

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 13, 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. 2006AP2103

Cir. Ct. No. 2005SC12081

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

SUSAN L. SCHEIB,

PLAINTIFF-RESPONDENT,

V.

RAY A. PETERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
MORIA KRUEGER, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, P.J.¹ Landlord Ray Peterson appeals a small claims judgment ordering him to pay Susan Scheib double her security deposit for

¹ This case was assigned to one judge pursuant to WIS. STAT. § 752.31(2)(a) (2005-2006). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Peterson's failure to either return the security deposit or account for withholding it within 21 days, as required by WIS. STAT. § 100.20(5) and WIS. ADMIN. CODE § ATCP 134.06(2)(a) and (4)(a) (Nov. 2006),² and denying his counterclaims against Scheib for back rent and holding over. We affirm.

Background

¶2 The circuit court found the following facts, which are undisputed except where noted. Susan Scheib rented an apartment in Madison from May 2001 to September 30, 2005. Scheib signed a lease to rent the apartment from The Meyer Group (Meyer) in 2001, and entered into a second lease in 2003 that ran from February 1, 2003 to June 30, 2003. The second lease stated: "Note: A lease for a fixed term expires without further notice. If tenancy is to be continued beyond stated lease term, parties should make arrangements for this in advance of lease expiration." Scheib paid a security deposit of \$560. No lease agreement exists in the record covering the period of June 30, 2003 to September 1, 2004.

¶3 Sometime before July 29, 2004, Ray Peterson became the owner of the apartment. On July 29, 2004, Peterson and Scheib entered into a Lease Extension Agreement for the apartment that ran from September 1, 2004 to May 31, 2005. The circuit court found that the extension agreement adopted the terms and conditions of the original lease. Rent was set at \$630 per month.

¶4 On March 23, 2005, Peterson sent Scheib a certified letter stating that the lease would "automatically renew at the present rental rate for a like

² All references to Chapter ATCP 134 of the Wisconsin Administrative Code are to the version published November 2006.

successive period, unless you notify us in writing to the contrary (on or before April 18, 2005).” Scheib did not respond to the letter. Neither the original lease nor the Lease Extension Agreement contained an automatic renewal clause.

¶5 From February 2003 to August 2004, the City of Madison Section 8 Housing Choice Voucher Program (CVP) paid Scheib’s rent in full each month. From September 2004 to September 2005, CVP paid \$621 of the \$630 monthly rent. The circuit court found that Scheib failed to pay at the time the remaining \$9 monthly balance.

¶6 Peterson gave Scheib three five-day notices to pay rent or vacate the premises, pursuant to WIS. STAT. § 704.17(1)(a), on May 5, 2005, June 7, 2005, and July 7, 2005, respectively. On August 2, 2005, Peterson filed an eviction action against Scheib, Dane County Circuit Court Case No. 2005SC7631. The circuit court dismissed the action without prejudice. On August 23, 2005, Peterson filed a second eviction action against Scheib, Dane Co. Circuit Court Case No. 2005SC8975, which alleged that Scheib’s lease extended through February 28, 2006, and seeking double rent from holding over pursuant to WIS. STAT. § 704.27, and costs associated with the eviction.

¶7 On August 29, 2005, Scheib sent Peterson a notice to terminate tenancy, pursuant to WIS. STAT. § 704.19(3), informing Peterson that she intended to move out of the apartment on September 30, 2005. At a September 9, 2005 hearing, the parties informed the court that they had agreed to a stipulated dismissal. Peterson and Scheib disagreed at the hearing on whether Scheib had paid the final month’s rent. At the conclusion of the hearing, the circuit court directed Peterson to file a separate action if he intended to seek payment for the final month’s rent.

¶8 In the instant case, the circuit court found that, under the terms of the September 9 stipulated dismissal, Scheib agreed to surrender the apartment on September 30, and, in return, Peterson agreed to waive his claims against Scheib. Peterson disputes this description of the stipulation, arguing that he never agreed to waive his claims under the stipulated dismissal.

