COURT OF APPEALS
DECISION
DATED AND RELEASED

February 13, 1997

NOTICE

No. 96-1327

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

KAREN L. OLSON, Personal Representative,
Estate of Gertrude M. Mikalson,

Plaintiff-Cross Appellant,

v.

WILLIAM MIKALSON,

Defendant-Cross Respondent.

APPEAL from a judgment of the circuit court for Jefferson County: JOHN M. ULLSVIK, Judge. *Affirmed*.

ROGGENSACK, J. Karen L. Olson, personal representative of the estate of Gertrude M. Mikalson, appeals a judgment denying the estate's claim for rent from William Mikalson, the son of the deceased, for the period of time when he occupied his mother's house after her death. Olson also claims the trial court erred by not granting the estate statutory double damages after evicting Mikalson. However, because this court concludes that no rent was due to the

estate under an implied lease and that the trial court properly determined the estate failed to prove its claim for statutory double damages, we affirm.[1]

BACKGROUND

Mikalson lived in a house owned by his mother, with her permission and without paying rent, for several years prior to her death. After Gertrude's death, her estate advised Mikalson that if he did not begin paying $800 per month rent as of January 1, 1996, he would be evicted. Mikalson refused to pay rent, but continued to occupy the property after receiving notice to quit, until the Jefferson County Circuit Court issued an eviction order.[2]

The estate sued to collect rent at the rate of $800 per month from January 1, 1996 through the time of the trial, on an implied lease theory. It also claimed it was due statutory double damages for each day Mikalson remained in the house after receiving notice to quit. The trial court found there had been no meeting of the minds, either as to forming a landlord-tenant relationship or as to the amount of rent due, and that the estate failed to prove that $800 per month was the reasonable rental value of the property. Therefore, it dismissed the estate's claims. The estate appeals.

DISCUSSION

Standard of Review.

Factual findings of the trial court will be upheld unless clearly erroneous. Section 805.17(2), STATS. However, whether the established facts show the existence of an implied lease is a conclusion of law, which we review *de novo*. *See* ***First Nat'l Leasing Corp. v. City of Madison***, 81 Wis.2d 205, 208,

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[1] This appeal is decided by one judge pursuant to § 752.31(2)(a), STATS.

[2] Mikalson had opposed the eviction action on the grounds that he was a squatter or adverse possessor, and originally appealed that portion of the judgment. However, that issue is not before this court because Mikalson voluntarily dismissed his appeal.

260 N.W.2d 251, 253 (1977). Similarly, whether the plaintiff has carried its burden of proving damages to a reasonable degree of certainty is a question of law. However, that conclusion is subject to the trial court's determination of the credibility of witnesses. ***Thorp Sales Corp. v. Gyuro Grading Co.***, 107 Wis.2d 141, 153, 319 N.W.2d 879, 884-85 (Ct. App. 1982).

Implied Lease.

A contract may be implied from the conduct of the parties. *See* ***Theuerkauf v. Sutton***, 102 Wis.2d 176, 185, 306 N.W.2d 651, 658 (1981). The estate relies on this basic tenant, and a line of cases in which holdover tenants were found to have agreed to higher rent by continuing to occupy the premises after notification of a rate increase, for its claim that Mikalson's failure to respond to the estate's demand for rent constituted an implied agreement to pay the amount requested. *See* ***Williams v. Foss-Armstrong Hardware Co.***, 135 Wis. 280, 284, 115 N.W. 803, 804 (1908); ***Pabst Brewing Co. v. Milwaukee Lithographing Co.***, 156 Wis. 615, 618, 146 N.W. 879, 881 (1914). However, the supreme court has held that the mere fact of occupancy does not always give rise to an inference of intention to form a lessor-lessee relationship. ***Town of Menominee v. Skubitz***, 53 Wis.2d 430, 436, 192 N.W.2d 887, 889 (1972). Rather, in order to find an implied lease, "there must be a showing of circumstances which permits the inference that the parties did intend to assume that relationship." ***M & I First Nat'l Bank v. Episcopal Homes Management, Inc.***, 195 Wis.2d 485, 500, 536 N.W.2d 175, 183 (Ct. App. 1995).

The trial court's finding that there was no meeting of the minds to pay $800 in rent is not clearly erroneous. Unlike ***Williams*** and ***Pabst***, which dealt with modifications of existing leases, this case involved no prior agreement to pay rent. Thus, there was no existing agreement by the tenant from which to infer Mikalson's intention as a matter of law. Mikalson's failure to respond to the estate's request for rent cannot be interpreted as agreeing to the estate's proposal in light of his belief, even if erroneous, that he was entitled to occupy the premises rent free as an adverse possessor. Therefore, we conclude, that based on the trial court's findings, there was no agreement to pay rent.

Damages.

A landlord may recover damages caused by the failure to vacate premises after service of a notice to quit. Section 704.27, STATS., provides:

> In absence of proof of greater damages, the landlord may recover as minimum damages twice the rental value apportioned on a daily basis for the time the tenant remains in possession. As used in this section, rental value means the amount for which the premises might reasonably have been rented, but not less than the amount actually paid or payable by the tenant for the prior rental period, and includes the money equivalent of any obligations undertaken by the tenant as part of the rental agreement, such as payment of taxes, insurance and repairs.

While this statute entitles a landlord to twice the damages proved, it does not relieve the landlord of the burden of proving the reasonable rental value of the property. *See* ***Thorp Sales Corp.***, 107 Wis.2d at 152-53, 319 N.W.2d at 884.

In this case, the estate simply presented evidence that it had requested $800 per month rent from Mikalson. However, there was no evidence that anyone would have agreed to pay such a sum, nor any other evidence to support a finding that $800 per month was the reasonable rental value of the house. Indeed, the court found:

> The evidence is that this is a 1400 square foot house with water damage, a very ugly yard, and in utter disrepair. It might not be worth 350.

In the absence of the evidence required by the statute, the court's conclusion that the plaintiff failed to prove damages was correct.

CONCLUSION

Mikalson's continued occupancy of the house owned by his mother, where he had been living rent free, did not constitute an implied agreement to pay rent after her death. Additionally, the trial court's finding that the parties failed to reach a meeting of the minds that Mikalson would pay rent after December 31 is not clearly erroneous. And finally, the trial court properly denied statutory damages because the estate failed to prove the reasonable rental value of the property.

By the Court.—Judgment affirmed.

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