COURT OF APPEALS
DECISION
DATED AND FILED

October 24, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0908 **Cir. Ct. No. 02-SC-1594**

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

EDWIN F. HAFERMAN,

PLAINTIFF-APPELLANT,

V.

MARY K. HEBENSTREIT,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: MORIA G. KRUEGER, Judge. *Reversed and cause remanded.*

¶1 DEININGER, J.[1] Edwin Haferman appeals an order dismissing his action to evict Mary Hebenstreit from his mobile home and to recover personal

[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.

property located within his mobile home. Haferman claims that the trial court erred in concluding that the termination notice he served on Hebenstreit did not terminate her tenancy and in dismissing his replevin claim without addressing the claim. We agree, and therefore we reverse the order and remand for further proceedings.

BACKGROUND

¶2 Edwin Haferman owns a mobile home and various items of personal property within it. In May 2001, Haferman entered into a written lease with Mary Hebenstreit, by which Hebenstreit leased both the mobile home and the personal property contained therein. The lease states that the parties executed the lease "[i]n consideration of the mutual covenants contained herein and other valuable consideration received." The lease calls for "rental payments in the amount of $ ZERO/NONE per year." The lease provides that it "will commence on June 1, 2001 and will continue from year to year on the same terms and conditions herein. Neither party may terminate this Lease, except for a separate, mutual accord."

¶3 By December 2001, Haferman no longer wanted Hebenstreit to live in his mobile home. He retained counsel, who sent Hebenstreit a letter stating that "Mr. Haferman intends to terminate your tenancy" of the mobile home and that "[t]he termination is effective 28 days from your receipt of this letter." The letter

states that it was served via certified mail,[2] and Hebenstreit does not dispute that she received the letter.

¶4 Hebenstreit remained in the mobile home beyond the termination date. Accordingly, in February 2002, Haferman commenced a small claims action for eviction and for replevin of his personal property contained within the mobile home.

¶5 At trial, Haferman argued that he was entitled to an order of eviction because the written lease was invalid and because his termination notice complied with applicable landlord/tenant law governing tenants who occupy property without a valid lease. The trial court disagreed, holding that "[t]hese are two adults signing a contract … telling me that there's consideration. I think the lease has got to play out." The court therefore denied the eviction claim. The court refrained from deciding Haferman's replevin claim, stating that a court commissioner should decide this claim. Nevertheless, the court entered an order which appears to dismiss Haferman's action in its entirety. Haferman appeals the dismissal order.

ANALYSIS

¶6 As an initial matter, we clarify the scope of our review. On appeal, Haferman asks us: (1) to "find as fact" that his mobile home constitutes personal

[2] We note that Haferman includes in his appendix a certificate of service concerning service on Hebenstreit of a "Notice to Vacate Premises" on December 14, 2001. However, neither the certificate of service nor the "Notice to Vacate Premises" to which it refers appear in the record before us. We remind Haferman that parties are only to include in an appendix "portions *of the record* essential to an understanding of the issues raised." WIS. STAT. RULE 809.19(2) (emphasis added).

property and is therefore properly the subject of a replevin action; (2) to "grant" his replevin action; (3) to "award" damages for loss of enjoyment of property, for the rental fees associated with the lot on which the mobile home sits, and for reasonable rent at a rate of $1.00 per square foot per month;[3] and (4) to "order" double damages, court costs, and attorney fees. We decline to do any of these things.

¶7 None of the above issues were tried in the circuit court. As a reviewing court, we do not have original jurisdiction to try cases. *See* WIS. STAT. § 752.01. Accordingly, "'[w]here the question raised for the first time on appeal involves factual elements not raised by the pleadings or not brought to the attention of the lower court, this court … will not generally decide such questions….'" ***Wirth v. Ehly***, 93 Wis. 2d 433, 444, 287 N.W.2d 140 (1980) (citation omitted). Nor will we "blindside trial courts with reversals based on theories which did not originate in their forum." ***State v. Rogers***, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995). Rather, we review only those issues raised in the trial court. Here, the only issue Haferman raised in the trial court on the record before us was whether, under the lease terms and applicable landlord/tenant law, Haferman's termination notice legally terminated Hebenstreit's tenancy of his

