COURT OF APPEALS DECISION DATED AND FILED

November 1, 2011

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. 2011AP101 **Cir. Ct. No. 2010SC727**

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

PAUL J. SIMON,

PLAINTIFF-RESPONDENT,

V.

CLIFFORD O. BAKER AND KIMBERLY J. BAKER,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Lincoln County: JAY R. TLUSTY, Judge. *Affirmed.*

¶1 PETERSON, J.[1] Clifford and Kimberly Baker, pro se, appeal a small claims judgment in favor of Paul Simon. The Bakers assert the court erred by determining their lease was not modified by a subsequent oral agreement and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

by denying their compensation request for improvements made to the property. We affirm.

BACKGROUND

¶2 The Bakers signed a three-year lease for Simon's residential property. The term of the lease began on November 1, 2008, and rent was $600 per month with a $20 late fee. The lease provided, in relevant part, "Tenant shall not physically alter or redecorate the premises … unless Landlord has granted specific written approval." The lease also required any modification of the agreement to be in writing.

¶3 The Bakers failed to pay rent in February 2010. Simon brought a small claims action against them for $620. The Bakers responded that Simon orally promised them one month free rent to be taken "during the heating season," and they had elected to use their rent credit in February. The Bakers then demanded $4,107.64 for improvements made to the property during their tenancy.

¶4 At the small claims hearing, Simon testified that after the Bakers signed the lease he told them that "if [he] could afford it in the spring, [he] would give them [a] 4 to $500 credit toward[] their rent for the utilities because they didn't have any money." Simon explained that the Bakers did not request any credit in the spring of 2009. The Bakers did, however, apply to the North Central Community Action Program for weatherization of the house. North Central contacted Simon, and Simon paid North Central $755 to install a new furnace in the property.

¶5 In February 2010, Simon received a letter from the Bakers, which provided, in relevant part:

> We remember when we were signing the lease that it was said that in the spring you would give us a credit for $500-$600 to help offset the high cost of utilities[,] is that still the case? If so[,] we would be very grateful if it was.

(Some capitalization omitted.) Simon told the Bakers he was not going to give them a credit because he had already "spent $755 on weatherization of the house so it would be easier for them to heat." The Bakers refused to pay February rent.[2]

¶6 The Bakers testified that although "it wasn't written on the lease[,] it was agreed that … [Simon] would allow one month of free [rent] … because of the high utility costs." The Bakers explained that, even after North Central installed the new furnace, the utilities remained high and, in February 2010, they asked Simon if they could still have the rent credit.

¶7 The Bakers also testified that they have made numerous improvements to the property during their tenancy.[3] They explained that, because Simon was requesting the February rent, they wanted to be compensated for their improvements. These improvements were completed "without asking [Simon] for permission" and were completed "at [their] own expense."

¶8 The court determined any oral agreement for rent credit could not modify the written rental agreement and, in any event, there was no oral agreement. The court observed the rental agreement specifically provided, "This agreement may be … modified by written agreement of the Landlord and the Tenant." The court also noted that the written lease contained a special provision

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[2] The Bakers have made all subsequent rent payments.

[3] Specifically, the Bakers have insulated and rewired the garage, reinforced one of Simon's out buildings, and installed new countertops, cabinets, dishwasher plumbing, ice maker plumbing, lights, outlets, and plugs.

section that had memorialized a nonstandard provision between the parties. The court reasoned that had an oral agreement actually occurred during the signing of the lease it would have been included along with the other, nonstandard agreement in the written lease. Finally, the court referenced the Bakers' letter, which inquired whether it "[was] still the case" that they could have the rental credit and "if so" they would be grateful. The court reasoned that had an agreement existed, the Bakers would not have inquired about it. The court ordered the Bakers to pay February 2010 rent and the $20 late fee.

¶9 The court also denied the Bakers' counterclaim for improvements. Specifically, the court found the Bakers did not seek approval from Simon to alter the property and, consequently, the Bakers failed to introduce sufficient evidence supporting their demand for compensation.

DISCUSSION

¶10 The Bakers raise two arguments on appeal. They assert the court erred by determining there was no subsequent oral agreement modifying the written lease and by denying their request to be reimbursed for improvements.[4]

¶11 Fact finding is in the province of the circuit court. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979). When making a factual determination, a circuit court may choose between conflicting

[4] In the conclusion of their brief, the Bakers request that we "allow [them] to leave the property in the term of a month without any future charges as per the terms of the lease agreement." It is unclear what the Bakers are asking. If they are asking for legal advice, we cannot give legal advice. *See* ***Fowler v. Fowler***, 158 Wis. 2d 508, 519, 463 N.W.2d 370 (Ct. App. 1990) (court is not an advocate). If they are raising a legal issue on this appeal, it is undeveloped. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (We do not address undeveloped arguments.).

testimony and may draw reasonable inferences from the evidence. ***Id.*** We will not overturn a circuit court's factual determination unless it is clearly erroneous. WIS. STAT. § 805.17(2). "[A] finding of fact is clearly erroneous when it is against the great weight and clear preponderance of the evidence." ***State v. Arias***, 2008 WI 84, ¶12, 311 Wis. 2d 358, 752 N.W.2d 748 (citation omitted).

¶12 The Bakers first contend the court erred by determining there was no oral agreement. We disagree. Here, the circuit court, when making its determination that no enforceable oral agreement existed, relied on the parties' lease, which required any modification to be in writing. The court also determined an oral agreement did not exist after observing the absence of the alleged agreement in the special provision section of the written lease and the Bakers' subsequent letter to Simon asking if they could have a rent credit. The circuit court's factual determinations are supported by the evidence introduced at trial and are therefore not clearly erroneous. *See* WIS. STAT. § 805.17(2).

¶13 The Bakers next argue the court erred by determining they were not entitled to compensation. Specifically, the Bakers assert the improvements they made were actually repairs and that, pursuant to the lease, Simon is responsible for repairs. They also contend that because "Simon has not objected to or asked to have any of the repairs … undone" they should be compensated.

¶14 The Bakers, however, never asserted before the circuit court that the improvements were in fact repairs that Simon was contractually obligated to fix.[5] *See* ***State v. Huebner***, 2000 WI 59, ¶¶10-12, 235 Wis. 2d 486, 611 N.W.2d 727

[5] Rather, the Bakers asserted they made the improvements without permission and for their own benefit.

(We need not address arguments raised for the first time on appeal.). In any event, based on our review of the record, we agree with the circuit court's determination that the Bakers have failed to introduce sufficient evidence supporting their request for compensation. *See* WIS. STAT. § 805.17(2).

¶15 No costs will be awarded on appeal. *See* WIS. STAT. RULE 809.25.

By the Court.—Judgment affirmed.

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