

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 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. 02-0723
STATE OF WISCONSIN**

Cir. Ct. No. 02-SC-1595

**IN COURT OF APPEALS
DISTRICT IV**

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

PLAINTIFF-APPELLANT,

V.

REGINA K. BUIE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
ROBERT A. DE CHAMBEAU, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ Ray A. Peterson, d/b/a Master Builders, appeals an order of the circuit court dismissing his complaint seeking to evict Regina Buie.

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.

Peterson argues that he gave Buie a valid five-day notice as required by WIS. STAT. § 704.17(2)(a), and that Buie did not comply, thus entitling Peterson to a judgment for eviction. We disagree and affirm the trial court.

Background

¶2 On December 1, 2000, Buie and Peterson entered a residential lease agreement, in which Buie agreed to pay rent on the twentieth of each month. As of January 20, 2002, Buie had not paid her January rent payment. Peterson gave Buie a five-day notice, dated January 25, 2002, to pay rent or vacate the property on or before February 1, 2002. Buie did not pay the rent due by February 1, 2002. On February 6, 2002, Peterson filed a complaint seeking to evict Buie.

¶3 The case was tried to the court. Buie testified that she customarily paid rent late after the twentieth of the month. She testified that the first rental payment she made was on December 29, 2000, rather than its due date, December 20, 2000. Buie testified that she has been paying rent late “for a year” and that her regular payment of rent was around the first of the month as opposed to the twentieth of the month. Her most recent rent payment was tendered on December 28, 2001. Buie testified that the reason she usually paid her rent around the first of the month was because she receives her income either at the beginning or the end of the month. Moreover, Buie testified to only three occasions on which she paid her rent close to the twentieth of the month: once on the twentieth, once on the twenty-first, and once on the twenty-third.

¶4 The trial court found that Buie established a pattern of paying rent at the end of the month, rather than on the twentieth of the month as required by the lease. The trial court stated:

There is a lease in this matter and there are terms in the lease. However, one of the things, and probably, Ms. Buie, you said it more eloquently than I can, that it to some extent is ridiculous. There had been established a pattern, and for whatever reason, but that you were paying a late charge.... That has not been contested in any way, and the reason for that is that you – your income flow was such that you received this at the end of the month and were paying your rent at the end of the month and were paying a premium for paying it at that time because it was late, but it had been established over the period of 12 months.

Discussion

¶5 When a tenant under a lease for a term of a year or less fails to pay rent, the tenancy is terminated if the landlord subsequently provides the tenant with a notice requiring the tenant to pay rent or vacate the premises on or before a date at least five days after the tenant is given notice, and the tenant fails to pay the rent before the deadline provided in the notice. WIS. STAT. § 704.17(2)(a).² The question here concerns which date should be deemed the rent-payment due date.

¶6 Whether a tenant fails to pay rent when due is a question of fact. We review factual findings by the trial court under a clearly erroneous standard of review. *Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983). The resolution of this case turns on the facts, and we will follow our normal practice of assuming facts, reasonably inferable from the record, in a

² WISCONSIN STAT. § 704.17(2)(a) states, in relevant part:

If a tenant under a lease for a term of one year or less, or a year-to-year tenant, fails to pay any instalment of rent when due, the tenant's tenancy is terminated if the landlord gives the tenant notice requiring the tenant to pay rent or vacate on or before a date at least 5 days after the giving of the notice and if the tenant fails to pay accordingly.

manner that supports the trial judge's decision. *See, e.g., State v. Wilks*, 117 Wis. 2d 495, 503, 345 N.W.2d 498 (Ct. App. 1984).

¶7 Peterson contends that he complied with WIS. STAT. § 704.17(2)(a) by providing Buie with a notice dated January 25, 2002, requiring Buie to pay rent or vacate by February 1, 2002. Peterson argues that the written lease requires that the rent be paid by the twentieth of each month and, therefore, when Buie did not pay her January rent by January 20, 2002, Buie's failure to pay rent by February 1, 2002, entitles Peterson to terminate her tenancy.

¶8 However, the trial court found that Peterson had established a pattern of accepting the rent payment at a date after the twentieth of the month. Buie testified that her first rent payment was on December 29, 2000, and that she normally paid the rent around the first of the month and had been doing so for about a year. For example, for the month of December 2001, preceding the January 25 notice of late payment that Peterson gave Buie, Buie had paid her rent on the twenty-eighth. Buie testified that on only three occasions during the prior thirteen months did she pay her rent on or before the twenty-third of the month. Moreover, it is reasonable to infer that Buie typically paid her rent about ten days late because Buie said she paid late because she received her income near the beginning of each month.

¶9 A pattern of late rent payments can operate to change the time the rent is due:

Any expressions or conduct of the obligee leading the obligor reasonably to believe that performance on time is not to be required operates as a waiver of the time condition for subsequent defaults as well [as] antecedent ones. If the obligee receives a series of delayed payments without objection, the obligor's belief that timely payment has been waived may be reasonable.

8 CATHERINE M.A. MCCAULIFF, CORBIN ON CONTRACTS § 40.3, at 530-31 (Joseph M. Perillo ed., rev. ed. 1999) (footnotes omitted). The trial court's ruling denying relief to Peterson necessarily assumes that Peterson gave premature notice. That is, that Peterson gave notice five days after the contract due date, when the pattern of late payments established an actual due date approximately ten days after the contract due date. Although the trial court did not make an express finding as to which day Buie customarily paid rent, we can infer from the trial court's ultimate decision that the court concluded it was sometime after the twenty-fifth of each month.

¶10 We conclude that Peterson gave Buie the five-day notice prematurely because Buie's rent was not due until after January 25, 2002. Therefore, Peterson failed to comply with WIS. STAT. § 704.17(2)(a). We affirm the trial court's decision to dismiss the complaint.

By the Court.—Order affirmed.

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