¶9 After vacating the apartment, Peterson failed to return the security deposit to Scheib or provide to her an accounting for the unreturned deposit within twenty-one days. On November 9, 2005, Scheib brought this action against Peterson for return of her security deposit plus interest. In his answer, Peterson made counterclaims³ for unpaid rent carried over from before he took over management of the property in March 2005; unpaid rent of \$9 per month from March 2005 to September 2005; rent for the months of October 2005 to February 2006 based on Peterson's assertion that the lease ran to February 28, 2006; holding over charges pursuant to WIS. STAT. § 704.27 for Scheib's failure to pay or vacate the premises after receiving her first five-day termination notice in June 2005; late fees; and court and service charges. In total, Peterson sought \$2,834.88 in damages from Scheib.

¶10 Following a trial de novo, the circuit court in a bench decision ordered Peterson to pay Scheib double her security deposit pursuant to WIS. STAT. § 100.20(5) and WIS. ADMIN. CODE § ATCP 134.06(2)(a) and (4)(a), less \$114.75 in back rent and late fees associated with her failure to timely pay her share of the

³ Peterson asserted in his answer to Scheib's complaint that he was entitled to late rent, holding over penalties, and court and service charges. We, like the circuit court, construe these assertions to be counterclaims. See *County of Portage v. Steinpreis*, 104 Wis. 2d 466, 479-80, 312 N.W.2d 731 (1981) (informality of small claims procedure facilitates the speedy and inexpensive resolution of disputes).

rent (i.e., the portion not paid by the CVP) from September 2004 to September 2005.⁴ Peterson filed a motion for reconsideration, which the circuit court denied in a written decision. Peterson appeals pro se. We granted a motion of Peterson to supplement the record with the case records in the prior cases involving Peterson and Scheib discussed above, Dane County Circuit Court Case Nos. 2005SC7631 and 2005SC8975.

Discussion

¶11 Peterson's arguments on appeal are difficult to track at times. It is apparent, however, that he argues that the circuit court erred in (1) concluding Scheib was entitled to double her security deposit; (2) determining that Scheib entered into a month-to-month rental agreement after the lease extension expired in May 2005, and, therefore, rejecting Peterson's claim of rent for October 1, 2005 to February 28, 2006; (3) not awarding double rent for July 15, 2005 to September 30, 2005, for Scheib holding over after her tenancy was terminated based on the finding, disputed by Peterson, that he agreed to waive his claims against Scheib in the stipulation to dismiss the second eviction action, Case No. 2005SC8975.⁵

⁴ The circuit court determined that Scheib owed a total of \$222.75 in back rent and late fees. The circuit court offset this amount by \$108, the amount of an August 29, 2005 money order Scheib paid toward the back rent, leaving Scheib with \$114.75 in unpaid back rent.

⁵ Peterson's brief appears to argue that he is entitled to double rent going back to May 2005 because, he argues, Scheib's tenancy was terminated that month by operation of the May 5 five-day notice. However, in his motion for reconsideration before the trial court, Peterson requested only damages for the period of July 15, 2005 to September 30, 2005. Because Peterson did not seek hold-over damages for the period prior to July 15 before the trial court, he cannot do so here. See *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2007 WI 98, ¶23, ___ Wis. 2d ___, 735 N.W.2d 93 (arguments made for the first time on appeal are deemed waived).

