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CLERK OF WISCONSIN
COURT OF APPEALS

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

KOBLE INVESTMENTS,

Plaintiff-Respondent,

v.

Case No. 2022AP000182

ELICIA MARQUARDT,

Marathon Co. Case No.: 20-SC-979

Defendant,

v.

JAMES MILLER,

Intervenor-Appellant.

**ON APPEAL FROM THE CIRCUIT COURT OF MARATHON COUNTY, CASE
NO. 2020-SC-979**

THE HONORABLE LAMONT K. JACOBSON, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

- (1) Did the trial court err when it found that Chapter 427 of the Wisconsin Consumer Act does not apply to residential leases?

Answer: No

- (2) Did the trial court err when it found that the lease used by Koble Investments, LLC was not void and unenforceable?

Answer: No

STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

Plaintiff-Respondent, Koble Investments, LLC, does not request oral argument in this case.

The questions of (1) whether Chapter 427 of the Wisconsin Consumer Act applies to residential leases and (2) what makes a lease void and unenforceable have not been thoroughly addressed by Wisconsin Courts enough and do meet the criteria for publication. There is not enough substantial existing precedent on these issue and publication of the Court's decision would add to existing law.

STATEMENT OF THE CASE

This is an appeal of a Decision on De Novo Review of Motions for Intervention and Attorneys Fees on March 26, 2021 wherein Judge LaMont K. Jacobson found that (1) Chapter 427 of the Wisconsin Consumer Act does not apply to residential leases and (2) the lease utilized by Koble Investments, LLC is not void and unenforceable.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

I. Procedural Background

Koble Investments, LLC (“Koble”) began this action on June 2, 2020 by filing a summons and complaint for eviction in Marathon County. (R: 2). The return date was scheduled for July 1, 2020. (R: 2). Koble attempted to dismiss this action at the return date on July 1, 2020. (R: 19-1).

However, on June 25, 2020, Elicia Marquardt (“Marquardt”) filed an answer and counterclaim for (1) a violation under Chapter 427 of the Wisconsin Consumer Act by Koble and (2) a determination that the lease utilized by Koble is void and unenforceable. (R: 9). Koble filed its answer to the counterclaim on July 15, 2020. (R: 13). The damages trial was scheduled for September 29, 2020. (R: 14).

On September 22, 2020, Attorney Miller filed a Motion to Intervene and a Contingent Motion to Withdraw as Counsel. (R: 17, 18). On September 24, 2020, Koble filed an Opposition to Motion for Attorney Fees. R: 19. During the trial on September 29, 2020, before the court commissioner, the Court determined that Attorney Miller was not entitled

to Attorney fees because (1) Koble did not violate Chapter 427 of the Wisconsin Consumer Act by Koble and (2) the lease utilized by Koble and Marquardt is not void and unenforceable. (R: 20-2).

On October 9, 2020, Marquardt filed a Demand for Trial De Novo. (R: 21). On January 8, 2021, Marquardt filed a Combined Brief in Support of Motions for Attorney Fees and to Intervene. (R: 27). On January 29, 2021, Koble filed a Memorandum in Opposition to Motion to Intervene. (R: 29). On March 26, 2021, Judge LaMont Jacobson issued a Decision on De Novo Review of Motions for Intervention and Attorney Fees. (R: 34). The decision stated again that (1) Koble did not violate Chapter 427 of the Wisconsin Consumer Act by Koble and (2) the lease utilized by Koble and Marquardt is not void and unenforceable. (R: 34).

As a result, Marquardt filed this appeal on February 3, 2022. (R: 48).

II. Statement of the Facts

Koble entered into a lease (the "Lease") for a term of 12 months with Marquardt on May 24, 2019. (R: 27-15, 16). The Lease was for the residence located at 29 Alexander Ave., Apartment 102, Rothschild, Wisconsin. (R: 27-

15, 16). The Lease required monthly rent payments in the amount of \$700.00. (R: 27-15, 16).

