COURT OF APPEALS
DECISION
DATED AND FILED

September 9, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP144 **Cir. Ct. No. 2007FO62**

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

CITY OF MILWAUKEE,

PLAINTIFF-RESPONDENT,

V.

ROBERT F. ZELLMER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JOHN SIEFERT, Judge. *Affirmed*.

¶1 FINE, J. Robert F. Zellmer appeals a circuit-court order in effect affirming a municipal-court judgment finding him guilty on the parties' stipulated facts of violating MILWAUKEE, WIS., ORDINANCE § 200-42-2-b. *See* WIS. STAT. § 800.14 (appeal from decision by municipal court). He contends that the

ordinance violates both state and federal fair-housing laws, and, also, runs afoul of 42 U.S.C. § 1983.[1] We affirm.

I.

¶2 Zellmer was charged with unlawfully offering to use a building contrary to Milwaukee's zoning restrictions, in violation of MILWAUKEE, WIS., ORDINANCE § 200-42-2-b. Section 200-42-2-b provides, as material: "It shall be unlawful to … offer to maintain, occupy or use, any building, structure, premises or part thereof … in violation of any regulation of this code."

¶3 The building Zellmer owns, and which is the focus of this appeal, is in an area of Milwaukee zoned an RO2 district, which permits rooming houses as a special use. MILWAUKEE, WIS., ORDINANCE § 295-503-1. A "rooming house" is, as material here, "any building or part of any building or dwelling unit occupied by more than 3 persons who are not a family or by a family and more than 2 other persons for periods of occupancy usually longer than one night and where a bathroom or toilet room is shared." MILWAUKEE, WIS., ORDINANCE § 200-08-74. Zellmer does not dispute that the property that is the focus of this appeal is not licensed as a "rooming house," and that he has not sought such a license or designation as a special use under the RO2 zoning code. Rather, he contends in his reply brief on this appeal that the "property is not a rooming house it is a duplex," without explaining why a "duplex" structure could not also qualify as a "rooming house" as that term is used by the Milwaukee ordinances.

[1] On August 21, 2008, the Chief Judge of the Court of Appeals denied Zellmer's motion to have this appeal decided by a three-judge panel. *See* WIS. STAT. RULE 809.41.

¶4 Zellmer contended before the circuit court and argues here that, as noted, the citation issued to him violates various overriding laws. Some of Zellmer's contentions before the circuit court are not renewed on appeal, and, therefore, are abandoned. *See* ***State v. Johnson***, 184 Wis. 2d 324, 344, 516 N.W.2d 463, 470 (Ct. App. 1994) (Matters not briefed or argued are abandoned.). Others were not argued to the circuit court, and, therefore, are waived. *See* ***Poling v. Wisconsin Physicians Serv.***, 120 Wis. 2d 603, 610, 357 N.W.2d 293, 297–298 (Ct. App. 1984) (Matters not argued in the trial court but raised for the first time on appeal are deemed waived.). With this background we now turn to his various arguments.

II.

A. *Was there an "offer"?*

¶5 Zellmer contended before the circuit court that there was no "offer" under the ordinance. He has not argued this issue on appeal. Accordingly, we do not address it. *See* ***Johnson***, 184 Wis. 2d at 344, 516 N.W.2d at 470.

B. *Do the ordinances under which Zellmer was convicted violate 42 U.S.C. § 3607(b)(1)?*

¶6 Zellmer argued before the circuit court that, as phrased by him in his submission to the circuit court, the ordinances under which he was convicted "violate[d] the Fair Housing Act 42 U.S.C. 3607(b)(1)." 42 U.S.C. § 3607(b)(1) provides in full: "Nothing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Nor does any provision in this subchapter regarding familial status apply with respect to housing for older persons." Zellmer does not explain why or how any of the Milwaukee ordinances

material to this appeal conflict with this section. We will not do his analysis for him. ***Vesely v. Security First Nat'l Bank of Sheboygan Trust Dep't***, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593, 598 n.5 (Ct. App. 1985) (We do not address issues inadequately briefed.); *see also* ***State v. Jackson***, 229 Wis. 2d 328, 337, 600 N.W.2d 39, 43 (Ct. App. 1999) ("A party must do more than simply toss a bunch of concepts into the air with the hope that either the trial court or the opposing party will arrange them into viable and fact-supported legal theories."), *grant of habeas corpus rev'd sub nom.* ***Jackson v. Frank***, 348 F.3d 658 (7th Cir. 2003), *cert. denied*, 541 U.S. 963.

