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Landlord and Tenant - Retaliatory Evictions. Dickhut v. Norton, 45 Wisc. 2d 389, 173 N.W.2d 297 (1970)

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into evidence does not foreclose inquiry into the procedure and accuracy of the chemical analysis.[25] The *Robertson* ruling appears to be based on the court's trust in the reliability of the state laboratory system, and its knowledge that the defendant, if he so desires, may require the chemist to appear as a witness.

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Landlord and Tenant—RETALIATORY EVICTIONS. *Dickhut v. Norton*, 45 Wis. 2d 389, 173 N.W.2d 297 (1970).

Elmer Dickhut, a landlord, brought an unlawful detainer action pursuant to a Wisconsin statute,[1] seeking a writ of restitution for the premises against Clifford Norton, a month-to-month tenant. The defendant admitted that a timely thirty day eviction notice had been served,[2] and that he had failed to quit the premises on or before the eviction day.[3] Prior to the eviction notice, the tenant had filed a complaint with the Milwaukee City Health Department reporting the unsanitary conditions of the premises.[4] He denied that he was holding over without right,

25. Kay v. United States, 255 F.2d 476, 481 (4th Cir. 1958).

1. Under the law of Wisconsin, applicable proceedings to remove a tenant holding over without right are governed by WIS. STAT. ANN. § 291.01(1) (1958). Commencement of the action, supplementary proceedings, and pleadings are codified in WIS. STAT. ANN. §§ 291.05, 291.07 (1958). The plaintiff-respondent fully complied with the requisite statutory proceedings.

2. WIS. STAT. ANN. § 234.03 (1958) embodies the notice requirement in terminating tenancies. It provides in pertinent part as follows:

> Whenever there is a tendancy at will or by sufferance, created in any manner, the same may be terminated by giving at least 30 days' notice in writing to the tenant requiring him to remove from the demised premises, or by the tenant's giving at least 30 days' notice in writing that he shall remove from said premises, and by surrendering to the landlord the possession thereof within the time limited in such notice. . . .

Under a month-to-month tenancy, the notice of thirty days by the landlord must terminate at the end of the rent month and not before. Hartnip v. Fields, 247 Wis. 473, 19 N.W.2d 878, 879 (1945). In *Dickhut*, the plaintiff-landlord gave the written statutory notice on May 27, 1968. The notice required the tenant to quit the premises on or before June 30, 1968. Consequently, the notice given was timely, pursuant to the applicable statute.

3. Dickhut v. Norton, 173 N.W.2d 297, 298 (1970).

4. *Id.* The tenant's allegation that the conditions of the premises were in fact unsanitary was corroborated at the trial by an inspector of the Milwaukee Health Department.

and stated as a defense that the eviction was retaliatory.[5] Both the county and the circuit courts held the defense inapplicable.[6]

In holding that the defense of retaliatory eviction could be raised under these circumstances, the Supreme Court of Wisconsin found it unnecessary to pass on the merits of the tenant's constitutional arguments,[7] but rested its decision on the "legislative public policy" of the state.[8] The legislative intent that housing code violations should be reported, the court reasoned, would be frustrated if a tenancy could be terminated as a means of retaliation.[9] Cognizant of the effect of its decision on the legal status of landlord-tenant relations,[10] however, the court qualified its decision by establishing a three-fold criterion for successful

5. The plaintiff-landlord received notice of the tenant's complaint to the Milwaukee Health Department on May 25, 1968. Upon hearing of the complaint, plaintiff immediately orally informed the tenant that the tenancy would be terminated. The required statutory notice came two days later. Thus, within a period of seven days from the filing of his complaint, the tenant received written eviction notice. *Id.*

6. The defense of a retaliatory eviction was found to be immaterial and plaintiff's motion that the answer be stricken was granted. *Id.*

7. The defendant contended that he had a federally guaranteed right to complain to the Division of Housing and Sanitation, and argued that the landlord's retaliation violated his First and Fourteenth Amendment rights. *Id.* at 299.