[3] Haferman does not specify the period of time for which he seeks damages related to Hebenstreit's use of the mobile home. We assume that he does not request damages for the period of time prior to his service of the termination notice, inasmuch as such a request would be inconsistent with the parties' agreement for "rental payments in the amount of $ ZERO/NONE per year."

mobile home. Accordingly, we limit our review to this issue, which we decide independently of the trial court.[4]

¶8 We conclude that the lease at issue is not a valid lease. To be valid, a lease must be for "a definite period of time," meaning that it either: (1) has "a fixed commencement date and a fixed expiration date"; or (2) has a commencement and expiration date that "can be ascertained by reference to some event, such as completion of a building." WIS. STAT. § 704.01(1). Here, the written lease has no ascertainable expiration date. The lease continues indefinitely absent the parties' "separate, mutual accord" to terminate it. We conclude that a termination that may occur only on the mutual assent of both parties is not ascertainable "by reference to some event" because, if Hebenstreit never chooses to agree to a termination, the lease would, on its face, continue indefinitely. Accordingly, the lease does not qualify as a valid lease under § 704.01(1).

¶9 Rather, we conclude that Hebenstreit occupied Haferman's mobile home as a tenant at will. A tenancy at will exists where a tenant occupies property with the owner's permission but without a valid lease and without paying periodic rent. WIS. STAT. § 704.01(5). Hebenstreit's tenancy fits this definition. Hebenstreit lived at Haferman's mobile home with his permission until he served the termination notice. Additionally, given that the lease called for "rental

[4] The resolution of this issue turns upon: (1) an interpretation of the lease; (2) an interpretation of Haferman's termination notice; and (3) the application of Wisconsin's landlord/tenant law (WIS. STAT. ch. 704) to Hebenstreit's undisputed receipt of the termination notice. The interpretation of written instruments and the application of law to an undisputed set of facts are questions of law that we may decide independently of the trial court. *See* ***Cohn v. Town of Randall***, 2001 WI App 176, ¶7, 247 Wis. 2d 118, 633 N.W.2d 674, *review denied*, 2001 WI 117, 247 Wis. 2d 1035, 635 N.W.2d 783 (Wis. Sept. 19, 2001) (No. 00-2176); ***Ball v. District No. 4, Area Bd.***, 117 Wis. 2d 529, 537, 345 N.W.2d 389 (1984).

payments in the amount of $ ZERO/NONE per year," Hebenstreit clearly did not pay rent on a periodic basis.

¶10 A landlord may terminate a tenancy at will by giving the tenant notice of the termination at least 28 days prior to the termination date. WIS. STAT. § 704.19(3). The notice "must be in writing, formal or informal," and must "substantially inform" the tenant "of the intent to terminate the tenancy and the date of termination." Section 704.19(4). The landlord need not state any reason for the removal. *See* ***id***. The landlord may serve the notice in a variety of ways, including by certified mail to the tenant's last known address. *See* WIS. STAT. § 704.21(1)(d).

¶11 Haferman fulfilled all of the above requirements. His counsel wrote Hebenstreit a letter stating that he "intends to terminate" her tenancy of the mobile home "effective 28 days from [her] receipt of this letter." The letter also specifies that it was served via certified mail, and Hebenstreit does not dispute that she received the letter or that she remained living in the mobile home beyond the twenty-eight-day period.

¶12 Because Haferman's termination notice complied with the requirements for terminating Hebenstreit's tenancy at will, we conclude that the trial court erred in refusing to evict Hebenstreit from the premises. Accordingly, we remand this case for entry of an order that a writ of restitution be issued under WIS. STAT. § 799.44 restoring possession of the mobile home to Haferman. Additionally, because the trial court did not address Haferman's replevin claim for his personal property within the mobile home, we conclude that it should do so on

remand. In revisiting this issue, the court may elect to take additional evidence in order to provide a complete record on this issue.[5]

By the Court.—Order reversed and cause remanded.

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

[5] This court must hear a timely appeal of the grant or denial of an eviction order, notwithstanding the fact that other claims may still be pending between the parties. *See* WIS. STAT. § 799.445. Haferman filed his notice of appeal within fifteen days of the order dismissing his eviction claim, thereby giving this court jurisdiction to consider his claim of error.