

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 18, 2009

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. 2007AP2768

Cir. Ct. No. 2007SC80

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

TED DOHM,

PLAINTIFF-APPELLANT,

V.

KENNETH WEBER,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Racine County:
ALLAN B. TORHORST, Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

¶1 NEUBAUER, J.¹ Ted Dohm appeals from a small claims judgment denying his damages claim against his former tenant, Kenneth Weber, based on the trial court's finding that Dohm wrongfully evicted² Weber and his co-tenant Rebecca Romeis. As a result, the trial court awarded damages to Romeis in the amount of \$4,272.50, which included two times her portion of the security deposit (\$1,050), reimbursement for damage to personal property, and actual costs and attorney's fees. Weber did not appear at trial and a default judgment was entered against him for past due rent (twenty days) in the amount of \$338. Weber did not receive any damages related to the wrongful eviction, nor was he ordered to pay any damages to Dohm arising from damages to the premises.

¶2 At the time of filing this appeal, Dohm challenged the trial court's award of damages to Romeis, as well as the denial of his damages claim. However, while this appeal was pending, Dohm and Romeis reached a settlement and Romeis was dismissed from the appeal. As a result, not all of Dohm's appellate arguments remain relevant. Dohm's appellate brief sets forth three issues: (1) whether the trial court erred when it found that Dohm wrongfully

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

² The trial court's findings characterize Dohm's action as a wrongful termination of the tenancy by self-help. We accept Dohm's characterization of this finding as a wrongful eviction under WIS. ADMIN. CODE § 134.09(7) which provides: "SELF-HELP EVICTION. No landlord may exclude, forcibly evict or constructively evict a tenant from a dwelling unit, other than by an eviction procedure specified under [WIS. STAT.] ch. 799."

We also note that Weber, acting pro se, submitted a letter to the court received November 18, 2008. By order dated November 18, 2008, we construe Weber's letter as the respondent's brief.

evicted Weber and Romeis; (2) whether the trial court erred “in awarding damages to [Romeis] in the amount of twice her security deposit and an additional amount for loss of, and damage to, her personal property”; and (3) whether the trial court erred as a matter of law when it automatically denied any claim by Dohm against Weber and Romeis for damage to the premises based on its finding that Dohm wrongfully evicted Weber and Romeis.

¶3 Based on the settlement reached between Dohm and Romeis, we address only the first and third issues raised on appeal. We conclude that there are facts of record supporting the trial court’s finding that Dohm wrongfully evicted Weber and Romeis. While we agree with Dohm that this finding does not, as a matter of law, necessarily preclude him from claiming damages, it is unclear whether the trial court denied damages as a matter of law or based on a factual finding that the wrongful eviction prevented the tenants from re-entering the premises for repairs. Alternatively, it may be that the damages were simply not established in light of the landlord’s actions. We therefore remand to the trial court on the issue of damages.³

³ We note that evidence regarding damages was presented by Dohm and Romeis during the October 5 trial at which Weber was in default; therefore, a determination on damages need not necessitate a separate hearing. *See* WIS. STAT. § 799.22(2) (if defendant fails to appear on the date set for trial, the court may enter a judgment on due proof of facts which show the plaintiff is entitled thereto).

BACKGROUND

¶4 The relevant facts and findings, as set forth in the trial court's written decision, are as follows. On March 12, 2007, Dohm filed an action against Romeis and Weber seeking \$3,970 plus costs for (1) neglecting to fulfill the terms of their lease, and (2) damages to the premises and professional cleaning costs. Romeis counterclaimed that Dohm had accepted surrender of the premises by entering upon the premises and, as a result thereof, lost any claim for damages; that Dohm failed to comply with the necessary notice for forfeiture of the security deposit; and that she suffered damage to her vehicle and loss of personal property. Romeis requested damages in the amount of \$3,737.86 plus costs and attorney's fees.

¶5 At trial on October 5, 2007, both Dohm and Romeis appeared and testified as to the January 2007 events and the condition of the premises as it related to damages. In its written decision dated November 16, 2007, the trial court found:

Dohm took absolute possession of the premises not later than the 19 January 2007. The lease ... was in favor of both Weber and Romeis, individually, and liable joint and several. Dohm had received information from Weber that he had vacated; Dohm had no contact with Romeis before taking possession of the premises. It is undisputed the rent for January 2007 was unpaid. Dohm gave no notice, of any nature, terminating the lease to either Weber or Romeis.... The lease requires a written 60 day notice....

As between Dohm and Romeis the landlord wrongfully, without notice, terminated the tenancy by reoccupying and changing the locks....

As to the claim by Dohm against Weber, the Court has concluded that Weber is in default. Notwithstanding Weber's default Dohm is not entitled to recover anything beyond possession of the premises as Dohm wrongfully

terminated the tenancy and by his self-help accepted Weber's vacation. Any claim submitted by Dohm against Weber is denied except for the rent from 1 January until 20 January in the amount of \$677.42 (20 days).

