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Landord and Tenant Law: Retalitory Eviction as a Defense

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RECENT DECISIONS

Landlord and Tenant Law: Retaliatory Eviction as a Defense. In Wisconsin a month-to-month tenancy has long been terminable for any reason or no reason by either the landlord or the tenant.[1] The only legal requirement has been thirty days notice, in writing, prior to the effective date of termination.[2] Under this type of law, tenants have been subjected to retaliatory evictions soon after taking action against the landlord in an effort to improve their substandard housing conditions.[3]

In the case of *Dickhut v. Norton*,[4] a tenant who reported housing code violations to the proper authorities was subsequently given the required thirty days notice to quit the premises. When the tenant refused, the landlord brought an unlawful detainer action to evict him. The tenant's answer denied that he was holding the premises without right. As a defense, he alleged that the eviction was in retaliation for reporting housing code violations that existed on the landlord's premises.

After being denied relief in both the County and Circuit Courts of Milwaukee County, the tenant appealed to the Wisconsin Supreme Court. The Supreme Court reversed the Circuit Court judgment and recognized "retaliatory eviction" as a valid defense to unlawful detainer actions where a retaliatory motive is the "sole" reason for the eviction.[5] The decision was based on the legislative public policy expressed in Wisconsin's Urban Renewal Act[6] and the City of Milwaukee's housing ordinance.[7] The constitutional questions raised by the tenant were not decided by the court.[8]

The two primary contentions of the tenant were expressed as follows: (1) State court approval of such retaliatory evictions abridged his constitutional right to make complaints to the housing authorities; (2) The legislative public policy of Wisconsin would be frustrated if he were not permitted to assert the defense of "retaliatory eviction."[9] The opinion of the court gave the tenant's constitutional argument little consideration, although several authors have contended that such a constitutional argument has merit.[10] No doubt the constitutional argument

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[1] *See* WIS. STAT. § 234.03 (1967), and Dickhut v. Norton, 45 Wis. 2d 389, 400, 173 N.W.2d 397 (1970).
[2] WIS STAT. § 234.03 (1967).
[3] Schoshinksi, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L. J. 519, 541-542 (1966).
[4] Dickhut v. Norton, 45 Wis. 2d 389, 173 N.W.2d 297 (1970).
[5] *Id.* at 399, 173 N.W.2d at 302.
[6] WIS. STAT. § 66.435 (1967).
[7] Vol. 1 MILWAUKEE CODE OF ORDINANCES § 75 (19).
[8] 45 Wis. 2d at 395, 173 N.W.2d at 299 (1970).
[9] *Id.* at 397, 173 N.W.2d at 301.
[10] *See* Traver v. G. and C. Construction Corp., Civil No. 64-2945 (S.D. N.Y., Nov. 9, 1964), *discussed in* 36 GEO. WASH. L. REV. 190, 192 n. 19 (1967); Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969); Potvin, *Landlord-Tenant—Eviction in Retaliation for Reporting Housing Code Violations Prohibited*, 44 NOTRE DAME L. REV. 286 (1968); and

would be important in jurisdictions which have not expressed a clear legislative policy in the area of urban planning and renewal. For this reason a discussion of the constitutional arguments is in order.

As expressed in the District of Columbia case of *Edwards v. Habib*,[11] the constitutional bases for barring retaliatory evictions stem from the theory that state court sanction of such evictions abridges a tenant's First Amendment right to petition the government for a redress of grievances.[12] However, before a tenant can prevail on this theory he must show that the government, including the judiciary, is in some sense responsible for inhibiting the right to petition for the redress of grievances. In other words, the tenant must establish the requisite "state action."

In the *Edwards* case Judge Wright premised his discussion of the above constitutional argument on three United States Supreme Court decisions which considered the concept of state judicial action.[13] One of them, *Shelley v. Kraemer*, held that judicial enforcement of a private agreement containing racially restrictive covenants constituted "state action." Hence, Judge Wright said:

> There can now be no doubt that the application by the judiciary of the state's common law, even in a lawsuit between private parties, may constitute state action which must conform to the constitutional strictures which constrain the government.[14]

Judge Wright seemed to have no doubt that the eviction in *Edwards* could not be sustained were he to decide the constitutional issue, because the government had, through its court, aided the landlord and failed to protect the tenant from recrimination for exercising her First Amendment right to petition the government for a redress of grievances.[15]

Case Note, Landlord-Tenant—Eviction of Tenant Disallowed When In Retaliation for Tenant's Report of Housing Code Violations to Authorities, 1 Univ. of Toledo L. Rev. 269 (1969).

[11] 397 F.2d 687 (D.C. Cir. 1968), *cert. denied* 393 U.S. 1016 (1969).

[12] U.S. CONST. amend. I has been construed to include the right to report violations of law. *In re* Quarles and Butler, 158 U.S. 532, 537 (1895); United States v. Cruikshank, 92 U.S. 542 (1876).

