COURT OF APPEALS
DECISION
DATED AND FILED

June 3, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1128 **Cir. Ct. No. 2007SC7082**

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

CHRISTOPHER TORZALA
AND CMT INVESTMENTS,

PLAINTIFFS-RESPONDENTS,

V.

TANYA HOUSTON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL B. BRENNAN, Judge. *Affirmed.*

¶1 CURLEY, P.J.[1] Tanya Houston appeals the order denying her motion for reconsideration of an earlier eviction judgment entered against her. She argues that the trial court erroneously exercised its discretion when it failed to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2005-06).

determine whether she had sufficiently proven that her landlord, Christopher Torzala, had commenced the eviction to retaliate for her entering a rent withholding program, and that the trial court erred in deciding that rent abatement was not contemplated by Houston, and thus, was not in operation when the eviction action was started, and in its determination that the $25 referred to in the lease as a reduction in rent was a rental discount, not a late fee. Because retaliation was not available as a defense to the eviction action under the facts as found by the trial court, and the trial court did not err in its legal determinations, the order and underlying judgment are affirmed.

I. BACKGROUND.

¶2 Houston entered into a year-long lease in October 2004 with Torzala for a property owned by Torzala at 1323 South 26th Street in the City of Milwaukee. A lease provision converted the lease to a month-to-month tenancy after the expiration of the lease without notice to either party. The lease contains a clause making the tenant responsible for keeping the plumbing in "reasonable working order." It also has a provision for what is termed "rental discount," which reduces the stated rent of $485 to $460 if the rent is paid "before or on the first day of the month." In addition, the lease also provided that any rent paid after the third day of the month accrued a late fee of $10 per day starting with the first day of the month.

¶3 Months before the eviction action was filed, this property came to the attention of the City of Milwaukee. After an inspection, multiple building code violations were found, which Torzala was ordered to correct. As a result of the conditions of the property, in February 2007, the City of Milwaukee Department of Neighborhood Services approved Houston's request to commence

rent withholding until the violations were corrected. Accordingly, Houston then sent $460 for March's rent and another $460 for April's rent to the City. The money orders which were sent to the City for March and April's rent were dated February 28th and March 30th; however, the City's receipts for the rents are dated March 8th and April 3rd. Houston told the court that she mailed them on February 28th and March 30th.

¶4 On March 12, 2007, Torzala filed a small claims eviction case against Houston in which he alleged that she owed him $759.[2] This amount consisted of $173.73 for a "plumbing issue," March rent of $485, and a late fee of $100.

¶5 On March 21, 2007, a default eviction judgment was entered against Houston, along with a Writ of Restitution. Five days later, Houston filed a motion to reopen the small claims judgment, claiming that she was never notified of the date and that no grounds existed for the eviction. The trial court determined that a delinquency existed for the outstanding plumbing bill, but that there was no rent delinquency because of the rent withholding. Houston then moved out of the property.

¶6 On April 23, 2007, Houston, now represented by a lawyer, filed a motion asking the court to reconsider its earlier ruling. At the hearing, the trial court rejected most of Houston's arguments. The trial court did, however, state that the plumbing issue could not form the basis for the eviction because it required a fourteen-day notice, and in an about-face from its earlier finding, the

[2] Originally the suit was started by CMT Investments. Torzala, the property owner, was added as a party later.

trial court found that Houston had not paid all the rent due because she paid the rent into the City past the due date, and thus, she was not entitled to the rental discount. As a result, the trial court determined that rent was owed to Torzala and the eviction judgment remained unchanged. This appeal followed.

II. ANALYSIS.

¶7 Houston makes several arguments. First, she submits that the trial court erroneously exercised its discretion when it failed to determine whether Houston had a valid defense to the eviction action because she claimed Torzala brought the eviction action to retaliate for her entering into the rent withholding program. Next, she argues that the trial court erred in its determination that rent abatement requires an intent by the tenant to abate the rent pursuant to WIS. STAT. § 704.07(4) (2005-06) before it can be used to offset any rent due.[3] Finally, she argues that the rental discount was actually a late fee requiring a fourteen-day notice under WIS. STAT. § 704.17(1)(b), and, as a consequence, Torzala was not entitled to an eviction judgment.

