COURT OF APPEALS
DECISION
DATED AND FILED

March 23, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1031 **Cir. Ct. No. 2004SC370**

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

MARK LATTIMORE,

PLAINTIFF-APPELLANT,

V.

CALDON RUSHING AND RICHARD KRATSCH,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Waushara County: LEWIS MURACH, Judge. *Affirmed.*

¶1 DEININGER, J.[1] Mark Lattimore appeals a judgment entered against him in favor of his former landlord, Richard Kratsch. He also appeals an order denying reconsideration. He claims the circuit court erred in not ordering

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Kratsch to pay him double damages, costs, and reasonable attorneys fees for violating an administrative rule governing a landlord's retention of a tenant's security deposit. Lattimore also contends the circuit court should have awarded him damages against Kratsch for allowing Lattimore's former girlfriend to retain certain of his belongings and for allegedly denying Lattimore's agents access to all of Lattimore's belongings. We conclude none of Lattimore's claims have merit. Accordingly, we affirm the appealed judgment.

BACKGROUND

¶2 Lattimore commenced this small claims action on his own behalf, naming as defendants his former landlord, Kratsch, and his former girlfriend, Caldon Rushing. He sought money damages of $4527, based on the following allegations:

> I rented an apartment from Richard. I was incarcerated, I paid rent while incarcerated because girlfriend lived at apartment. Girlfriend did not support me in time of need. I terminated tenancy. I gave girlfriend opportunity to have apartment put in her name. I had my agent go to apartment to get my property. My agent was denied access to apartment. My deposit was not returned.

¶3 Both Kratsch and Rushing were served with the summons and complaint, but only Kratsch responded. In his amended answer Kratsch denied that he owed Lattimore any money, and asserted that when Lattimore "left he owed unpaid rent of $218.33." Kratsch further asserted in his written answer that he had received a notice from Lattimore terminating Lattimore's tenancy, and that he permitted Rushing to rent the room after Lattimore's incarceration. Kratsch also stated that Lattimore's agents, his wife or ex-wife and a pastor, had come and picked up "most" of Lattimore's belongings but that they had declined his offer to allow them to go into the room. He noted as well that, except for an inoperable

television set, the "remaining items were taken by Caldon Rushing." Finally, Kratsch acknowledged in his answer that he had not returned the security deposit to Lattimore "because he owed money when he left and there (sic) damages to the property plus a mess to clean up."

¶4 The matter was tried to the court. Lattimore testified he rented a room from Kratsch beginning in early July of 2002. He stated that upon moving in, he paid Kratsch $89 for one week's rent plus another $89 as a security deposit. He also explained that soon thereafter he was arrested and incarcerated, but he continued to pay rent to Kratsch so that Rushing could continue to occupy the room. Lattimore also established through testimony and exhibits that, in August 2003, he designated "Rosette Armstrong" and "Lorene Lattimore" as his agents to retrieve his belongings from the rented room. At the same time, he sent a notice to Kratsch that "as of August 22, 2003 I will be terminating my tenancy." The notice to Kratsch also requested the return of his security deposit. Lattimore testified that he never received his security deposit back from Kratsch, and that his agents picked up some but not all of his personal property from the premises. He identified the items of personal property that his agents did not recover for him, and he testified to their value based on the replacement cost for new items.

¶5 Kratsch acknowledged at trial that he received $89 from Lattimore as a security deposit. He also acknowledged that he received Lattimore's notice terminating the tenancy in August 2003. Kratsch presented an accounting to the court showing the receipt of the deposit and rental payments from Lattimore, as well as the weekly rental charges for the room and an unpaid bill for the telephone in the room. The exhibit, to which Kratsch testified, showed a balance due the landlord, after crediting all payments of rent and the security deposit, of $218.33. Kratsch testified that, at some point, Rushing informed him that Lattimore was in

jail and wanted to know if she could stay in the room, to which he replied that she could if she paid the rent. From that point onward, Kratsch accounted for Rushing's rental payments on a separate ledger sheet, which was not introduced at trial.