[13] The cases relied on were: Shelley v. Kraemer, 334 U.S. 1 (1948); New York Times Company v. Sullivan, 376 U.S. 254 (1964); and Marsh v. Alabama, 326 U.S. 501 (1946).

[14] 397 F.2d at 691. It has been established that a deprivation of Constitutional rights, arising from specific amendments to the Constitution, is not confined to direct action on the part of the state but extends to the "pretense" of action under the authority of the state so that the action is "clothed" by the state's authority. Screws v. United States, 140 F.2d 662, 665 (5th Cir. 1944), *reversed on other grounds*, 325 U.S. 91 (1945); Monroe v. Pape, 365 U.S. 167 (1961). While the Supreme Court of the United States "has never attempted the 'impossible task' of formulating an infallible test for determining whether the state 'in any of its manifestations' has become signicantly involved in private discriminations, '(o)nly by sifting facts and weighing circumstances' on a case-by-case basis can a 'non-obvious involvement of the state . . . be attributed its true significance.'" Reitman v. Mulkey, 387 U.S. 376, 378 (1967).

[15] 397 F.2d at 695.

As stated above, the Wisconsin Supreme Court did not decide the constitutional questions raised in *Dickhut v. Norton.*[16] The court found that the legislative public policy of Wisconsin permits the defense of "retaliatory eviction" to be raised in unlawful detainer actions. The legislative public policy mentioned by the court is derived from the urban renewal acts of the state legislature and the Milwaukee Common Council. The acts clearly recognize that blighted, substandard and unsanitary housing conditions do exist and are detrimental to the public interest. The acts contemplate the enactment of housing regulations by municipalities to impose certain duties on property owners concerning the maintenance of their premises. In its housing code, the City of Milwaukee declared that:

> the elimination of blighted premises and the prevention of occurrence of blighted premises in the future is in the best interest of the citizens of this city, of the State of Wisconsin, and of the entire United States; . . . (T)he enactment of this ordinance is hereby declared to be essential to the public interest and it is intended that this ordinance be liberally construed.[17]

The Supreme Court took cognizance of the legislative policy in the area of urban renewal and held that housing code violations were intended to be reported by tenant's who were aware of the violations.[18] Upon this premise the court concluded that retaliatory eviction of tenants who reported code violations was contrary to the expressed legislative intent. In an effort to remedy this situation, the court stated:

[16] This is in accord with established judicial decision-making which encourages non-constitutional decisions whenever possible. However, the Wisconsin Supreme Court expressed some reservations as to whether the facts and factors of the Dickhut action brought it within the constitutional concepts proposed by the defendant. For arguments to the contrary see materials cited at note 10 *supra.*

[17] 1 MILWAUKEE CODE OF ORDINANCES § 75-(19).

[18] In support of its recognition of the legislative policy in the area of urban blight and housing code regulations the court cites language from two cases. The court noted that in Pines v. Perssion, 14 Wis. 2d 590, 595-596, 111 N.W.2d 409 (1961), it had taken cognizance of this policy prior to the Dickhut case when it stated:

> To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliche, caveat emptor. Permitting landlords to rent "tumble down" houses is at least a contributing cause of such problems as urban blight, juvenile delinquency, and high property taxes for conscientious landowners.

The court noted the following language of the *Edwards* decision, *supra* note 11, at 701-702:

> In light of the appalling condition and shortage of housing in Washington, the expense of moving, the inequality of bargaining power between tenant and landlord, and the social and economic importance of assuming at least minimum standards in housing conditions, we do not hesitate to declare that retaliatory eviction cannot be tolerated. There can be no doubt that the slum dweller, even though his home be marred by housing code violations, will pause long before he complains of them if he fears eviction as a consequence.

> A landlord may terminate a tenancy at will or from month-to-month (or lesser periods) for any legitimate reason or no reason at all, but he cannot terminate such tenancy simply because his tenant has reported an actual housing code violate as a means of retaliation.[19]

Creation of the "retaliatory eviction" defense may effectively prevent such evictions from occurring in Wisconsin. Under *Dickhut v. Norton* a tenant can avoid a summary eviction if he can convince the trier of fact that a condition existed on the premises which in fact violated the housing code; that the landlord knew the tenant reported the condition to the authorities; and the landlord evicted the tenant with the "sole" motive of retaliation. The tenant should be able to prove the first element by introducing housing authority records which confirm the violation. The second element can be proven by the housing authority records showing that the landlord was notified of the violations. If such notification by the authority to the landlord does not name the complainant then the tenant may be able to raise an inference of knowledge on the landlord's part by introducing facts surrounding the housing authority's investigation. For example, if the investigation took place immediately prior to receipt of an eviction notice, the inference of knowledge may be difficult for the landlord to overcome. Similarly, the third element involving the "sole" motive may also be satisfied by demonstrating the proximity in time between the tenant's report of the violations and the receipt of an eviction notice. The tenant would necessarily have to show that he had duly performed his obligations as a tenant and that there was no other reason for which a landlord, in the ordinary course of his business, would evict him.