Constitutional challenges to retaliatory evictions have been based on two theories. The first is that by permitting retaliatory evictions, the tenant's constitutionally protected right of free speech would be abridged. Edwards v. Habib, 397 F.2d 687, 690-91 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969). But under this theory it is necessary that state action be established. Shelly v. Kraemer, 334 U.S. 1 (1948). The second theory states that the right of a tenant to report violations of law may be abridged by private conduct as well as state action. Edwards v. Habib, 397 F.2d 687, 697 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969). This argument is based on *In re* Quarles and Butler, 158 U.S. 532 (1895). For detailed discussions of the constitutional arguments involved, see 48 NEB. L. REV. 1101, 1114-1118 (1969); 44 NOTRE DAME LAWYER 286, 286-289 (1968); 13 ST. LOUIS U. L. J. 323, 325-27 (1968).

8. While we express our reservations as to whether the facts and factors of this action bring it within the concept proposed by the defendant, we find it unnecessary to reach the constitutional question because of our opinion that the *legislative public policy of this state permits the defense to be raised.*

173 N.W.2d at 299 (emphasis added).

9. The court emphasized that violations of housing and sanitation ordinances are against the public interest, and that the legislative intent was to alleviate these conditions. *Id.* The Wisconsin Urban Renewal Act embodies a similar legislative policy in regard to unsanitary housing conditions. WIS. STAT. ANN. § 66.435(2) (1958).

10. The court recognized the principle that a landlord can terminate a tenancy for any legitimate reason, or for no reason at all. However, a landlord cannot terminate a tenancy as a means of retaliation. 173 N.W.2d at 302. *See* Edwards v. Habib, 397 F.2d 687, 702 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969) wherein the court discusses the position of the landlord in a retaliatory eviction context.

assertion of the defense. The court ruled that the tenant "must prove by evidence that is clear and convincing that a condition existed which in fact did violate the housing code, that the plaintiff-landlord knew the tenant reported the condition to the enforcement authorities, and that the landlord, for the sole purpose of retaliation, sought to terminate the tenancy." [11]

Traditionally, courts, with few exceptions,[12] have sustained evictions regardless of the landlord's reason for terminating the tenancy.[13] Since 1968 and the case of *Edwards v. Habib*,[14] however, courts have exhibited a willingness to depart from this traditional approach.[15] *Edwards* provided the judicial answer to the question of a retaliatory eviction defense by relying on rules of statutory construction and public policy in holding that the defense could be properly raised.[16] The court found, in reconciling the conflicting purposes of the District of Columbia housing code and summary eviction statute, that the latter could not be read as allowing retaliatory evictions in order to give effect to the former.[17]

While the judicial response since *Edwards* has not been overwhelming it has hastened the end of long-standing legislative neglect. At present, nine states have enacted legislation limiting the landlord's right of evic-

11. 173 N.W.2d at 302.

12. *See* 13 ST. LOUIS U. L. J. 323, 324 (1968), in which three exceptions to the traditional approach are listed. Rudder v. United States, 226 F.2d 51, 53 (D.C. Cir. 1955) (where the governing body was a landlord); Block v. Hirsch, 256 U.S. 135 (1921), and Calvin v. Martin, 64 Ohio L. Abs. 265, 268, 111 N.E.2d 786, 788 (Ohio App. 1952) (where emergency rent control measures were in effect); United States v. Bruce, 353 F.2d 474 (5th Cir. 1965), and United States v. Beaty, 288 F.2d 653 (6th Cir. 1961) (where eviction was motivated by tenant's registration to vote).

13. Snitman v. Goodman, 118 A.2d 394 (D.C. Mun. Ct. App. 1955); Fowel v. Continental Life Ins. Co., 55 A.2d 205, 207 (D.C. Mun. Ct. App. 1947); Warthen v. Lamas, 43 A.2d 759, 761 (D.C. Mun. Ct. App. 1945); Wormwood v. Alton Bay Camp Meeting Ass'n, 87 N.H. 136, 175 A. 233 (1934).

14. Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

15. *See, e.g.*, Portnoy v. Hill, 57 Misc. 2d 1097, 294 N.Y.S.2d 278 (Binghamton City Ct. 1968), wherein the court, relying on the *Edwards* rationale, allowed the defense of retaliatory eviction to be raised. *See also* 29 MD. L. REV. 214, 218-20 (1969), which discusses two cases subsequent to *Habib* in the Baltimore courts, in which the defense of retaliatory eviction was raised.

16. 397 F.2d at 700. In order to implement and enforce the housing and sanitation codes, private initiative in reporting violations is a necessity. "To permit retaliatory evictions, then, would clearly frustrate the effectiveness of the housing code as a means of upgrading the quality of housing in Washington." *Id.* at 700-01.

17. Similarly, to give literal effect to the plain language of the Wisconsin summary eviction statute would be to defeat the purpose and intent of that state's housing and sanitation code. 173 N.W.2d at 301.

tion in cases where a tenant has filed a complaint against him.[18] Furthermore, the American Bar Foundation has proposed a Model Residential Landlord-Tenant Code with specific provisions relating to retaliatory evictions.[19] The Model Code could serve as a suitable standard for legislative reform, since it implicitly recognizes the mutually dependent policies of effective enforcement of housing and sanitation codes, and respect for the rights of both landlord and tenant.[20]

The rationale of the court in *Dickhut* in allowing the retaliatory eviction defense to be successfully asserted recognizes that a summary eviction statute cannot be literally enforced at the expense of the effective operation of housing and sanitation codes.[21] Contemporary concerns over substandard housing and unsanitary conditions tend to reinforce this position.[22] In light of the three criteria of *Dickhut*, however, the effect of the decision appears to be limited.[23] Where landlords proceed in blatant disregard of the tenant's right to report housing code violations, courts can permit the defense of retaliatory eviction to be raised. However, where landlords act within their statutory authority, and not to the frustration of legislative public policy, their traditional right to evict, even for no reason at all, will not be abridged.

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18. *See* CONN. GEN. STAT. ANN. § 52-546 (Supp. 1970-71); ILL. ANN. STAT. ch. 80, § 71 (Smith-Hurd 1966) which provides that retaliatory eviction is against public policy; MASS. GEN. LAWS ANN. ch. 239, §§ 9-13 and ch. 111, § 127F (Supp. 1970); MICH. COMP. LAWS ANN. § 600.5646(4), (5) (Supp. 1970); N.Y. SOC. WELFARE LAW § 143b(5), (6) (McKinney 1966) which applies only to tenants who are welfare recipients; PA. STAT. tit. 35, § 1700-1 (Supp. 1970). For recent legislation see ch. 223, [1969] Md. Laws 682; ch. 215, [1967] N. J. Laws; ch. 55, [1968] R. I. Laws.

19. AMERICAN BAR FOUNDATION, MODEL RESIDENTIAL LANDLORD-TENANT CODE (Tent. Draft 1969). For an excellent discussion of the nature and merits of the retaliatory eviction provisions of the Code see Note, *Retaliatory Evictions: A Study Of Existing Law And Proposed Model Code*, 11 WM. & MARY L. REV. 537, 546-49 (1969).

20. *See* Note, *supra* note 19, at 548, wherein the author lists several reasons why the Model Code is superior to statutes in force.

21. 173 N.W.2d at 301. *See* Edwards v. Habib, 397 F.2d 687, 700-01 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

22. *See, e.g.*, The Wisconsin Urban Renewal Act, WIS. STAT. ANN. § 66.435(2) (1965). "There can be no doubt that the legislature and the common council of the city of Milwaukee have both recognized that blighted, substandard and insanitary housing conditions do exist and that they are detrimental to the public interest." 173 N.W.2d at 299.

23. Although the defense of retaliatory eviction can be raised where the eviction is a direct result of the tenant's report of a housing or sanitary violation, the tenant must prove the three criteria by "clear and convincing" evidence in order to prevail. 173 N.W.2d at 302.