COURT OF APPEALS
DECISION
DATED AND FILED

February 21, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1264 **Cir. Ct. No. 00-SC-280**

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

KML DEVELOPMENT CORPORATION,

PLAINTIFF-RESPONDENT,

V.

CLYDE SCHREIBER AND IRENE SCHREIBER,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Clark County: JON M. COUNSELL, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Clyde and Irene Schreiber appeal a judgment of the circuit court in favor of KML Development Corporation in the amount of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

$4,314.52 for unpaid rent, utility bills, late fees, and costs. For the following reasons, we affirm.

Background

¶2 On May 5, 1997, Clyde and Irene Schreiber (f/n/a Irene Ziba) signed a rental agreement with KML Development Corporation to lease an apartment located in Abbotsford, Wisconsin. The lease provided for monthly rent in the amount of $475, due on or before the fifth of the month, and a $10 per day late fee for every day the rent was late. An attached addendum indicated that the lease would be renewed on identical terms unless either party, at least forty-five days before expiration of the lease, notified the other in writing of an intent to terminate.

¶3 The Schreibers apparently renewed their lease the next year in June of 1998. On April 1, 1999, Kate Lindquist, the property manager for KML, sent the Schreibers a renewal notice per the lease addendum, instructing the Schreibers to respond in writing if they did not wish to renew the lease. The Schreibers did not respond to this letter, thereby renewing their lease for another year.

¶4 On September 10, 1999, the Schreibers wrote a letter to Lindquist stating their intention to vacate the premises on October 8, 1999, more than seven months before the termination of their lease. On September 14, 1999, Lindquist responded by letter, indicating that the Schreibers would be obligated to pay the monthly rent and utility bills until the end of the lease term on May 31, 2000, or until an approved tenant could be secured.

¶5 On November 5, 1999, Lindquist provided written notice to the Schreibers that their security deposit would not be returned because it had been

used to pay the rent owed for the month of November. The Schreibers did not make any rental payments after that date. A new tenant signed a lease and moved into the premises on March 13, 2000, approximately two and one-half months before the termination of the Schreibers' lease.

¶6 On April 28, 2000, KML filed a small claims complaint seeking a money judgment against the Schreibers in the amount of $4,332.73, for unpaid rent, utilities, and late fees, as provided by the lease agreement. The Schreibers filed an answer and counterclaim, alleging that KML did not comply with WIS. ADMIN. CODE § ATCP 134.06(2)(a), in that KML failed to return the Schreibers security deposit or provide notice of withholdings from that security deposit.[2]

¶7 At trial, Lindquist testified that she made an appointment to have the carpets professionally cleaned in the Schreibers' apartment on October 13, 1999, a date after the Schreibers' intended date of vacation. The carpet cleaner arrived on that date, but the carpets were not cleaned because personal effects were still in the apartment. The carpet cleaner returned to the apartment on October 14 and again found personal effects in the apartment.

¶8 Lindquist then testified that she personally inspected the apartment on October 18, 1999. During this inspection, she found a home gym system, boxes and clothes in the closets, and items in the laundry room and in the kitchen cupboards. Lindquist stated that she became aware the Schreibers moved out

[2] The Schreibers' counterclaim incorrectly identified the applicable chapter of the Code as chapter 135 rather than chapter 134. WISCONSIN ADMIN. CODE § 134.06(2)(a) provides, in relevant part: "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 under sub. (3)."

when the carpets were able to be cleaned on October 25, 1999, because all personal possessions had been removed.

¶9 Lindquist also testified that in late September, before the Schreibers vacated the premises, KML found a potential tenant to rent the Schreibers' apartment. However, KML learned that the potential tenant was in the process of declaring bankruptcy and, therefore, the tenant did not ultimately rent the apartment. Lindquist stated that a new renter was secured in March of 2000, approximately two and one-half months before the Schreibers' lease expired.

¶10 At the close of trial, the court found in favor of KML. In doing so, the court noted that although the Schreibers expressed an intent to move out of the premises on October 8, 1999, they did not actually do so. The court concluded that occupancy continued at least through October 15, 1999. Accordingly, the court found that KML timely notified the Schreibers of its withholding of their security deposit within twenty-one days of the date the Schreibers vacated the apartment, in compliance with WIS. ADMIN. CODE § ATCP 134.06(2)(a).