C. *Do the ordinances under which Zellmer was convicted violate other provisions of the federal Fair Housing Act?*

¶7 In an apparent realization that 42 U.S.C. § 3607(b)(1) is a weak meniscus upon which to float his contention that he was unlawfully convicted of violating MILWAUKEE, WIS., ORDINANCE § 200-42-2-b, Zellmer's appeal briefs seek to enfold other provisions of the federal Fair Housing Act. The essence of his contention is that, as expressed in his main brief on this appeal, enforcement of the Milwaukee zoning ordinance "bears no rational relationship to a permissible state objective." This argument and the statutes on which it purports to rest were not presented to the circuit court for its consideration, and, as noted, we will not consider matters asserted for the first time on appeal. *See* ***Poling***, 120 Wis. 2d at 610, 357 N.W.2d at 297–298.

D. *Do the ordinances under which Zellmer was convicted violate WIS. STAT. § 106.50(1)?*

¶8 WISCONSIN STAT. § 106.50(1) provides in full:

> It is the intent of this section to render unlawful discrimination in housing. It is the declared policy of this state that all persons shall have an equal opportunity for housing regardless of sex, race, color, sexual orientation, disability, religion, national origin, marital status, family status, lawful source of income, age or ancestry and it is the duty of the political subdivisions to assist in the orderly prevention or removal of all discrimination in housing through the powers granted under ss. 66.0125 and 66.1011. The legislature hereby extends the state law governing equal housing opportunities to cover single-family residences which are owner-occupied. The legislature finds that the sale and rental of single-family residences constitute a significant portion of the housing business in this state and should be regulated. This section shall be deemed an exercise of the police powers of the state for the protection of the welfare, health, peace, dignity and human rights of the people of this state.

Other than quote this section and some decisions that invoke general principles of statutory construction, Zellmer does not explain how or why the Milwaukee ordinances under consideration here violate § 106.50(1), and he does not point to any other provision of state law that he alleges makes unlawful what the City did here. Accordingly, we decline to address this "issue" further. *See* ***Vesely***, 128 Wis. 2d at 255 n.5, 381 N.W.2d at 598 n.5.

E. *42 U.S.C. § 1983.*

¶9 Finally, in a largely undeveloped argument, Zellmer contends that enforcement of the ordinances was an unlawful taking of his property in violation of due process because the property that is the subject of this appeal "is in a university neighborhood … and most of his tenants are students contributing to rent a multi-bedroom unit." Accordingly, Zellmer argues, the "ordinances[']s ban

on rental to no more than three unrelated people is the direct and proximate cause of defendant[']s loss of income."

¶10 As the City points out, whether Zellmer might have a *claim* against the City under 42 U.S.C. § 1983 is matter separate from the issue whether § 1983 may be interposed as a defense in a civil forfeiture action. Section 1983 provides in full:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

This provision gives a tort remedy for the deprivation of rights within its purview. ***City of Monterey v. Del Monte Dunes at Monterey, Ltd.***, 526 U.S. 687, 709 (1999); *see also* ***Albright v. Oliver***, 510 U.S. 266, 271 (1994) ("Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'") (quoted source omitted). We are not aware of any situation where § 1983's declaration that those who violate the rights of others "shall be liable to the party injured in an action at law" permit the statute's use as a defense to either a criminal prosecution or a civil-forfeiture action, and Zellmer has pointed us to none.

By the Court.—Order affirmed.

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