

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 21, 2002

Cornelia G. Clark
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. 01-1738
STATE OF WISCONSIN**

**Cir. Ct. No. 99-SC-1588
00-SC-7348**

**IN COURT OF APPEALS
DISTRICT IV**

RAY A. PETERSON D/B/A MASTER BUILDERS,

PLAINTIFF-APPELLANT,

V.

TERESA E. TUCKER,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Modified, and as modified, affirmed and cause remanded with directions.*

¶1 DEININGER, J.¹ Ray Peterson appeals a small claims judgment entered against him in favor of Teresa Tucker. He raises several claims of error.

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

First, he claims the trial court erred in determining that he was not entitled to damages for Tucker's breach of an apartment lease. Peterson also argues that the trial court erred in awarding Tucker damages for rent abatement, lodging expenses, her security deposit and attorney's fees. Finally, Peterson claims the circuit court judgment should be reversed in the interests of justice because City of Madison ordinances cannot "override" state law.

¶2 We conclude that the trial court erred in determining that Peterson breached his lease with Tucker. Peterson properly terminated Tucker's tenancy by obtaining a judgment for her eviction, and we modify the damages awarded to account for this fact. The trial court did not err, however, in finding that Peterson unlawfully resorted to a self-help remedy to remove Tucker from the premises, and we affirm the damages awarded to Tucker based on that finding and on previous administrative rent abatement orders. Accordingly, we modify the amount of damages awarded in the judgment, and as modified, affirm it.

BACKGROUND

¶3 Tucker leased an apartment in Madison from Peterson on September 21, 1998. The City of Madison Building Inspection Unit cited Peterson on October 15, 1998 for twenty-five building code violations in the unit. Because Peterson failed to correct the building code violations in a timely manner, a City hearing examiner awarded Tucker \$184 in an administrative rent abatement proceeding. Peterson had not paid Tucker any part of the rent abatement award at the time of the trial in this matter.

¶4 Peterson commenced an eviction action against Tucker in February 1999 for her alleged failure to pay rent. Tucker failed to appear at the eviction hearing on February 26, 1999, and the court entered a default judgment for

eviction and issued a writ of restitution. Tucker obtained an order staying enforcement of the eviction judgment on March 3, 1999, but she failed to appear at the March 9 hearing on her request to reopen the judgment. Accordingly, the court denied her petition to reopen and a second writ of restitution was issued on March 12.

¶5 Tucker filed a separate small claims action against Peterson on July 25, 2000, seeking money damages for Peterson's allegedly wrongful actions in removing her from the premises and for his failure to pay rent abatement awards. Also in July 2000, Peterson moved for monetary damages in the original eviction action. Each party obtained a default judgment against the other. On August 10, 2000, the court entered a judgment for \$3,982.18 against Tucker in the eviction action, and on August 15, Tucker obtained a \$5,000 default judgment in her separate action against Peterson. Both judgments were subsequently vacated² and the cases were consolidated for a bench trial in the circuit court.

¶6 The court found that Peterson shut off the heat and electricity to Tucker's apartment on March 9, 1999, and that as a result, Tucker moved from the apartment to a motel on that date. Tucker also established that the City of Madison cited Peterson for discontinuing Tucker's utilities on March 9, 1999, and that she again prevailed in an administrative rent abatement proceeding, obtaining an award of \$700 for this violation. *See* Madison General Ordinance Sec.

² The default judgment against Peterson was vacated because it was discovered that he had filed a written answer to Tucker's complaint prior to the return date. The court granted Tucker's petition to reopen Peterson's judgment for money damages in the eviction action on the grounds that she had not received notice of the hearing on damages.

27.05(2)(m) (1999).³ Peterson had not paid any part of this award at the time of trial.

¶7 The circuit court concluded that Peterson was not entitled to recover on his claims for unpaid rent and other items of damages because he “broke the lease” by unlawfully discontinuing utilities while Tucker still occupied the premises. The court awarded Tucker damages totaling \$3,752.52 for the two unpaid rent abatement awards, which were doubled on account of Peterson’s failure to promptly pay them,⁴ Tucker’s motel lodging costs, and her security deposit. The court also awarded Tucker \$1,215 for attorney’s fees she incurred in her action against Peterson (see footnote 4), for a total judgment of \$4,967.52.

