus, the court did not erroneously exercise its discretion in fashioning and carrying out its purge order.

¶2 We will set forth only those facts we deem relevant to this appeal. The appellate record that has been presented to us by Schuster-Kartes is confusing and we will have to reconstruct the chronological events as best we can. The original complaint in this matter was filed by Schoenbeck in September 2006, alleging that Schuster-Kartes had unlawfully repossessed the truck. Schuster-Kartes then filed her own suit which was merged with Schoenbeck's. There was a court trial on November 6, 2006, and judgment was rendered on November 14. Schuster-Kartes filed a motion to reopen but that was denied. Then, on February 21, 2007, Schuster-Kartes, in the words of the small claims court, filed "another whole lawsuit over the same issue." On March 29, 2007, the small claims court held a status conference on this new complaint. As we read the transcript of the status conference, we see that the small claims court was understandably not going

to allow a new complaint to take precedence over a judgment that had already been rendered on the same issue and was therefore the law of the case. It is clear that the court had ordered each party to do certain things to bring the matter to closure and that these things had not been accomplished. Therefore, the small claims court used the status conference to instead try to iron out the differences remaining between the parties so that the judgment could effectively be carried out.

¶3 The small claims court heard each party's side of the story. At the conclusion of the hearing, the court ordered that the truck remain in Schoenbeck's possession, that title be transferred to him, that he pay the tax on the sale, and that Schuster-Kartes have a lien in the amount of $8900.

¶4 Subsequently, Schuster-Kartes brought yet another small claims complaint and Schoenbeck countered with a motion for contempt. By this time, both parties were represented by counsel. The motion was heard on May 16, 2007. Schoenbeck's counsel represented to the court that title had in fact been transferred, per court order, that Schoenbeck had attempted to pay Schuster-Kartes the $8900 but had been thwarted in that attempt, and that Schuster-Kartes instead "took on her own self-help … in fact, she then stole that truck from him while he was in a bar." Schoenbeck's counsel told the court that Schoenbeck had brought with him the checks to pay off the truck and requested that Schuster-Kartes be ordered to accept the checks and return the truck.

¶5 Schuster-Kartes' counsel replied that Schoenbeck had not tendered the checks and Schuster-Kartes therefore had the statutory right to self-help repossession under WIS. STAT. § 409.609, and was lawfully in possession of the

truck. After taking the truck, Schuster-Kartes had also changed title back to her name.

¶6 The small claims court found as follows:

> Ms. Kartes, you're going to jail now and you're going to stay in jail. I'm finding you in contempt of court. You're going to stay in jail until that lien is signed, that check has been paid, and I want that car delivered, delivered. And you will sit in jail until it is. And you're going to arrange that.

¶7 Schuster-Kartes, appearing once more pro se, appeals from the order following the contempt hearing.[2] Her apparent complaint with regard to that order is that the court erred by ordering her to sign and transfer the title to the truck because it had been legally repossessed under the self-help statute due to the fact that Schoenbeck was two months behind in payments. She also appears to appeal the earlier status conference order as it regards the court having lowered the dollar amount of the money due and owing to her from $11,200 to $8900.

¶8 Schuster-Kartes' basic contention is that Schoenbeck was behind on his payments and she therefore had the right to retake possession under the statutory self-help procedure. Therefore, she claims, the small claims court acted contrary to law by ordering her to give back the truck after she lawfully repossessed it. She is wrong. WISCONSIN STAT. § 409.609(2)(b) does indeed give a secured party the right to take possession of the property following default

[2] Schoenbeck did not file a respondent's brief. The Presiding Judge of this district issued an order on December 20, 2007, warning Schoenbeck that we could issue a further order requiring him to submit a brief or we could summarily reverse on disciplinary grounds. However, we point out that such action is discretionary with this court. After review of the record and applicable law, we decline to require a brief and we also decline to summarily reverse.

without judicial process so long as there is no breach of the peace. But she cannot avail herself of this statute for three reasons.

¶9 First, the self-help statute provides that a secured party may seek help via the judicial process *or* without judicial process. WIS. STAT. § 409.609(2). Schuster-Kartes sought help by way of the judicial process and received a judgment in her favor, though she did not get everything she wanted. Having availed herself of one alternative, she cannot now use the other alternative. Second, she did not become a *secured* party by reason of the contract. She became a lienholder by reason of the court's judgment. We doubt that she even had standing to use the statute in furtherance of any contact rights she may have had.