On May 15, 2020, Koble served Marquardt with a 5-day Notice for Failure to Pay Rent (the "Notice") in the amount of \$1,548.00. (R: 3). Koble filed this eviction action on June 2, 2020. (R: 2). Koble did not understand that it could not give the Notice during the eviction moratorium and it did not understand what its eviction rights were during the moratorium. (R: 29-1). It seemed clear that courts around the State of Wisconsin did not understand what a landlord's rights were and what a tenant's rights were during the moratorium. Koble voluntarily dismissed this eviction action on July 1, 2020. (R: 29-1).

The Lease is a residential lease and not a consumer lease. (R: 27-15, 16). Furthermore, lines 108 through 109 of the Lease state "Tenant shall use the Premises for residential purposes only. (R: 27-15, 16). Neither party may make or knowingly permit use of the premises for any unlawful purpose." (R: 27-15, 16). Lines 129 through 133 state that "Failure of either party to comply substantially with any material provision hereof is a breach of this

Agreement. Should Tenant neglect or fail to perform and observe any of the terms of this Lease, Landlord shall give Tenant written notice of such breach requiring Tenant to remedy the breach or vacate the Premises on or before a date at least 5 days after the giving of such notice, and if Tenant fails to comply with such notice, Landlord may declare this tenancy terminated and proceed to evict Tenant from the Premises without limiting the liability of Tenant for the rent due or become due under this Agreement.” (R: 27-15, 16).

Koble never tried to evict Marquardt for any reason other than her failure to pay rent. Furthermore, once Koble realized it could not evict Marquardt during the eviction moratorium, it was quick to dismiss the eviction action. (R: 29-1). This action has only continued at the request of Marquardt. (R: 29-1).

ARGUMENT

I. Applicable Statutes.

Wisconsin Statute §704.44 **Residential rental agreement that contains certain provision is void.**

A residential rental agreement is void and unenforceable if it does any of the

following: (1m) Allows a landlord to do any of the following because a tenant has contacted an entity for law enforcement services, health services, or safety services; (a) increase rent; (b) decrease services; (c) bring an action for possession of the premises; (d) refuse to renew a rental agreement; (e) threaten to take any action under pars. (a) to (d); (2m) authorizes the eviction or exclusion of a tenant from the premises, other than by judicial eviction procedures as provided under ch. 799; (3m) provides for an acceleration of rent payment in the event of tenant default or breach of obligations under the rental agreement, or otherwise waives the landlord's obligation to mitigate damages as provided in s. 704.29; (4m) requires payment by the tenant of attorney fees or costs incurred by the landlord in any legal action or dispute arising under the rental agreement. This subsection does not prevent a landlord or tenant from recovering costs or attorney fees under a court order under ch. 799 or 814; (5m) authorizes the landlord or an agent of the landlord to confess judgment against the tenant in any action arising under the rental agreement; (6) states that the landlord is not liable for property damage or personal injury caused by negligent acts or omissions of the landlord. This subsection does not affect ordinary maintenance obligations of a tenant under s. 704.07 or assumed by a tenant under a rental agreement or other written agreement between the landlord and the tenant; (7) imposes liability on a tenant for any of the following: (a) personal injury arising from causes clearly beyond the tenant's control, (b) property damage caused by natural disasters or by persons other than the tenant or the tenant's guests or invitees. This paragraph does not affect ordinary maintenance obligations of a tenant under s. 704.07 or assumed by a tenant under a rental agreement or other written agreement between the landlord and the tenant; (8) waives any statutory or other legal obligation on the part of the landlord to deliver the premises in a fit or habitable condition or to maintain the premises during the tenant's tenancy; (9) allows the landlord to terminate the tenancy of a tenant based solely on the commission of a crime in or on the rental property if the tenant, or someone who lawfully resides with the tenant, is the victim, as defined in s. 950.02(4), of that crime, (10) allows the landlord to terminate the tenancy of a tenant for a crime committed in relation to the rental property and the rental agreement does not include the notice required under s. 704.14.

Wisconsin Statute §427.104(1)(j) **Prohibited practices.**

(1) In attempting to collect an alleged debt arising from a consumer credit transaction or other consumer transaction, including a transaction primarily for an agricultural purpose, where there is an agreement to defer payment, a debt collector may not: (j) claim, or attempt or threaten to enforce a right with knowledge or reason to know that the right does not exist.