¶12 The standards of review we apply in addressing each of Peterson’s contentions are as follows. The question of whether the circuit court properly awarded Scheib double her security deposit requires us to apply undisputed facts to WIS. STAT. § 100.20(5) and WIS. ADMIN. CODE §§ ATCP 134.06(2)(a) and (4)(a), a question of law that we review de novo. *See Kenyon v. Kenyon*, 2004 WI 147, ¶11, 277 Wis. 2d 47, 690 N.W.2d 251 (application of undisputed facts to legal standard is a question of law). Likewise, the issues of whether the court correctly determined (a) that the term of Scheib’s lease was month-to-month when she vacated the apartment, and (b) that Peterson was not entitled to holding over damages require application of undisputed facts to statutory standards, which are legal questions subject to independent review. *See id.*

¶13 We begin with Scheib’s claim to recover her security deposit. WISCONSIN ADMIN. CODE § ATCP 134.06(2)(a) provides as follows: “Within 21 days after a tenant surrenders the rental premises, the landlord shall deliver or mail to the tenant the full amount of any security deposit held by the landlord, less any amounts properly withheld by the landlord” If a landlord withholds “any portion of a security deposit ... the landlord shall, within [21 days] ... deliver or mail to the tenant a written statement accounting for all amounts withheld....” Section ATCP 134.06(4)(a). The loss of a security deposit resulting from a landlord’s violation of §§ ATCP 134.06(2)(a) or (4)(a) is a pecuniary loss under WIS. STAT. § 100.20(5). *See Moonlight v. Boyce*, 125 Wis. 2d 298, 305-06, 372 N.W.2d 479 (Ct. App. 1985). A tenant is thus entitled to double the value of the security deposit, as well as attorney fees and costs, for a violation of §§ ATCP 134.06(2)(a) or (4)(a). Section 100.20(5).

¶14 Here, it is undisputed that, after Scheib vacated the premises on September 30, 2005, Peterson failed to return the security deposit to Scheib within

twenty-one days as required by WIS. ADMIN. CODE § ATCP 134.06(2)(a), or, alternatively, to provide her with an accounting for the unreturned deposit within twenty-one days as required by § ATCP 134.06(4)(a). Accordingly, Scheib is entitled to double the value of her security deposit, the amount of damages mandated by WIS. STAT. § 100.20(5) for violations of WIS. ADMIN. CODE §§ ATCP 134.06(2)(a) and (4)(a). We therefore conclude the circuit court properly ordered Peterson to pay Scheib double her security deposit.

¶15 We turn now to Peterson's claim for back rent for the period of October 1, 2005 to February 28, 2006. Peterson contends that Scheib is liable for rent for this period despite the fact that she vacated the premises on September 30, 2005. He argues that the Lease Extension Agreement that expired by its terms on May 31, 2005, was extended until February 28, 2006, by Scheib's failure to object to Peterson's March 23, 2005 letter informing Scheib that the lease would "automatically renew at the present rental rate for a like successive period, unless you notify us in writing to the contrary (on or before April 18, 2005)." Peterson is mistaken.

¶16 It is undisputed that neither the February 2003 lease nor the Lease Extension Agreement extending that lease contained an automatic renewal clause. In fact, the February 2003 lease was for a fixed term, running from February 1, 2003, to June 30, 2003, and included the following note: "A lease for a fixed term expires without further notice. If tenancy is to be continued beyond stated lease term, parties should make arrangements for this in advance of lease expiration." The Lease Extension Agreement, which began September 1, 2004, stated that the lease term "shall ... terminate on 5/31/05 at 10:00 AM," and that "all other terms and conditions of the [February 2003] Lease agreement ... shall remain the same." Thus, if Peterson and Scheib wished to further extend the February 2003 lease

beyond May 31, 2005, the agreement of both parties was necessary under the terms of the February 2003 lease.

¶17 Under WIS. STAT. § 704.25(2)(b) and (c), the parties created a month-to-month tenancy that ran from May 31, 2005 to September 30, 2005. Section 704.25(2)(c) provides that “[a]cceptance of rent for any period after expiration of a lease or other conduct manifesting the landlord’s intent to allow the tenant to remain in possession after the expiration date constitutes an election by the landlord under this section.” For a lease of less than one year, “the landlord may elect to hold the tenant on a month-to-month basis.” Section 704.25(2)(b).