¶6 Kratsch testified that, after he received the termination notice and the copy of the power of attorney from Lattimore, he told Rushing that Lattimore's agents would be coming to pick up his property. Rushing then brought what she apparently deemed to be Lattimore's property to the downstairs "foyer," and when Lattimore's two agents arrived, they took this property except for a console television that was not in working condition. Kratsch also said that he asked the agents if they wanted "to go through the apartment and see what else you wanted to take," an offer they "declined." Kratsch's testimony regarding the agents' removal of Lattimore's personal property and his offer of access to the room was verified by witnesses to the events who testified at trial. Finally, Kratsch submitted a personal property inventory that had apparently been prepared by Lattimore, on which Kratsch had noted which items were taken by the agents and which items apparently remained in Rushing's possession.

¶7 At the close of testimony, the court permitted the parties to give closing arguments. Lattimore noted that he had received neither his security deposit nor an itemized listing from Kratsch showing how the deposit was applied. He acknowledged that there had been a telephone in the room at the time he rented it. As for the personal property, he claimed Rushing should be responsible for the value of much of it, but other items he claimed were Kratsch's responsibility. Kratsch responded by arguing that if Lattimore's agents "failed to pick up the property … it's not my problem, it's not my fault."

¶8 The court rendered its decision from the bench. The court found that there was a week-to-week tenancy for the room and that Lattimore had posted $89 as a security deposit. He noted that the premises were ultimately "occupied by a person that had been put into possession of the premises by the plaintiff, Mr. Lattimore." The court concluded that there was no "legal basis upon which the landlord would have been responsible for the property of the tenant under those circumstances, particularly since that property had been put in the possession of Ms. Rushing, not by the landlord, but by Mr. Lattimore himself." The court also specifically found that Lattimore's agents had been given the opportunity to view the premises and inspect the apartment for additional property but declined to do so.

¶9 The court noted in its decision that Kratsch did not provide Lattimore the required twenty-one day written notice of what deductions were taken from the security deposit. Accordingly, the court found Kratsch liable for twice the amount of the deposit ($178). The court further found that, when Lattimore terminated his tenancy, there was a rent arrearage and unpaid telephone bills totaling $218.33. The court netted the figures and directed entry of judgment in favor of Kratsch and against Lattimore for $40.33.

¶10 As for Lattimore's property allegedly retained by Rushing, upon her default in appearance, the court found that she wrongfully retained certain items belonging to Mr. Lattimore. The court stated, however, that it could not determine the reasonable value of those items based on the record made at trial. Lattimore declined the court's offer to give him two weeks' time to produce additional evidence of the value of the items beyond the replacement cost for new items to which he had testified at trial. Lattimore requested instead that the court determine the values as best it could from his testimony. The court agreed to do

so, stating it would enter a judgment against Rushing for the amount it determined and would assess Lattimore's court costs against Rushing because Lattimore had fully prevailed on his claim against her.

¶11 In a subsequent written order, the court listed the items that it found Rushing had kept, placed a value on the items of $700 and directed that judgment against Rushing be entered accordingly. Two judgments were entered—one in favor of Kratsch against Lattimore for $40.33, and another against Rushing and in favor of Lattimore for $700 plus $222 in court costs.

¶12 Lattimore moved for reconsideration, citing WIS. STAT. § 100.20(5), which he argued entitled him to double damages, costs and a reasonable attorney fees because of Kratsch's improper withholding of his security deposit. In a written order denying reconsideration, the court noted that it had allowed the double recovery of Lattimore's security deposit, but even with that as an offset, Lattimore owed a net amount to Kratsch. The court further stated that, because it had found both Kratsch and Lattimore liable for certain sums, it had not awarded costs to either party and had entered judgment for only the net damages in Kratsch's favor. Lattimore appeals the judgment against him in Kratsch's favor and the order denying reconsideration.[2]

[2] Lattimore identified both the judgment in Kratsch's favor and the judgment entered in his favor against Rushing, as well as the order denying reconsideration, in his notice of appeal. He raises no claims of error in his opening brief, however, regarding the judgment entered in his favor against Rushing for $922. Accordingly, we deem Lattimore to have appealed only the judgment for $40.33 in Kratsch's favor and the order denying reconsideration.