Wisconsin Statute §421.301(11) **General definitions.**

“Consumer Lease” means a lease of goods which a merchant makes to a customer for a term exceeding 4 months.

II. The Trial Court Properly Ruled that Koble Investments, LLC did not Violate Chapter 427 of the Wisconsin Consumer Act.

Wisconsin Statute §421.301(11) very clearly states “Consumer lease” means a lease of goods which a merchant makes to a customer for a term exceeding 4 months.” Furthermore, right below Wisconsin Statute §421.301(11) it clearly states “Cross-reference, See also s. DFI-WCA 1.05, Wis. Adm. code.” DFI-WCA 1.05 states “Acquisition of a leasehold interest in real property by a customer from a merchant is not a consumer lease within the meaning of s. 421.301(11), Stats. For laws governing the leasing of real estate see ch. 704, Stats.” Furthermore, a document provided by Attorney Miller to counsel for Koble clearly states “the FDCPA does not apply to a landlord collecting debt owned by that landlord.” (R: 31-1,3). Therefore, the Wisconsin Consumer Protection Act, Wisconsin Statutes §421 through §427, clearly does not apply to residential leases or this case for that matter.

Furthermore, in this action, court commissioner, Douglas Bauman, determined that the Wisconsin Consumer Act does not apply. (R: 20). More importantly, Judge LaMont Jacobson determined that Marquardt was not a customer, therefore, the Trial Court determined that the Wisconsin Consumer Act does not apply. (R: 34-3). The Trial Court stated “An administrative code provision makes clear that residential leases do not fall under the Act: Wis. Adm. Code §DFI-WCA 1.05 specifically states, ‘Acquisition of a leasehold interest in real property by a customer from a merchant is not a consumer lease within the meaning of s. 421.301(11). For laws governing the leasing of real estate see ch. 704, Stats.” (R: 34-3). The Court then stated “Because the defendant is not a customer under the Act, she does not qualify for attorney fees under Wis. Stat. §425.308(1). It is therefore unnecessary to consider whether the plaintiff violated any of the Act’s restrictions in debt collection.” (R: 34-3).

Even more troubling is the fact that Judge LaMont Jacobson is not the only judge in Marathon County to determine that Koble did not violate Chapter 427 of the Wisconsin Consumer Act. (R: 29-2, 3). In almost identical

cases, Judge Gregory Huber and Judge Gregory Strasser have both also determined that Koble did not violate Chapter 427 of the Wisconsin Consumer Act. (R: 29-2, 3). Marquardt is simply wasting this Court's time as well as Koble's time by drafting her appeal brief, which is simply a confusing eight-page meandering rant trying to connect dots to show the Court why Koble violated Chapter 427 of the Wisconsin Consumer Act. The issue Marquardt has is that the Wisconsin Consumer Act makes it as clear as possible that it does not apply to residential leases. Marquardt is the only person who cannot seem to realize that.

This case is simply a situation in which our society faced something it has never seen before, that being the COVID-19 pandemic. As a result, laws were being passed on the fly and people did not know or understand their rights or how they should react during the pandemic. Koble made a mistake by filing an eviction during the COVID-19 pandemic. Once Koble realized its transgression, it immediately dismissed the action. Marquardt was not harmed by Koble's actions. She was able to remain living at Koble's property without paying rent. Marquardt is simply trying to take

advantage of Koble's honest mistake when she herself does not have clean hands because she was more than two months behind in rent.

III. The Trial Court Properly Ruled that the Lease was not Void and Unenforceable.

Marquardt argues the Lease is void under Wisconsin Statute §704.44(9) and (10). In arriving at this conclusion, Marquardt first addresses lines 108 through 109 of the Lease which states "Tenant shall use the Premises for residential purposes only. Neither party may make or knowingly permit use of the premises for any unlawful purpose." Marquardt then addresses lines 129 through 133 which states "Failure of either party to comply substantially with any material provision hereof is a breach of this Agreement. Should Tenant neglect or fail to perform and observe any of the terms of this Lease, Landlord shall give Tenant written notice of such breach requiring Tenant to remedy the breach or vacate the Premises on or before a date at least 5 days after the giving of such notice, and if Tenant fails to comply with such notice, Landlord may declare this tenancy terminated and proceed to evict Tenant from the Premises without limiting the liability of Tenant for the rent due or become due under this