¶11 The court entered a judgment in favor of KML in the amount of $4,314.52. Of that figure, $1,545.00 was for late rent, $2,280.00 was for late fees, $317.21 was for unpaid utilities, and $172.31 was for costs. Nevertheless, the court gave the Schreibers an opportunity to file a brief within ten days of the ruling to support their position that late fees could not be properly awarded in this action. The Schreibers did not file a brief on this matter. Instead, the Schreibers filed a motion for reconsideration alleging that KML did not prove it took

reasonable efforts to mitigate its damages as required by WIS. STAT. § 704.29(3).[3] The court denied that motion. Judgment was entered, and the Schreibers appealed.

Discussion

¶12 The Schreibers raise the following three claims on appeal: (1) the circuit court erred in holding that KML timely notified the Schreibers of its withholding of their security deposit as required by WIS. ADMIN. CODE § ATCP 134.06(2)(a); (2) the court erred in holding that KML had complied with WIS. STAT. § 704.29 by proving that it mitigated damages; and (3) the court erred in holding that late fees, as contained in the residential lease, were a proper item of damages. We consider each argument in turn.

Timely Notice of Withholding of the Security Deposit

¶13 The Schreibers first argue that the circuit court did not correctly determine the date that they vacated the apartment, and thus, the court erred in holding that KML timely notified the Schreibers of any amounts withheld from

[3] WISCONSIN STAT. § 704.29(3) provides:

> The landlord must allege and prove that the landlord has made efforts to comply with this section. The tenant has the burden of proving that the efforts of the landlord were not reasonable, that the landlord's refusal of any offer to rent the premises or a part thereof was not reasonable, that any terms and conditions upon which the landlord has in fact rerented were not reasonable, and that any temporary use by the landlord was not part of reasonable efforts to mitigate in accordance with sub. (4)(c); the tenant also has the burden of proving the amount that could have been obtained by reasonable efforts to mitigate by rerenting.

their security deposit within twenty-one days of the date the Schreibers vacated as required by WIS. ADMIN. CODE § ATCP 134.06(2)(a).[4]

¶14 WISCONSIN ADMIN. CODE § ATCP 134.06(2)(a) provides that a landlord must deliver or mail to a tenant the full amount of any security deposit held by the landlord, less any amounts properly withheld pursuant to subsection (3), "[w]ithin 21 days after a tenant surrenders the rental premises." Subsection (2)(b)1 further provides that a tenant surrenders the premises on the last day of tenancy provided under the rental agreement, except that:

> If the tenant vacates before the last day of tenancy provided under the rental agreement, *and* gives the landlord written notice that the tenant *has vacated*, surrender occurs when the landlord receives the written notice that the tenant has vacated. If the tenant mails the notice to the landlord, the landlord is deemed to receive the notice on the second day after mailing.

WIS. ADMIN. CODE § ATCP 134.06(2)(b)1 (emphasis added).

¶15 While the Schreibers sent notice to KML that they *intended* to vacate the premises on October 8, 1999, the Schreibers did not send notice after they vacated indicating to KML that vacation had occurred. Accordingly, we find WIS. ADMIN. CODE § ATCP 134.06(2)(b)1 to be inapplicable in this case. Nor do we find any published opinions that provide guidance for determining the time at which vacation occurs in the absence of written notice to the landlord subsequent

[4] Although the Schreibers alleged in their counterclaim that KML "has not returned the Defendant's [sic] security deposit or a statement of withholdings from that security deposit" in violation of WIS. ADMIN. CODE § ATCP 134.06(2)(a), the Schreibers appear to agree on appeal that KML did indicate in a letter dated November 5, 1999, that it was withholding the Schreibers' security deposit to pay for the November rent. The Schreibers suggest, however, that this notice was not within twenty-one days of the date they vacated the apartment.

to vacation. Accordingly, we look to an opinion from the attorney general, defining the term "surrender" as it is used in this context, as persuasive authority. *See* ***State v. Johannes***, 229 Wis. 2d 215, 223, 598 N.W.2d 299 (Ct. App. 1999) (an attorney general's opinion is entitled to such persuasive effect as this court deems the opinion warrants).