¶18 Applying the undisputed facts to WIS. STAT. §§ 704.25(2)(b) and (c), we conclude that Peterson’s acceptance of CVP’s check of \$621 for the June 2005 rent created a month-to-month tenancy. This tenancy expired when Scheib, after giving Peterson more than twenty-eight days’ notice of termination as required by WIS. STAT. § 704.19(3), vacated the premises on September 30, 2005. Because the tenancy expired on that date, the circuit court properly rejected Peterson’s claim to back rent for the months of October 2005 through February 2006.

¶19 Finally, we address whether the circuit court erred in not awarding Peterson double rent under WIS. STAT. § 704.27 for Scheib’s holding over after receiving a five-day notice in July 2005 to pay overdue rent or vacate the premises. The circuit court concluded that Peterson was not entitled to double rent for July 15, 2005 to September 30, 2005 on grounds that his claim for double rent, first raised in Case No. 2005SC8975, was waived when he agreed to the stipulated dismissal of that case.

¶20 Peterson argues that he never agreed to waive this claim by agreeing to the stipulated dismissal, and the minutes from the hearing at which the court

accepted the stipulated dismissal do not explicitly address whether Peterson's claims survive. Regardless, we conclude that, by agreeing under the stipulation to dismiss his eviction claim against Scheib and to permit Scheib to occupy the apartment through September 30, 2005, and by receiving the rental payments of CVP and Scheib for the period of July 15, 2005 to September 30, 2005, Peterson consented to Scheib remaining in possession of the apartment and therefore Peterson is not entitled to double rent.

¶21 WISCONSIN STAT. § 704.27 provides that “[i]f a tenant remains in possession without consent of the tenant’s landlord after expiration of a lease or termination of a tenancy by notice given by either the landlord or the tenant ... the landlord may recover from the tenant twice the rental value” in damages. The statute requires the termination of a tenancy for the landlord to collect double rent. Here, Peterson gave Scheib a five-day notice to pay or vacate the premises on July 7, 2005, and then brought an eviction action to enforce the termination of the tenancy. By agreeing to the stipulation dismissing the eviction action, which permitted Scheib to stay on the premises until September 30, 2005, Peterson extended Scheib’s tenancy, he did not terminate it. Accordingly, Peterson gave up his claim to double rent under § 704.27 and other costs associated with the eviction.⁶

¶22 Moreover, we question whether the July 7 five-day notice would have been effective in terminating Scheib’s tenancy even if Peterson had not

⁶ We need not decide the amount to which Peterson would have been entitled had he maintained his eviction claim against Scheib—whether, less the amount already paid by CVP and Scheib, he would have been entitled to the full amount in double rent or just double Scheib’s nominal portion of the rent.

abandoned his claim for double rent. The notice is suspect because it does not clearly set forth the amount Scheib had to pay to keep from losing her apartment. It states as follows:

This notice terminates your tenancy and requires you to remove from the premises described in this notice, or pay the rent of \$630.00 which was due on July 1, 2005, plus \$120.80 past due balance and \$6.49 late fee, for a total due of \$757.29 by July 15, 2005 (\$621.00 tender by Check #287093 being held to apply upon complete payment).

The notice does not state that Scheib must pay \$106.05 (\$727.05 less \$621.00 paid by CVP) to avoid eviction. In fact, it declares that Scheib must “pay ... \$757.29 by July 15, 2005,” or vacate the premises, before noting parenthetically “\$621.00 tender by Check #287093 being held to apply upon complete payment.” The amount owed, \$106.05, appears nowhere on the notice. This fact has particular significance in this case because it is undisputed that, prior to September 2004, CVP paid Scheib’s entire rent, and Scheib maintains that she was unaware that, beginning September 2004, CVP began paying only \$621 per month, leaving her responsible for the remaining \$9 per month.⁷ While we need not decide whether this notice would have been sufficient because we have concluded that Peterson is not entitled to double rent on other grounds, we question whether a notice that does not clearly state the amount owed is adequate to terminate a tenancy.

By the Court.—Judgment affirmed.

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

⁷ The circuit court made no finding regarding when Scheib became aware that she was responsible for \$9 of the rent each month.