The *Dickhut* decision, by providing a judicial answer to the problem of retaliatory eviction, has raised some interesting questions concerning the effect of this defense on landlord-tenant law in Wisconsin. For example, if a tenant establishes and thereby successfully defends an unlawful detainer action, for how long may the tenant remain in possession before the landlord has a right to terminate the tenancy for any reason or no reason as the statute provides? In other words, how long does the defense of "retaliatory eviction" protect the tenant from being evicted? Although a landlord may evict for no reason at all he may not be able to overcome the previous finding of illegal motive, unless he can show a legitimate affirmative reason for the subsequent eviction.[20] What would be a legitimate affirmative reason under Wisconsin law? Perhaps, evidence of a tenant's willfull or negligent conduct would be sufficient to show a legitimate reason for the eviction. Eviction of a tenant who harasses the landlord with numerous unreasonable demands

[19] 45 Wis. 2d at 399, 173 N.W.2d at 301-302 (1970).
[20] Edwards v. Habib, *supra* note 11, at 702, footnote 53.

may also be legitimate. Certainly a breach of the lease obligations by the tenant would provide adequate reason for eviction. In any event, the *Dickhut* decision appears to restrict the right of a landlord to terminate a tenancy at will or from month-to-month for no reason at all. One can infer from the *Dickhut* decision that once a sole motive of retaliation has been judicially determined, a subsequent eviction by the landlord must be for a legitimate reason. It seems logical to require landlords to prove legitimate motive for eviction in unlawful detainer actions when the defendant has successfully raised the defence of "retaliatory eviction" in a prior action.[21] Such a requirement would be consistent with the policy of discouraging landlords from intimidating tenants who report housing code violations.

A final question concerns other action by the landlord. For example, will the judiciary recognize retaliatory rent increases as a valid defense to an unlawful detainer action brought for failure to pay the increased rent? Clearly, rent increases are another means by which a landlord could intimidate tenants who try to better their housing conditions by reporting violations as such, they should be declared inconsistent with the policy of housing codes.[22] Consistent with this reasoning, a landlord desiring to raise a tenant's rent, under circumstances where a retaliatory motive could be presumed, may have to produce records to prove that the increase was an economic necessity and not a means of retaliation against the tenant.[23]

The "retaliatory eviction" defense will not remedy all of Wisconsin's housing problems, but the Wisconsin Supreme Court is to be applauded for its decision for several reasons. First, Wisconsin has now affirmed its position, initially taken in *Pines v. Perssion*,[24] among a progressive minority of states which no longer are satisfied with anachronistic, landlord oriented landlord-tenant laws.[25] Secondly, while

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[21] *Id.;* Dickhut v. Norton, *supra* 4, at 399-400.

[22] When considering what additional actions or defenses tenants may be allowed due to the policy recognized in *Pines* and *Dickhut,* a subsequent decision affecting Wisconsin's landlord-tenant law must be mentioned. The Wisconsin Supreme Court in Posanski v. Hood, 46 Wis. 2d 172, 174 N.W.2d 528 (1970), unanimously rejected a tenants contention that he had a right to withhold rent because the landlord had violated the "covenants" contained in the Milwaukee Housing Code. The court declared that the Milwaukee Housing Code does not constitute an implied covenant to lease agreements, because the public policy set forth in the housing code is clearly to be implemented through administrative actions and not through the judiciary. The court made it clear that a tenant's only remedy is through the housing authority with judicial protection against landlord's retaliatory actions.

[23] *See* Traver v. G. and C. Construction Corp., *supra* note 10, *discussed in* Potvin, *Landlord-Tenant—Eviction in Retaliation for Reporting Housing Code Violations Prohibited,* 44 NOTRE DAME L. REV. 286, 293. note 49, (1968).

[24] 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

[25] For survey discussion of just how lessor oriented American landlord-tenant is see generally MacBain, *Tenants Rights,* LEGAL COUNSELING FOR THE INDIGENT § 5 (1968); Shoshinski, *Remedies of the Indigent Tenant; Proposal for Change,* 54 GEO. L. J. 519 (1966).

legislative action may be necessary for equitable solutions to the numerous problems confronting landlords and tenants, the *Dickhut* decision properly places the burden of awaiting legislative change upon the landlord who violates the housing code, rather than upon the tenant who wants to report such violations. Finally, the *Dickhut* decision gives tenants a needed psychological victory. Ultimately, any rehabilitation of slum areas is inextricably tied up with the attitudes of the slum dwellers. If the indigent tenants do not believe that their efforts at self-improvement will meet with some success then most legislative remedial action will be in vain.

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