ANALYSIS

¶13 Lattimore first argues that no judgment should have been entered in Kratsch's favor because Kratsch did not file a counterclaim against him. Lattimore contends the court should have granted him a judgment against Kratsch for twice the amount of his security deposit, plus costs and reasonable attorney fees. In support, Lattimore relies on WIS. STAT. § 100.20(5) (granting a private right of action for certain rule violations) and WIS. ADMIN. CODE § ATCP 134.06(2) (requiring landlords to refund security deposits or account for their application within twenty-one days of the termination of a tenancy).

¶14 It is true that Kratsch's answer did not set forth a "counterclaim" denominated as such, but, as we have described, Kratsch plainly stated in his answer that he claimed Lattimore owed him $218.33 for unpaid rent and a telephone bill after crediting the security deposit and all amounts Lattimore had paid in rent. Kratsch attached to his answer the ledger sheet to which he testified at trial that showed the credits, debits and remaining balance due from Lattimore. We are satisfied that, given the less formal rules of pleading and procedure applicable in small claims actions, *see* WIS. STAT. § 799.209, Kratsch did in fact plead a counterclaim against Lattimore through these assertions in and attachment to his answer.

¶15 As we have explained, the circuit court determined that Kratsch was liable to Lattimore for twice the amount of the security deposit, a total of $178, which the court offset against what Lattimore owed Kratsch, $218.33. Each party thus prevailed on his respective claim, and we conclude the circuit court did not erroneously exercise its discretion in awarding costs to neither party. *See* ***Mid-Continent Refrigerator Co. v. Straka***, 47 Wis. 2d 739, 751, 178 N.W.2d 28

(1970) (concluding that "costs are purely discretionary when both parties recover on their respective claims in one action."). As for Lattimore's claim for reasonable attorneys fees, both for the trial court proceedings and on appeal, we note that Lattimore has appeared *pro se* throughout the proceedings in both courts. Accordingly, he has incurred no attorney fees that could be reimbursed to him for prevailing on his security deposit claim.

¶16 The remainder of Lattimore's claims involve his allegations that Kratsch improperly engaged in "self-help eviction," failed to give proper notice terminating Lattimore's week-to-week tenancy and wrongfully retained or disposed of Lattimore's personal property without notice to him. In support, Lattimore points to several administrative regulations that govern a landlord's responsibilities in these regards. *See, e.g.,* WIS. ADMIN. CODE § ATCP 134.09(4) and (7). We conclude that some of the claims Lattimore raises on appeal were not presented in the circuit court, and those that were, were properly denied.

¶17 Lattimore made no effort at trial to establish that Kratsch had terminated his week-to-week tenancy without proper notice. Indeed, as we have described, Lattimore alleged in his complaint that it was he, not Kratsch, who terminated the tenancy, and both parties so testified at trial. Lattimore thus waived any claim that Kratsch terminated the tenancy without proper notice, a claim that Lattimore neither pled nor proved.

¶18 By the same token, Lattimore made no showing at trial that he had been "evicted" from the premises. Rather, he acknowledged that he was absent from the premises because he was incarcerated, still deeming himself a tenant, however, while permitting Ms. Rushing to occupy the premises in his absence. Lattimore testified that he subsequently terminated his tenancy voluntarily by

giving notice of termination to Kratsch. In short, there was simply no "eviction" at issue in this litigation.

¶19 Finally, as to Lattimore's claims regarding Kratsch's allegedly improper handling of his personal property, the trial court found that Kratsch surrendered all of the personal property that came into his possession (i.e., the items that Rushing removed from the rented room and placed in the foyer) to Lattimore's agents, save for the inoperable television. Lattimore seems to believe that Kratsch had an obligation to wrest Lattimore's remaining property from Rushing's possession and store it for him until his agents could retrieve it. A landlord, however, has no duty to retrieve or safeguard personal property that a tenant voluntarily leaves in the possession of a co-occupant of the rented premises. The record supports the trial court's determination that Lattimore established no basis on which to find Kratsch liable for any of the personal property items that remained in Rushing's possession. As to those items, Rushing was liable and Lattimore obtained a judgment against her for their value.

CONCLUSION

¶20 For the reasons discussed above, we affirm the judgment in Kratsch's favor and the order denying reconsideration.

By the Court.—Judgment and order affirmed.

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