¶10 Third, and much more importantly, the small claims court rendered judgment following a trial and then amended its judgment following a hearing at the status conference. A valid and final personal judgment is *conclusive* between the parties. The claim for breach of contract is *extinguished* and *merged* in the judgment. *See* ***Waukesha Concrete Products Co. v. Capitol Indem. Corp.***, 127 Wis. 2d 332, 343-44, 379 N.W.2d 333 (Ct. App. 1985). As the RESTATEMENT (SECOND) OF JUDGMENTS explains, when a plaintiff recovers a valid and final personal judgment, the original claim is extinguished and the rights upon the judgment are substituted for it. RESTATEMENT (SECOND) OF JUDGMENTS § 18 cmt. a (1982). The plaintiff's original claim is said to be "merged" in the judgment. ***Id***. She may not thereafter maintain any action on the original claim or any part thereof. ***Id***., cmt. b. Her remedy is to seek enforcement of the judgment. ***Id***., cmt. c.

¶11 As applied to this case, assuming *arguendo* that Schuster-Kartes had standing to use the self-help statute, she could only avail herself of that statute if she were a secured party *under the contract*. But, as we have explained, her contractual rights—and thus her claimed statutory right—were extinguished and merged with a judgment of the court. In sum, Schuster-Kartes had no right to use the self-help statute once a judgment was in place.

¶12 She also appears to contest the circuit court's determination that she must give up possession even though Schoenbeck was two months behind in his payments. But the court found that, rather than the remedy of repossession, she should instead be entitled to the remedy of specific performance—a remedy requested by Schoenbeck. The small claims court certainly had the authority to render such remedy. And the record shows that Schoenbeck was ready, willing and able to complete performance of the contract. He had checks for the balance of the amount due in hand in the courtroom. We hold that this particular aspect of her claim is without merit.

¶13 Correlatively, she claims that one of the checks was from an insurance company and was delivered to Schoenbeck due to "insurance fraud." We decline to give any weight to this accusation since it is wholly conclusory, without any factual support to back it up. And even if she could show a semblance of fraud going on, which we doubt, she would have no standing to use it to keep from having to transfer the vehicle. Standing on that issue would be reserved for the party allegedly hurt by the fraud—the insurer in this case.

¶14 Schuster-Kartes next complains that the amount owed to her should have been higher than the amount that the small claims court found to be the case. This is, in reality, a complaint that the facts found by the small claims court are

erroneous. But factual findings of the circuit courts will not be overturned on appeal unless the findings are "clearly" erroneous. WIS. STAT. § 805.17(2). The small claims court heard both parties and made its credibility assessment based on the facts it heard. Based on our review of the transcript, there is no basis to conclude that the facts found by the court were in any way erroneous, let alone "clearly" so.

¶15 Finally, Schuster-Kartes asserts that the small claims court abused its discretion by jailing her until she handed over the title and the truck because, in her words, "after [the] … Judge signed a new order stating that the only judge … [who] could sign the order to release [her] from jail was him … he proceeded to leave early for the day causing [her] to remain in jail overnight. Then he declined to sign the release the next morning." She also argues that the court was "always short tempered and very gender-biased." We gather that, by these assertions, she is claiming that the court was biased against her and exhibited animus towards her.

¶16 In order to prove bias, she must show either subjective bias or objective bias. *See* ***State v. McBride***, 187 Wis. 2d 409, 415, 523 N.W.2d 106 (Ct. App. 1994). Subjective bias is based on the judge's own determination that he or she cannot act impartially in the matter. ***Id***. Objective bias is based on facts showing that the court treated a party unfairly. ***Id***. at 416. There is a presumption that the judge is free of bias. ***Id***. at 414. The burden is on the party asserting judicial bias to show by a preponderance of the evidence that the judge is biased or prejudiced. ***Id***. at 415.

¶17 We have no record to determine the small claims court's own determination of whether it acted impartially because Schuster-Kartes did not go before the court and request such a determination. So, from the very outset, she

has failed to show subjective bias because she never made the proper record. Moreover, regarding objective bias, our independent review of the record shows that the small claims court was equally frustrated by *both* parties' seeming refusal to pay attention to the court's pronouncements. As for the claim that she was kept in jail overnight, not only is there—as we said—a failure by Schuster-Kartes to make a proper record about whether this was the result of an intentional or unfair act by the court, but if she landed in jail and the purge could not be completed before the next day, then all we can say is that she, by her own actions, placed herself in that predicament. Without more of a record, we must assume that she had the proverbial "keys to the jailhouse door" to purge her condition without having to stay overnight.

By the Court.—Order affirmed.

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