Based on its findings, the trial court entered judgment against Weber for \$338, or half the amount of rent owing as of January 20, 2007. The trial court made no factual finding as to Dohm's claim for damages to the premises.

DISCUSSION

¶6 Dohm first contends that the trial court erred in finding that he wrongfully evicted Weber and Romeis when the evidence clearly showed that they had abandoned the property.⁴ “The definition of abandonment, as applied to leases, involves an absolute relinquishment of the premises by a tenant, and consists of an act or omission and an intent to abandon.” *Rapids Assocs. v. Shopko Stores, Inc.*, 96 Wis. 2d 516, 519, 292 N.W.2d 668 (Ct. App. 1980). Whether a tenant has abandoned a premises is a question of fact. *See Sporleder v. Gonis*, 68 Wis. 2d 554, 558, 229 N.W.2d 602 (1975). We will not overturn the trial court's findings of fact unless clearly erroneous. WIS. STAT. § 805.17(2).

¶7 Here, the trial court found that Dohm took possession of the premises, thereby terminating the lease, on January 20, 2007; Dohm gave “no notice, of any nature, terminating the lease”; Dohm had no contact with Romeis

⁴ We note that Dohm frames his abandonment argument in terms of “the defendants” and makes no argument that Weber, as joint tenant, should be treated any differently than Romeis. Additionally, Dohm does not challenge the trial court's finding that no notice of termination was provided. No notice was provided either to terminate the tenancy under the hold-over provision of the lease (which requires a sixty-day notice) or to terminate for failure to pay rent. Both WIS. STAT. § 704.17(1), governing notice for failure to pay rent for month-to-month tenancies, and the terms of the parties' lease provide for five days' written notice.

before taking possession; it was clear that Romeis still occupied the premises at that time; Romeis had some personal property and a vehicle at the residence when Dohm changed the locks; Romeis had not returned her key or garage door opener to Dohm. Based on our review of the record, these facts are supported by testimony at trial.

¶8 While Dohm points to evidence which might support a finding of an intent to abandon,⁵ we do not reweigh the evidence or reassess the witnesses' credibility, but will search the record for evidence that supports findings the trial court made, not for findings it could have made but did not. *Dickman v. Vollmer*, 2007 WI App 141, ¶14, 303 Wis. 2d 241, 736 N.W.2d 202. Even though other outcomes are conceivable given the evidence, that is not the test on appeal. *Id.*, ¶29. We therefore uphold the trial court's finding that Weber and Romeis had not abandoned the property.

¶9 Dohm next contends that the trial court erred as a matter of law when it concluded that Dohm was not entitled to recover for damages to the premises as a result of the wrongful termination of the lease.⁶ In support, Dohm cites to our decision in *Moonlight v. Boyce*, 125 Wis. 2d 298, 372 N.W.2d 479 (Ct. App. 1985), in which we recognized that "a landlord who fails to comply with orders issued under [WIS. STAT. §] 100.20 is not estopped thereby from asserting

⁵ For example Dohm cites to his testimony that Weber had indicated to him that the premise would be vacated by January 15, 2007; when Dohm visited the premises on January 20, 2007, he found no furniture or clothing; he found no cleaning supplies to indicate that Weber or Romeis would be returning to the property; and he found a key on the kitchen counter.

⁶ Dohm does not make any appellate argument as to a claim for unpaid rents. We therefore limit our discussion and decision, as Dohm does, to recovery of damages to the premises. *A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) (An issue raised in the trial court, but not raised on appeal, is deemed abandoned).

and litigating a counterclaim for other violations of the statutes and/or damages to the premises by the tenant.” *Id.* at 306-07 (citing *Paulik v. Coombs*, 120 Wis. 2d 431, 433, 355 N.W.2d 357 (Ct. App. 1984).

¶10 Based on *Moonlight*, we agree that Dohm still may be entitled to pursue a claim against Weber for damage to the premises despite the trial court’s finding that Dohm wrongfully evicted Weber and Romeis in violation of WIS. ADMIN. CODE § ATCP 134.09(7), as implemented under WIS. STAT. § 100.20. However, as stated earlier, it is unclear whether the trial court denied damages as a matter of law, i.e., arising solely from a wrongful eviction, or based on a finding that either (1) Dohm’s wrongful eviction of the tenants deprived them of the opportunity to cure any damage to the premises, or (2) damages were not established in light of the landlord’s actions, which included retaining Weber’s portion of the security deposit. We therefore remand to the trial court for clarification of damages and, if necessary, a determination of damages.

CONCLUSION

¶11 We conclude that there are facts in the record sufficient to support the trial court’s finding that Dohm wrongfully evicted Weber and Romeis. However, for the reasons stated above, we remand the issue of damages for the trial court’s consideration.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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

