

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 23, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1202

Cir. Ct. No. 2005SC4564

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

BILL HARING,

PLAINTIFF-APPELLANT,

GINA HARING,

PLAINTIFF,

V.

JEFF YINGLING,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Outagamie County:
MICHAEL W. GAGE, Judge. *Affirmed.*

¶1 PETERSON, J.¹ Bill Haring appeals an order denying his claim for double his security deposit, costs, and attorney fees, and granting Jeff Yingling's request for March 2005's rent. Haring also argues Yingling's counterclaim is frivolous and he is therefore entitled to costs and attorney fees. We disagree and affirm.

BACKGROUND

¶2 Bill and Gina Haring² rented a duplex from Joan and Jack Diedrich. The Diedrichs subsequently sold the duplex to Yingling. The offer to purchase made provisions for the Harings to continue renting the property and stated they anticipated vacating "in early March when their new home is complete." The Diedrichs' representative drafted a written lease. The lease stated the term was from October 1, 2004, through February 28, 2005. However, the lease also stated that it was for one year and required thirty days' notice to terminate the tenancy before October 1, 2005. The lease defined a rental period as the first to the last day of each month.

¶3 The Harings moved out of the duplex on February 28, but did not personally return the keys. Yingling stated he discovered on March 4 that the Harings had vacated. Yingling mailed the Harings an accounting of deductions from the security deposit and a check for the balance of \$52.22. Yingling mailed the accounting and check on May 10, 2005.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² Gina Haring failed to file a timely notice of appeal and, therefore, she is not a party to this appeal. See *LaCrosse Trust Co. v. Bluske*, 99 Wis. 2d 427, 428, 299 N.W.2d 302 (Ct. App. 1980).

¶4 On December 6, 2005, the Harings filed a complaint against Yingling, alleging untimely return and accounting of the security deposit. Yingling denied the allegation and counterclaimed for unpaid rent for March and April 2005 and damages to the rental property. The Outagamie County Court Commissioner heard the case, granting relief to the Harings and denying Yingling’s counterclaim except for damages related to cleaning expenses and lawn repair.

¶5 The Harings then filed for a demand for a trial, which the trial court held on September 15, 2006. The court described the lease as “somewhat cobbled together with some rather obvious and acknowledged inconsistencies or incongruities.” The court found that the lease required a minimum of thirty days’ notice to terminate the agreement prior to one year. The court further found the Harings did not meet their burden to prove they provided this notice. The court concluded the Harings did not effectively terminate their lease until April 30, and the security deposit and accounting was therefore timely. The court granted March rent to Yingling and denied any recovery for damages relating to the property, but found that claim and all other counterclaims were not frivolous.

DISCUSSION

¶6 The meaning of an unambiguous contract such as a lease is generally a question of law. *Patti v. Western Mach. Co.*, 72 Wis. 2d 348, 353, 241 N.W.2d 158 (1976). However, when a contract is ambiguous, its meaning is a question of fact that we will uphold unless clearly erroneous. See *Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 177, 557 N.W.2d 67 (1996). Whether the contract is ambiguous is a question of law we review without

deference. *Borchardt v. Wilk*, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990).

¶7 The first issue is whether Yingling timely provided the security deposit and the accounting for any unreturned deposit. Yingling was required to provide the deposit and accounting within twenty-one days of the Harings' surrender of the property. WIS. ADMIN. CODE §§ ATCP 134.06(2)(a), (4) (2006). Surrender occurs on the last day of the tenancy provided by the rental agreement. WIS. ADMIN. CODE § ATCP 134.06(2)(b) (2006).

¶8 Thus, we must examine the lease to determine the last day of the tenancy. Yingling claims the lease is ambiguous. A contract is ambiguous when it may be reasonably construed in more than one way. *Borchardt*, 156 Wis. 2d at 427. Where a contract is ambiguous, its interpretation requires the use of extrinsic evidence. *Management Computer Servs., Inc.*, 206 Wis. 2d at 177. The purpose of interpreting a written contract such as a lease is to determine the parties' intent. *United States Fire Ins. Co. v. Ace Baking Co.*, 164 Wis. 2d 499, 502, 476 N.W.2d 280 (Ct. App. 1991).

¶9 Here, as noted by the trial court, the lease contained multiple provisions regarding the termination date. While one part of the lease stated it ended on February 28, 2005, another part stated it was for one year and required

thirty days' notice to vacate prior to October 1, 2005. Therefore, the lease was susceptible to more than one reasonable interpretation and is ambiguous.³

¶10 The trial court determined that February 28 was only an anticipated date for the completion of the Harings' home. The trial court further found that the lease was for up to one year and required the Harings provide thirty days' notice of their intent if they terminated the tenancy prior to October 1, 2005. The court found the thirty-day notice requirement served the purpose of providing flexibility to the Harings for their move-out date, while ensuring enough notice to Yingling to find new tenants. Because the Harings moved out before one year, surrender could not occur until after they provided thirty days' notice.

¶11 The Harings did not present any evidence that they provided written notice of their move-out date to Yingling. The trial court determined that the Harings did not prove that they provided notice. Therefore, Yingling did not receive notice of the Harings' intent to move out until he discovered the property was vacant. The trial court found that date was March 4, 2005. The trial court then correctly concluded:

the notice of termination under the contract was only effective as of March 4th, 2005. 30 days thereafter would fall on or about April 3rd, 2005, after the commencement of the April rental period.

Thus, the notice by abandoning the property and leaving keys was not effective to terminate the lease until the end of the rental period on 4-30, or April 30th of 2005, and the

³ Haring argues we should construe any ambiguity in the lease against Yingling. *See Capital Invests., Inc. v. Whitehall Packing Co.*, 91 Wis. 2d 178, 190, 280 N.W.2d 254 (1979) (finding that ambiguity must be construed against the drafting party). Haring's reliance on law requiring courts to construe ambiguities against the drafting party is misplaced here because Yingling did not draft the lease.

accounting for the security deposit on or about May 10th, 2005, was timely....

Because the Harings did not surrender the property until April 30, the accounting was timely and Yingling therefore does not owe double the security deposit, costs, or attorney fees. *See* WIS. STAT. § 100.20(5). Additionally, the trial court correctly concluded Yingling was entitled to March rent, though it declined to award rent for April because by then Yingling had moved into the property himself.⁴

¶12 The second issue is whether Yingling’s counterclaims were frivolous. Haring argues Yingling’s counterclaims violated WIS. STAT. § 802.05(2) because they “caused unnecessary and increased costs in this litigation; they were not warranted by existing law; and, they lacked evidentiary support.”

¶13 We disagree. Yingling’s counterclaims asked for rent for March and April as well as compensation for damages to the property. The lease terminated April 30, and the trial court awarded Yingling rent for the month of March. Therefore, despite the fact that the trial court concluded Yingling was not entitled to rent for April, the claim had some evidentiary support. Additionally, the trial court found there was evidence to support the claim for damages, although the court ultimately did not find that evidence convincing.

⁴ Haring claims he is not responsible for March rent because the lease contained an improper automatic lease renewal provision contrary to WIS. STAT. § 704.15 and WIS. ADMIN. CODE § ATPC 134.09(3) (2006). However, the thirty day notice required by the lease was not an automatic renewal provision as contemplated by these provisions. Rather, the notice was only required if, as here, the tenants wished to vacate prior to the end of the one-year lease. Additionally, Haring failed to argue the lease contained any code violations at the trial court level and therefore waived this issue. *State v. Polashek*, 2002 WI 74, ¶25, 253 Wis. 2d 527, 646 N.W.2d 330.

By the Court.—Order affirmed.

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