¶16 The attorney general's opinion suggests that "surrender" of the premises, as that term is used in WIS. ADMIN. CODE § ATCP 134.06(2)(a), occurs not simply when the tenant physically vacates the premises, but also when the landlord knows or has reason to know that fact. *See* 80 Op. Att'y Gen. 86, 86-88 (1991). This protects the landlord from being held liable under the Code for not refunding a tenant's security deposit within twenty-one days of the date the tenant vacated, when the tenant vacates prior to the date specified in the lease and without the landlord's knowledge. *See* ***id.*** Thus, the opinion suggests, notice in some form by the tenant, or discovery by the landlord that the premises has been vacated, would satisfy the element of knowledge by the landlord. *See* ***id.*** at 90.

¶17 The opinion also suggests that implicit in the concept of a tenant's giving up possession of a premise is the element of giving possession to another. Typically, this would include the removal of all of the tenant's belongings, vacation of the premises, and return of the keys to the landlord. *See* ***id.*** at 89.

¶18 As discussed, the Schreibers did not give notice to KML after vacating the premises. On appeal, the Schreibers do no more than allege they vacated on October 8, 1999, without citing any facts in support of that conclusion. At trial, Lindquist testified that she inspected the apartment on October 18, 1999, and found some of the Schreibers' personal effects still there. Additionally, Lindquist stated that she did not become aware that the Schreibers had vacated

until October 25, 1999, when the carpets could finally be cleaned because all of the Schreibers' personal possessions had been removed. These dates surpass the October 15 date the circuit court had to conclude the Schreibers vacated at or beyond in order for the November 5 notice to have been in compliance with WIS. ADMIN. CODE § ATCP 134.06(2)(a). Because we conclude that the evidence in the record supports the circuit court's finding that KML provided the Schreibers with a timely statement concerning their security deposit, we affirm.

Mitigation of Damages

¶19 The Schreibers next contend that the court erred in determining that KML met its burden to allege and prove that it acted to mitigate damages as required by WIS. STAT. § 704.29(3).

¶20 We interpret the Schreibers' argument as a challenge to the sufficiency of the evidence supporting the circuit court's factual findings. "When considering the sufficiency of the evidence, we apply a highly deferential standard of review. Furthermore, the fact finder's determination and judgment will not be disturbed if more than one inference can be drawn from the evidence." ***Jacobson v. Am. Tool Companies, Inc.***, 222 Wis. 2d 384, 389, 588 N.W.2d 67 (Ct. App. 1998). The circuit court's findings of fact will not be set aside unless clearly erroneous. ***Id.*** at 389-90; WIS. STAT. § 805.17(2).

¶21 Although the Schreibers suggested in their motion for reconsideration that it was KML's duty to prove that it took "reasonable measures" to mitigate damages, WIS. STAT. § 704.29(3) provides only that a landlord must allege and prove that it made efforts to mitigate damages resulting from a tenant's early vacation of a premise. It is the tenant's duty to prove that the landlord's efforts were unreasonable, in addition to proving "the amount that could

have been obtained by reasonable efforts to mitigate by rerenting." WIS. STAT. § 704.29(3).

¶22 KML alleged in its complaint that it acted to mitigate damages. Additionally, KML presented evidence that it found two potential tenants after it was notified that the Schreibers were going to vacate prematurely, one of which actually signed a lease prior to the termination of the Schreibers' lease. The Schreibers did not persuade the circuit court that the efforts expended by KML in obtaining two potential tenants prior to the termination of the Schreibers' lease were unreasonable. Nor did the Schreibers present evidence of the amount of damages KML could have avoided through more reasonable efforts to re-rent the premises. We conclude that the circuit court's decision, holding that KML alleged and proved that it mitigated damages as required by WIS. STAT. § 704.29(3), was reasonable. Accordingly, we affirm.

Late Fees as an Item of Damages

¶23 Finally, the Schreibers assert that the circuit court erred by improperly including late fees as an item of damages in the award to KML. We disagree.

¶24 The lease that the Schreibers signed included a provision for a penalty of $10 per day for every day the rent was late. After the circuit court rendered its decision, it gave the Schreibers ten days to submit a trial brief on the issue of whether the circuit court could include late fees in its award to KML. The Schreibers never submitted a brief on this matter. Accordingly, the Schreibers have waived this issue for purposes of appeal. *See* ***Anderson v. Nelson***, 38 Wis. 2d 509, 514, 157 N.W.2d 655 (1968).

By the Court.—Judgment affirmed.

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