

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 30, 2010

A. John Voelker
Acting 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. 2009AP3004

Cir. Ct. No. 2009SC5939

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE BANK OF CROSS PLAINS,

PLAINTIFF-RESPONDENT,

V.

JULIA LATIMER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
JOHN W. MARKSON, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, J.¹ Julia Latimer appeals a judgment of eviction entered following a trial to the court. Latimer argues that the trial court

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2007-2008). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

erred when it (1) failed to conduct the proper evidentiary analysis and failed to explain its decision; (2) refused to allow Latimer to obtain a statement relevant to the proceedings; and (3) refused to set terms by which Latimer could receive a stay pending appeal. We reject these arguments and affirm.

¶2 In November 2008, Latimer signed a lease for a condominium unit owned by Jillplex, LLC. The lease required Latimer to pay \$1275 per month in rent and \$240 per month in utilities. Latimer had a personal relationship with the principal of Jillplex, Richard Burris. Latimer and Burris have two children together.

¶3 In February 2008, Burris met with State Bank of Cross Plains, the mortgage holder of Jillplex, to discuss Burris's failure to make payments on the Jillplex mortgage. Latimer's father also attended this meeting. Latimer's father wrote State Bank a check for approximately \$27,000 and noted on the check that this money was a "loan." Burris continued to default on Jillplex's payments to State Bank. State Bank initiated a foreclosure and appointed a receiver to collect rents from the Jillplex tenants in January 2009. The receiver hired Apex Property Management in February 2009.

¶4 In June 2009, Apex Property Management filed an eviction action against Latimer for failure to pay rent. At trial, Latimer did not dispute that she had not been making monthly rent payments. Instead, Latimer argued that she did not have to pay rent because she and Burris had agreed that the \$27,000 check from her father to State Bank would be considered pre-payment of her rent for approximately two years. Latimer moved into evidence a document signed by her and Burris explaining this agreement. Latimer's original lease with Jillplex contained no reference to this agreement. The court found the agreement to be

incredible, determined that Latimer owed approximately \$14,000 in rent, and granted the judgment of eviction.

¶5 On appeal, Latimer first argues that the trial court erroneously exercised its discretion because it failed to determine whether the agreement regarding the pre-payment of rent satisfied WIS. STAT. § 706.02(1),² which sets forth the requirements for a valid lease of a residential property. Latimer also argues that the circuit court failed to explain how it reached its decision granting the eviction action. We have reviewed the record and reject both of these arguments.

² WISCONSIN STAT. § 706.02(1) states in relevant part:

Transactions under s. 706.001(1) shall not be valid unless evidenced by a conveyance that satisfies all of the following:

(a) Identifies the parties; and

(b) Identifies the land; and

(c) Identifies the interest conveyed, and any material term, condition, reservation, exception or contingency upon which the interest is to arise, continue or be extinguished, limited or encumbered; and

(d) Is signed by or on behalf of each of the grantors; and

(e) Is signed by or on behalf of all parties, if a lease or contract to convey; and

(f) Is signed, or joined in by separate conveyance, by or on behalf of each spouse, if the conveyance alienates any interest of a married person in a homestead under s. 706.01(7) except conveyances between spouses, but on a purchase money mortgage pledging that property as security only the purchaser need sign the mortgage; and

(g) Is delivered....

¶6 The trial court based its decision on certain credibility determinations and factual findings, to which we defer on review. See *Fidelity & Deposit Co. v. First Nat'l Bank of Kenosha*, 98 Wis. 2d 474, 485, 297 N.W.2d 46 (Ct. App. 1980) (where the trial court is the finder of fact, the trial court is the ultimate arbiter of witness credibility); *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985) (appellate court will affirm trial court's findings of fact unless clearly erroneous). The trial court found that the document describing the \$27,000 check as pre-payment of rent was a "self-serving agreement" made by two people "who had a personal relationship involving kids in common." The court even went so far as to suggest that Latimer and Burris had drawn up the agreement for purposes of this litigation: "[T]hey have gone back and reconstructed this, relabeled it for their own purposes, and it simply isn't consistent with reality." In concluding that the \$27,000 was not pre-payment of rent, the court relied on the following evidence: the note by Latimer's father on the check indicating that the money was a "loan" to the bank for the Jillplex account; notes made contemporaneously by a State Bank employee signifying that the check was a loan to assist Jillplex; the lease requiring Latimer to pay \$1275 per month in rent and \$240 in shared utilities; and testimony from an Apex employee that Latimer owed approximately \$14,000.

¶7 Having found the purported pre-payment-of-rent agreement to be incredible, the trial court was not required to conduct a mechanical application of WIS. STAT. § 706.02(1) to determine if the agreement was valid. The court offered a lengthy explanation of its findings, and the evidence amply supports its determinations.

¶8 Latimer also argues that the trial court abused its discretion when it failed to grant requests for a recess to obtain an affidavit signed by Latimer's

father supporting Latimer's defense. We reject this argument. A trial court's discretion to admit or exclude evidence in eviction actions is broader than its discretion in normal trial proceedings. *See* WIS. STAT. § 799.209(2). Here, the court explained that it refused to admit the affidavit at trial because the affidavit would have repeated Latimer's arguments. Based on the record, we conclude that the court acted within its discretion by refusing to admit this affidavit. Regardless, the court eventually did consider the affidavit when evaluating the motion to reconsider and found the affidavit unpersuasive because Latimer's father signed it at the time of trial, well after he had issued the check to the bank as a "loan" for the Jillplex account.

¶9 Lastly, Latimer argues that the trial court erred when it failed to set forth any terms by which Latimer could receive a stay pending appeal. This argument misstates both the law and the facts. Latimer incorrectly asserts that WIS. STAT. § 799.445 requires the trial court to grant a stay of eviction when a tenant appeals. The statute guarantees the tenant the right to appeal the eviction; it does not require the court to grant a stay pending appeal, nor does it require the court to set terms for an undertaking that are ideal to the tenant. *See* WIS. STAT. § 799.445.³ Here, the record indicates that the court (1) offered to grant a stay if

³ WISCONSIN STAT. § 799.445 provides in relevant part:

An order for judgment for restitution of the premises under s. 799.44(1) or for denial of restitution is appealable as a matter of right under s. 808.03(1) within 15 days after the entry of the order for judgment for restitution or for denial of restitution.... No appeal by a defendant of an order for judgment for restitution of the premises may stay proceedings on the judgment unless the appellant serves and files with the notice of appeal an undertaking to the plaintiff, in an amount and with surety approved by the judge who ordered the entry of judgment.

Latimer could post an undertaking representing all of the unpaid rent in addition to the costs of appeal and rent that would accrue during appeal and (2) offered to grant a temporary stay so that Latimer could pursue a stay with this court if Latimer agreed to place \$500 in opposing counsel's trust fund. The court did set forth terms; Latimer simply objected to them. We therefore reject this argument.

By the Court.—Judgment affirmed.

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