¶8 WISCONSIN STAT. § 704.45(1) sets out the defense of retaliation in an eviction action. While a landlord may not "bring an action for possession of the premises" when a tenant "[e]xercis[es] a legal right relating to residential tenancies" (e.g., enters into a rent withholding program), the statute contains an exception. ***Id.*** Section 704.45(2) carves out an exception when rent has not been paid. It states: "(2) Notwithstanding sub. (1), a landlord may bring an action for

[3] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

possession of the premises if the tenant has not paid rent other than a rent increase prohibited by sub. (1)." ***Id.***

¶9 Here, the trial court determined that the lease provision reducing the rent from the actual rental amount of $485 by $25 if the rent was paid on or before the first of the month was not a late fee. The trial court apparently concluded that while Houston said that she mailed the rent in on the last day of each of the preceding months, it was not officially received by the City until several days later. With respect to March, it was not processed until March 8th, and in April, it was not processed until April 3rd. It was Houston's obligation to pay the rent before or on the first day of the month to obtain the discount. She did not do so; therefore, the full amount of the rent was due and Houston had rent outstanding that was not paid within the appropriate time limits. Consequently, Houston cannot avail herself of the defense of retaliation.

¶10 Houston next argues that she was entitled to abate her rent pursuant to WIS. STAT. § 704.07(4) by approximately $25 because the conditions of the property affected her health and safety. She contends that, as a consequence, she owed no rent and the eviction action was unjustified. Section 704.07(4) allows a tenant, when "there is a substantial violation of sub. (2) materially affecting the health or safety of the tenant, [to]" remain in possession and "rent abates to the extent the tenant is deprived of the full normal use of the premises." Houston argues that she is entitled to at least a $25 reduction in rent, calculated on the basis of an abatement schedule in effect in the City of Madison. The trial court disagreed, stating:

> But what she was doing here is she was paying her rent, she was paying it into rent withholding, she had chosen that route, otherwise what [t]he Court is doing is every time that there is a potential violation, it's assuming that there has

> been a desire for abatement on behalf of the tenant and that the rent automatically is reduced based upon any potential code violation and that automatically reduces the tenant's rent.

Later, the trial court concluded:

> I am going to rule as follows: I am going to indicate that I don't see any factual grounds or basis to conclude that Miss Houston was engaged in any abatement, and I don't see any ability even under [§] 704.07(4) to indicate that automatically there is an abatement situation because of these potential code violations or actual code violations.

This court agrees. While it is theoretically possible for rent withholding and rent abatement to be in operation at the same time, implicit in the statute is some type of communication with the landlord that the tenant is exercising his or her right under the statute to abate the rent, and the landlord is entitled to know the amount of rent that the tenant is refusing to pay as a result of the conditions.

¶11 Here, Houston never notified Torzala that she believed she was entitled to a reduction in her rent because of defects in the property. Indeed, the first time this issue was ever raised was in the motion seeking reconsideration. Moreover, if Houston's interpretation of the statute were to be adopted, i.e., that tenants could unilaterally reduce the rent by a figure determined by the tenants for conditions they believe materially affect their health or safety, without any notice to the landlord, the small claims court would collapse under the number of hearings that would take place when eviction actions are started for failure to pay rent. Thus, this court agrees that under the facts and circumstances of this case Houston was not entitled to rent abatement as a defense to the eviction action.

¶12 Finally, Houston contends that the $25 which is termed a "rental discount" in the lease is actually a late fee which required a fourteen-day notice. The trial court determined that the money owed to Torzala was the full amount of

$485 and that the $25 deduction was a reduction in the rent and not a late fee. This court agrees.

¶13 The lease clearly sets forth that the $25 reduction is a "rental discount." Houston relies on a statement by Torzala, who told the trial court: "The rent is [$]460, however, on the lease it shows it being [$]485." While this statement might support Houston's argument, Torzala went on to say that "[i]f they pay on or before the first of the month, they can send me $460 as an incentive to have them get the rent to me on time." The $25 was not a late fee. It was, as Torzala indicated, an "incentive" because the $25 was a reduction from the rent of $485. When the rent was paid promptly, it applied. It was not a late fee and was not subject to a fourteen-day notice. Thus, no fourteen-day notice was necessary.

¶14 For the reasons stated, the order of the trial court and the underlying judgment are affirmed.

By the Court.—Order affirmed.

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