COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2198-FT **Cir. Ct. No. 2007SC4589**

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

DEAN PUCCETTI AND WENDEE PUCCETTI,

PLAINTIFFS-RESPONDENTS,

V.

WENDY OLSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: RALPH M. RAMIREZ, Judge. *Reversed and cause remanded with directions.*

¶1 ANDERSON, P.J[1]. A tenant, Wendy Olsen, appeals a small claims judgment that found her landlords, Dean and Wendee Puccetti, had accepted her

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

surrender of a commercial premises lease and awarded them $5000, plus costs, for unpaid rent and consequential damages. Both hornbook law and the statutes provide that when a landlord accepts the tenant's surrender of the lease, he forfeits his right to future rents and damages; therefore, we reverse.

¶2 The facts are uncontested and will be set forth in summary fashion. In 2005, Olsen and the Puccettis entered into a five-year commercial lease for commercial premises in the village of Pewaukee. In March 2007, Olsen failed to pay her monthly rent of $1100 and her security deposit was used to cover the unpaid rent. Olsen paid her April rent nineteen days late and failed to pay rent in May.

¶3 The Puccettis immediately began to look for a new tenant after Olsen placed a "Store Closing" sign in her window in February. They were approached by a local representative of Edward D. Jones & Co. and entered into negotiations with an agent of MLG Commercial, a real estate services company. The Puccettis and Edward D. Jones entered into a five-year and two-month lease beginning June 1, 2007. Under the terms of the lease, Edward D. Jones was given possession of the premises on June 1, rent free for two months. The first year's rent was set at $1200 per month, beginning August 1, 2007. Under the terms of the lease, the Puccettis were required to pay a $4000 commission to MLG Commercial.

¶4 The Puccettis brought this action against Olsen seeking unpaid rent for three months of $3300 and the commission paid to MLG Commercial of $4000. Seeking the streamlined procedure of small claims court, the Puccettis capped damages at $5000. Olsen filed an answer admitting that she owed rent

only for May; she contended that because Edward D. Jones occupied the premises on June 1, 2007, her obligation to pay rent ceased.

¶5 After losing before the court commissioner, Olsen filed a demand for a trial de novo in the circuit court. The circuit court ruled in favor of the Puccettis. Applying ***CCS North Henry, LLC. v. Tully***, 2001 WI App 8, 240 Wis. 2d 534, 624 N.W.2d 847, it held that the Puccettis accepted Olsen's surrender of the premises and re-let the premises for their own account, releasing Olsen from any further liability for rent effective the first day the Puccettis received rent, August 1, 2007. Olsen appeals.

¶6 Olsen does not claim that any of the circuit court's factual findings are clearly erroneous. *See* WIS. STAT. § 805.17(2). She only challenges the court's legal conclusions, which include the court's application of the law to the undisputed facts. We thus are faced with questions of law that we decide de novo. ***Vander Wielen v. Van Asten***, 2005 WI App 220, ¶10, 287 Wis. 2d 726, 706 N.W.2d 123.

¶7 Olsen asserts that the circuit court misapplied ***CCS North Henry***. She contends that in entering into a lease with Edward D. Jones, which extended beyond the expiration of her five-year lease and generated more rental income, the Puccettis elected to accept her surrender of the lease and she owed no rent from the day Edward D. Jones took occupancy, June 1, 2007.

¶8 Because ***CCS North Henry*** is the pivotal case in this appeal, we will set forth the facts and discuss the holding of that case. The facts are straight forward:

> On May 22, 1997, Tully entered into a commercial lease with 202 North Henry Street Joint Venture which was

> assigned to CCS North Henry, Tully's landlord at all times material to this lawsuit. Her tenancy began June 1, 1997 and was to terminate May 31, 2002. Tully breached the lease by moving out on February 3, 1999 and ceasing to pay rent. Rental payments under the lease were $1,362.90 per month for 1999 and increased incrementally each year thereafter.
>
> CCS North Henry re-let the premises to the State Street Army Store at $1,785 per month rent beginning May 1, 1999. The lease was to terminate April 30, 2003. As with Tully's lease, Army Store's lease had an escalation clause that increased the monthly rent each year according to a schedule set out in the lease. However, to obtain this new tenant, CCS North Henry paid $3,780 to a realtor and paid $88.41 to change the locks.

CCS North Henry, 240 Wis. 2d 534, ¶¶2-3.

¶9 CCS North Henry commenced a small claims action seeking to recover for the breach of the lease. ***Id.***, ¶4. After a de novo trial in circuit court, CCS North Henry recovered a judgment for rent lost before Army Store's occupancy started, consequential damages and attorney fees. ***Id.*** Tully appealed.

¶10 On appeal, Tully challenged the circuit court's conclusion that "CCS North Henry had the option of continuing to hold Tully to the full term of the lease" or it "could terminate Tully's lease when Army Store's tenancy began and sue for damages that had accrued only up to that time." ***Id.***, ¶6.

