COURT OF APPEALS
DECISION
DATED AND FILED

February 4, 2004

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. 03-1978 **Cir. Ct. No. 02SC005895**

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

ANITA GARTZ,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

J&J ASSOCIATION HOLDING, LLC,

DEFENDANT-RESPONDENT-CROSS-APPELLANT,

HAIR PRO'S,

GARNISHEE.

APPEAL AND CROSS-APPEAL from a judgment of the circuit court for Waukesha County: LEE S. DREYFUS, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

¶1 NETTESHEIM, J.[1] Anita Gartz sued her former landlord, J&J Association Holding, LLC, (J&J) seeking double damages pursuant to WIS. ADMIN. CODE § ATCP 134.06(2)(a) based upon her claim that J&J did not timely return her security deposit within twenty-one days of her surrender of the premises. J&J counterclaimed seeking additional rent, a late rent fee, the cost of replacing and installing a new dishwasher, and the cost of carpet cleaning.

¶2 The trial court rejected Gartz's claim for double damages and J&J's counterclaim for additional rent and the late rent fee. However, the court granted J&J's claim for the costs related to the new dishwasher and the cost for carpet cleaning.

¶3 Gartz appeals pro se and J&J cross-appeals. We affirm the trial court's denial of Gartz's claim for double damages and the award to J&J for the carpet cleaning cost. We reverse the court's denial of J&J's counterclaim for additional rent and the late rent fee. We also reverse the court's award to J&J for the costs related to the dishwasher.

BACKGROUND

¶4 On March 25, 2001, Gartz and J&J entered into a written month-to-month rental agreement. The agreement included a termination provision which stated, "A sixty (60) day notice by tenant, must be provided IN WRITING effective only as of the first day of the month, must be given before vacating," and "Prior to vacating, the undersigned must have all carpeting cleaned by a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version.

professional commercial cleaning service and provide a receipt to owner." Both provisions include a space for initials by a prospective renter indicating "Agreed" with a space for the date signed. Gartz initialed both provisions and dated them March 25, 2001.

¶5 On November 25, 2002, Gartz filed this small claims action against J&J alleging that she had surrendered the rental property on September 3, 2002, but had not received her security deposit within the twenty-one-day period prescribed by the law. As such, Gartz sought double damages in the amount of $1260 pursuant to WIS. STAT. § 100.20(5).

¶6 In its response, J&J stated that although Gartz claimed to have mailed her notice on July 29, 2002, J&J did not receive the notice until August 2. J&J further stated that Gartz had failed to allow five days after the day of mailing for an out-of-state notification pursuant to WIS. STAT. § 704.19(7)(c)[2] and that she had failed to send the notice via registered or certified mail pursuant to WIS. STAT. § 704.21(2)(c). Therefore, pursuant to the termination provision of the agreement, J&J alleged that Gartz's sixty-day notice was first effective as of September 1, and she was not entitled to her security deposit until twenty-one days following surrender of the premises on November 1. Since J&J had refunded the full security deposit to Gartz by November 16, J&J claimed that the deposit was timely returned.

¶7 Based on this same reasoning, J&J counterclaimed for the October rent ($680 including a $40 late fee). J&J also counterclaimed for the cost of

[2] J&J was headquartered in Illinois.

replacing and installing a new dishwasher ($310.42), and the cost of carpet cleaning ($84).[3]

¶8 At the initial hearing, a judicial court commissioner ruled in Gartz's favor on her complaint and rejected J&J's counterclaim. J&J filed a demand for, and received, a trial de novo in the small claims court. *See* WIS. STAT. § 799.207(2)(b) ("Either party may file a demand for trial within 10 days from the date of an oral decision [by the court commissioner] or 15 days from the date of mailing of a written decision [of the court commissioner] to prevent the entry of the judgment.").

¶9 Both Gartz, appearing pro se, and Jeff Ritter, a principal owner of J&J, testified. Gartz testified that she mailed her rent check together with a sixty-day termination notice on July 29, 2002, informing J&J that she would be vacating the premises by September 30.[4] Gartz did not know when J&J Association received the notice, nor did she send the notice by certified mail. Gartz vacated the premises on September 3 and turned in her keys to a caretaker. The caretaker who conducted her "checkout" on September 3 noted that the dishwasher was broken. According to Gartz, she had the dishwasher repaired three times, and the repairperson had informed her that the dishwasher was old and needed to be used more often in order to work properly.

[3] J&J also counterclaimed for $421.15, representing costs incurred for re-rental and advertising. The trial court rejected this claim. On appeal, J&J does not mount any argument in support of this claim or against the trial court's ruling. We therefore do not discuss this aspect of the case.

[4] Although Gartz and Ritter had previously discussed an early move out by Gartz, the only written notice provided by Gartz was that of July 29, 2002.

¶10 On October 30, 2002, after deducting an outstanding water bill, J&J paid Gartz $565 of Gartz's $630 security deposit. However, on approximately November 12, J&J paid Gartz the deducted amount after discovering that Gartz had paid the water bill. Therefore, by November 16, Gartz had received her entire security deposit.

¶11 Ritter, the J&J representative, testified that he did not receive Gartz's sixty-day notice until August 2, 2002. Relying on the lease provision that such notice was "effective only as of the first day of the month," Ritter contended that the notice was effective September 1. Therefore, Ritter reasoned that the termination was effective as of November 1 under the sixty-day notice provision in the lease. Ritter testified that although J&J had not received October rent from Gartz, J&J nonetheless returned Gartz's security deposit in a letter dated October 28, 2002, because J&J was "looking to be done with this." Ritter testified that by the time he became aware that the dishwasher was broken it was irreparable and needed to be replaced. Ritter testified that the value of the dishwasher in working order was approximately $50.