Agreement.” Marquardt uses these lines of the Lease to jump to the conclusion that the Lease gives Koble the authority to terminate the Lease based solely on the commission of a crime on the premises even if Marquardt is only the victim, which is a violation of Wisconsin Statute §704.44(9). Furthermore, Marquardt then jumps to the conclusion that the Lease gives Koble the authority to terminate the tenancy if a crime is committed in relation to the rental property in violation of Wisconsin Statute §704.44(10).

Marquardt’s assertions are wrong and illogical. The Lease does not give Koble the automatic authority to terminate the lease if a crime is committed on the premises. Wisconsin Statute §704.17(3m) specifically addresses criminal activity on a residential rental premises. Wisconsin Statute §704.17(3m)(b) provides that a landlord may automatically terminate a lease if there is criminal activity on the premises by giving the tenant a 5 day notice to vacate the premises without a right to cure. Wisconsin Statute §704.17(3m)(c) then provides that (b) does not apply to a tenant who is the victim. Wisconsin Statute §704.17(5)(b) then states that

any provisions in any lease or rental agreement for termination contrary to §704.17(3m) are invalid. The Lease is therefore clearly not invalid because the lease is not contrary to Wisconsin Statute §704.17(3m). The Lease gives Koble the right to give a 5-day notice to cure the unlawful activity if there is unlawful activity on the premises but it does not state that the Lease is automatically terminated if there is criminal activity on the premises. The Lease also does not state that the Lease is terminated even if the tenant is a victim of a crime. The Lease gives the tenant the opportunity to cure any breaches of the Lease.

Judge Lamont Jacobson's analysis was on point when he determined that the Lease was not void and unenforceable. Judge Jacobson stated:

The lease does not authorize eviction based on the commission of a crime. The closest that it comes to mentioning crime is this restriction on the use of the premises: 'Neither party may (1) make our [sic] knowingly permit use of the premises for any unlawful purpose, [or] (2) engage in activities which unduly disturb the neighbors.' That lease provision incorporates Wis. Stat. §704.05(3), which says, 'The tenant cannot use the premises for any unlawful purpose nor in such manner as to interfere unreasonably with use by another occupant of the same building or group of buildings.' Only a strained reading of the lease provision would allow for the possibility that a tenant who was a crime victim could be evicted for permitting a crime to occur; victims are victims because of things that happened against their will, and the lease provision is not violated if the tenant did not permit the criminal activity to occur.

(R: 34-4, 5).

Judge Jacobson then stated:

Because the lease does not permit crime victims to be evicted, the fact that it fails to include the specified exceptions for crime victims is irrelevant and the lease-voiding language of Wis. Stat. §704.44 is not triggered. And although the lease does not contain the notice of domestic abuse protections mandated by Wis. Stat. §704.14, the failure to include that notice only invalidates the lease if the lease 'allows the landlord to terminate the tenancy of a tenant for a crime committed in relation to the rental property,' Wis. Stat. §704.44(10), which this one does not. Thus, the lease is not void. And because the lease is enforceable, the defendant's argument that rental payments and fees imposed by the lease constitute pecuniary damages necessarily falls apart.

(R: 34-5).

Therefore, based on the clear reading of Wisconsin statutes, the Lease is not void and it is not unlawful. Furthermore, there is not an allegation by Marquardt that Koble did anything to terminate the Lease without first providing a notice to cure the default. Marquardt's request to get all of the money she paid for rent under the Lease would be an absurd result and would create a massive windfall that the Wisconsin statutes never intended.

CONCLUSION

For the reasons discussed herein, Koble respectfully requests that the Court of Appeals finds that (1) Koble did not violate Chapter 427 of the Wisconsin Consumer Act by Koble and (2) the lease utilized by Koble and Marquardt is not void and unenforceable.

Dated this 13th day of June, 2022.

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electronically signed by Brandon P. O'Connor

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2,767 words.

Dated this 13th day of June, 2022.

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