> On appeal, Tully argues that CCS North Henry cannot make that election, but rather it must credit all amounts received from Army Store against damages accruing under her lease, yet she implies that she should be released from obligations accruing after Army Store took over the premises.

Id.

¶11 We rejected Tully's arguments. First, we restated hornbook landlord/tenant law.

> After a tenant has breached its lease and vacated the premises, a tenant's liability for the breach is evaluated in part by determining whether the landlord has accepted the tenant's return in a manner that effects a legal surrender of the premises. "Surrender" entails the tenant's giving up of the lease before its expiration and the landlord's acceptance of the tenant's relinquishment of rights, either in fact or as implied at law.
>
> Once the premises have been returned to the landlord before the expiration of the lease, a landlord may either: (1) accept the tenant's surrender and re-enter the premises to re-let them for the landlord's own account, thereby releasing the tenant from any further liability for rent, or (2) notify the tenant that it is re-entering and re-letting the premises for the tenant's benefit and therefore the monies received from the successor tenancy will be fully credited to the initial tenant's obligation under the lease. If the premises are re-rented for the initial tenant's account, that tenant remains responsible for the payments due on the underlying lease until its term has concluded.

CCS North Henry, 240 Wis. 2d 534, ¶¶10-11 (citations omitted); Jay E. Grenig & Nathan Fishbach, 1 WIS. PRAC., *Methods of Practice*, § 13.120 (2008).

¶12 We then applied this hornbook law to the specific facts found by the circuit court, ***id.***, ¶13, and concluded:

> Here, CCS North Henry has refused to apply the rents received from Army Store to Tully's obligation under her lease, even though Tully requested that it do so. Additionally, it rented to Army Store for a period of time beyond that covered by Tully's lease. Therefore, under the undisputed facts of this case, we conclude that, as a matter of law, CCS North Henry elected to accept surrender when it obtained Army Store as its tenant for the premises. In making this election, *it capped Tully's damages at the date of Army Store's tenancy*, and therefore it cannot look to Tully for any damages beyond June 1, 1999. Accordingly, because CCS North Henry elected to rent the premises for its own account, it has no obligation under the common law to credit Tully with any rents it received from Army Store.

Id., ¶14 (emphasis added).

¶13 ***CCS North Henry*** is just the latest expression of the two inconsistent remedies available to a landlord. The supreme court discussed the remedies available when a tenant abandons the leased premises in ***First Wisconsin Trust Co. v. L. Wiemann Co.***, 93 Wis. 2d 258, 270-74, 286 N.W.2d 360 (1980). The supreme court noted:

> When a tenant vacates or abandons the leased premises before the end of the lease term, the landlord has a right to elect (1) to accept the surrender and terminate the lease or (2) to enter and take possession for the purpose of mitigating the damages for which the tenant is liable because of his breach of the lease.

Id. at 271 (citation omitted). The remedies are inconsistent because under remedy (1), a landlord forfeits his rights to damages, including future rent; but under remedy (2), he can pursue damages if he makes a reasonable effort to mitigate those damages.

¶14 That the landlord forfeits his rights to damages when he accepts surrender of the lease and re-lets for his own account is made clear in ***First Wisconsin Trust***:

> This court has held that when the landlord occupies the premises for his own use or takes exclusive possession, he accepts the tenant's surrender and terminates the lease, and he cannot collect rent which would have accrued under the lease subsequent to the surrender.

Id. at 272-73 (citation omitted). The same results were reached in ***CCS North Henry***, where we held that when CCS North Henry elected to accept surrender of the lease, it capped Tully's damages at the date of Army Store's tenancy. ***CCS North Henry***, 240 Wis. 2d 534, ¶14.

¶15 In ***CCS North Henry***, we held that WIS. STAT. § 704.29 does not change the hornbook law rules. ***CCS North Henry***, 240 Wis. 2d 534, ¶20. The

introductory section of the statute makes it clear that when a landlord accepts surrender of the premises and terminates the lease he cannot pursue damages.

> SCOPE OF SECTION. If a tenant unjustifiably removes from the premises prior to the effective date for termination of the tenant's tenancy and defaults in payment of rent, or if the tenant is removed for failure to pay rent or any other breach of a lease, *the landlord can recover rent and damages* except amounts which the landlord could mitigate in accordance with this section, *unless the landlord has expressly agreed to accept a surrender of the premises and end the tenant's liability*. Except as the context may indicate otherwise, this section applies to the liability of a tenant under a lease, a periodic tenant, or an assignee of either.

Sec. 704.29(1) (emphasis added).

¶16 Applying both hornbook law and the statute to undisputed facts in this case, we hold that Olsen is only liable for the May rent of $1100 because the Puccettis accepted surrender of the lease effective June 1, 2007, forfeiting their right to pursue rent accruing after that day or other damages. Therefore, we reverse the judgment of the circuit court holding Olsen liable for rent for June and July and the real estate agent's commission. Upon remand, the circuit court shall amend the judgment so it is consistent with this opinion.

By the Court.—Judgment reversed and cause remanded with directions.

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