ANALYSIS

¶8 Several of Peterson’s claims are closely related. He claims the trial court erred in concluding that he was not entitled to any damages but that Tucker was entitled to recover on her claims. Peterson contends that even if he did violate a Madison ordinance by shutting off Tucker’s utilities while she still occupied the apartment, his claim for unpaid rent and other damages is still legitimate, and that his violation of an ordinance should not release his tenant from her obligations.

³ Madison General Ordinance Sec. 27.05(2)(m) provides in relevant part: “No owner, operator or occupant shall cause any service, facility, equipment, or utility which is required under this ordinance to be removed from or shut off from or discontinued for any occupied dwelling, dwelling unit or lodging room let or occupied by him except for such temporary interruptions as may be necessary while actual repairs are in process, or during temporary emergencies when discontinuance of service is approved by an authorized inspector.”

⁴ Madison General Ordinance Sec. 32.04(6)(c) provides in relevant part: “[I]f the tenant or successor tenant no longer resides at the premises in question, the tenant, provider agency or successor tenant shall recover from the landlord double the amount not reimbursed in accordance with the order of the Hearing Examiner plus costs of collecting including reasonable attorney fees.”

We find merit in some of Peterson's contentions, and as we discuss below, we conclude that Tucker's damages must be reduced to reflect the fact that Peterson lawfully obtained a judgment for restitution of the premises prior to his unlawful action in discontinuing Tucker's utilities.

¶9 Unlike Peterson's later judgment against Tucker for monetary damages, the eviction judgment which he obtained on February 26, 1999, was never vacated, although its enforcement was temporarily stayed from March 3 until March 9, 1999. Thus, from and after March 9th, Tucker was "holding over." Peterson's discontinuance of Tucker's utilities may have been unlawful, but we conclude that he did not violate Tucker's right to occupy the apartment under the lease—that right was terminated by the eviction judgment.⁵ We therefore conclude that the trial court erred in awarding Tucker \$1,034.88 for her expenses in renting a motel room for twenty-four days in June 1999, a period well after Tucker's right to occupy Peterson's apartment had been terminated by the judgment of eviction and Peterson had obtained a valid writ of restitution for the apartment.

¶10 We will not disturb, however, the amount the court awarded for Tucker's three-day motel stay immediately following Peterson's wrongful discontinuance of her utilities, inasmuch as that amount (\$269.64 for March 9-11) is directly attributable to Peterson's wrongful act.⁶ We also affirm Tucker's

⁵ Tucker stipulated at trial that, with respect to the eviction judgment of February 26, 1999, all eviction procedures, including the giving of required notices, were "properly followed," and that Peterson had obtained a default judgment for Tucker's eviction from the apartment.

⁶ Tucker stayed with a friend between March 12 and June 7 and made no claim for lodging expenses during that period.

recovery of her \$700 security deposit, given that the trial court found Tucker's testimony "much more credible" than Peterson's in all "areas of dispute." Thus, Peterson failed to establish his entitlement to any portion of the deposit.⁷ Finally, we affirm the amounts included in the judgment for the two rent abatement awards, doubled, together with Tucker's reasonable attorney's fees in collecting them. The recovery of these amounts appear to be in accordance with City of Madison ordinances, and the record suggests that Peterson was unsuccessful in appeals of these administrative determinations.⁸

¶11 Before addressing whether Peterson is entitled to recover any amounts on his claims against Tucker, we address his contention that Madison city ordinances should not be allowed to have precedence over state law. We take Peterson's argument to be that, because he properly complied with state statutes in obtaining a judgment for Tucker's eviction, he should not be penalized for effecting her removal by shutting off her utilities after the stay of the eviction judgment was lifted. We reject this contention. The eviction judgment Peterson obtained entitled him to regain possession of the apartment by lawful means, not by way of a "self-help eviction." *See* WIS. ADMIN. CODE § ATCP 134.09(7)

⁷ Peterson claimed \$600 for "clean up and repair to make apartment habitable" and testified to his expenditure of time and payments to others for work in the apartment after Tucker's departure. Tucker, however, testified that the apartment was "a mess" when she moved in, that it was "clean" when she left it on March 9, and that she had no opportunity to do further cleaning after Peterson shut off the utilities on that date. As we have noted above, the trial court credited Tucker's testimony over Peterson's. A trial court's factual finding will not be disturbed on appeal unless it is "clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *See* WIS. STAT. § 805.17(2).

⁸ We note that Tucker's counsel and the trial court apparently made a mathematical error when doubling the abatement awards. The two awards totaled \$884, which doubled equals \$1,768, twenty dollars more than the \$1,748 included in the judgment. We thus calculate Tucker's allowable damages to be \$3,952.64 (\$269.64 lodging expense; \$700 security deposit; \$1,768 doubled rent abatement awards; and \$1,215 for attorney's fees).

(“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 ch. 799, STATS.”). Peterson’s proper course of action to enforce the eviction judgment was via a writ to the sheriff for restitution of the premises, *see* WIS. STAT. § 799.44, a course which Peterson eventually followed.

¶12 We conclude that Madison General Ordinance § 27.05(2) (see footnote 3), does not contravene “state law,” but complements it. WISCONSIN ADMIN. CODE § ATCP 134.10(1) provides that the state administrative code governing landlord-tenant relations “does not prohibit or nullify any local government ordinance with which it is not in direct conflict.” And, under code definitions, a “tenant” is “a person occupying ... a dwelling unit ... [including] persons holding over after termination of tenancy until removed from the dwelling unit by sheriff’s execution of a judicial writ of restitution issued under sec. 799.44, STATS.” WIS. ADMIN. CODE § ATCP 134.02(12). Thus, the application to the present facts of the Madison ordinance prohibiting a landlord from shutting off utilities to an occupied dwelling is not in “direct conflict” with state enactments governing landlords and tenants.

¶13 As we have discussed, the trial court’s credibility determinations preclude Peterson from recovering on his claim for “cleaning and repair” damages. We also conclude that he is not entitled to recover for unpaid rent for the period before his discontinuance of utilities to the apartment on March 9, 1999. Peterson claimed Tucker owed him \$405 for “unpaid rent from 11-21-98 to 2-21-99” when

he sued for eviction, but there are indications in the record that Peterson received rental payments on Tucker's behalf after her removal on March 9th.⁹

¶14 We further conclude that the trial court did not err in refusing to award Peterson any rent under the lease for the period after he unlawfully disconnected Tucker's utilities in order to gain possession of the premises. Not only is the amount of rent due for the period after March 9, 1999, in some doubt (see footnote 9), but we also agree with the trial court that permitting Peterson to recover rent for the period after he unlawfully removed Tucker from the apartment would be inequitable. Similarly, we affirm the trial court's denial of Peterson's claim for expenses related to what would have been a lawful restitution and re-renting of the premises (\$200 for a mover's cancellation fee, \$100 for a bond, \$239 for advertising).

¶15 We conclude that only \$81, which Peterson claimed for "filing and service in eviction," should be applied as an offset to Tucker's damages. Peterson incurred these costs prior to any unlawful actions on his part, and as we have discussed, he properly obtained an eviction judgment that was neither set aside nor challenged at trial. Peterson makes several other arguments, including that permitting Tucker to recover on the present facts somehow "erodes the rights of minority tenants." Peterson's remaining claims of error are inadequately briefed, however, and they are unsupported by citation to legal authority. We will not

⁹ The "Findings of Fact and Conclusions of Law" from the administrative rent abatement proceedings relating to the utility disconnection states that "tenant paid rent after 3/1/99 and landlord received rent payment." Also in the record are copies of rent receipts that were apparently introduced at a hearing before a court commissioner. One of the receipts is dated March 24, 1999, and it recites that it is for "\$2,871.90 For Partial Rent ... from Nov 21, 1998 to Apr. 20, 1999." (Emphasis added.)

address them further. *See State v. Shaffer*, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980).

CONCLUSION

¶16 For the reasons discussed above, we modify the appealed judgment as follows: Tucker's damages, including attorney's fees, are reduced to \$3,952.64 (see footnote 8), and Peterson is awarded an offset of \$81 for his filing and service fees in obtaining the original judgment for eviction. The net judgment in Tucker's favor is thus modified to be \$3,871.64, and as modified, it is affirmed. On remand, the clerk of circuit court should enter an amended judgment to reflect the modified amount. No costs to either party. *See* WIS. STAT. RULE 809.25(1)(a)5.

By the Court.—Judgment modified, and as modified, affirmed and cause remanded with directions.

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