¶12 The trial court found that Gartz's notice of termination to J&J was received on August 2. Therefore, pursuant to the lease agreement, the court ruled that the notice was effective as of September 1 and that the lease terminated November 1, sixty days thereafter. Because Gartz had received her full security deposit by November 16, 2002, within the twenty-one day limitation period mandated by WIS. ADMIN. CODE § ATCP 134.06(2)(a), the court ruled that Gartz was not entitled to double damages.

¶13 With respect to J&J's counterclaim, the trial court made the following rulings: (1) J&J had abandoned its claim for October rent by failing to

make any claim for rent prior to filing its counterclaim and by virtue of an understanding with Gartz that it would re-rent the apartment upon her departure, (2) J&J was entitled to $84 for carpet cleaning based on Gartz's failure to provide J&J Association with a receipt under the terms of the lease, (3) J&J was entitled to the cost of a new dishwasher and installation in the amount of $310.42 due to extraordinary wear and tear, and (4) J&J was entitled to statutory costs in the amount of $127.62.

¶14 Gartz appeals and J&J cross-appeals.

DISCUSSION

Gartz's Appeal

¶15 Gartz first contends that the trial court erred in its determination that her sixty-day notice became effective on September 1, 2002, and therefore, her security deposit was timely returned. Resolution of this dispute involves the application of law to the facts of the case. It therefore presents a question of law that we review de novo. ***Bloomer Housing v. City of Bloomer***, 2002 WI App 252, ¶12, 257 Wis. 2d 883, 653 N.W.2d 309. However, we will not overturn the trial court's findings of fact unless they are clearly erroneous. ***Id***. Where, as here, there is conflicting testimony, the fact finder is the ultimate arbiter of credibility and when more than one reasonable inference can be drawn, "the reviewing court must accept the inference drawn by the trier of fact." ***Id***. (citation omitted).

¶16 The lease signed by Gartz provides, "A sixty (60) day notice by tenant, must be provided IN WRITING effective only as of the first day of the month, must be given before vacating." Gartz does not dispute that she had agreed to a sixty-day notice requirement and understood that requirement when she

signed the lease. Gartz testified that in keeping with this requirement, she mailed her written termination notice on July 29, 2002, with the expectation that it would be effective as of August 1, 2002. Ritter testified that he did not receive Gartz's notice until August 2, 2002.

¶17 Because Gartz did not send her notice via registered or certified mail, there is no evidence to contradict Ritter's testimony that he did not receive the notice until August 2, 2002. While Gartz argues that Ritter's testimony is incredible because previous mail exchanges between Gartz and Ritter, who resides in Illinois, had taken only two days, there is no evidence that this particular piece of mail arrived in a two-day time period. Therefore, the trial court's finding that J&J received notice on August 2, 2002, is not clearly erroneous. Further, pursuant to WIS. STAT. § 704.19(7)(c), if a termination notice is mailed out of state, notice is considered to be given on the fifth day after the day of mailing.

¶18 As noted earlier, WIS. ADMIN. CODE § ATCP 134.06(2)(a), requires that a landlord must return a tenant's security deposit "[w]ithin 21 days after a tenant surrenders the rental premises." Since we have upheld the trial court's finding that J&J did not receive Gartz's termination notice until August 2, 2002, the notice was not effective until September 1 per the parties' lease agreement. Since the lease agreement provided for a sixty-day termination notice, the lease terminated November 1. Pursuant to § ATCP 134.06(2)(a), Gartz was entitled to the return of her security deposit within twenty-one days thereafter. J&J complied with this deadline since it is undisputed that Gartz received her full security deposit from J&J by November 16. Therefore, the trial court properly rejected Gartz's claim for double damages under WIS. STAT. § 100.20(5).

¶19 Gartz next challenges the trial court's award of $310.42 for the replacement and installation of a new dishwasher. Gartz argues that the dishwasher was outdated and needed repair due to only "normal wear and tear." Pursuant to WIS. ADMIN. CODE § ATCP 134.06(3)(c), a landlord is not authorized to withhold a security deposit for normal wear and tear, or for other damages or losses for which the tenant cannot reasonably be held responsible under applicable law. While J&J did not withhold Gartz's security deposit due to the dishwasher repairs, this law nevertheless instructs that a landlord may not recover for the depreciation of appliances absent extraordinary wear and tear.

¶20 Gartz had the dishwasher repaired three times during her tenancy. The repairperson told her that the problem was due to the dishwasher's age and the lack of frequent use. When Gartz was preparing to move out, she checked the appliances and discovered that the dishwasher was not working. When J&J's employee checked Gartz out of the apartment on September 3, 2002, the written check-out list notes that the dishwasher was not working.

¶21 Ritter testified that he did not receive a copy of the check-out list indicating that the dishwasher was broken and therefore he did not learn of this until after he returned Gartz's security deposit. Ritter estimated the value of the dishwasher during Gartz's tenancy to be $50, given its age and depreciation. In closing arguments, J&J reiterated that it was not "asking this court to award [J&J] $200 or $300 to replace an entire dishwasher. [J&J] understands that [the dishwasher] certainly had diminished [in] value at that point in time. The tenant is responsible for such things, and I would argue that [Gartz] would be responsible for the $50." However, J&J did not provide any evidence of extraordinary wear and tear to support its request for $50. Indeed, Ritter's testimony gives no indication that Gartz was responsible for the dishwasher's condition. Contrary to

J&J's statements in closing, a tenant is not responsible for the depreciation of appliances absent extraordinary wear and tear.

¶22 Despite J&J's request for an award of $50 relating to the dishwasher, the trial court awarded J&J $310.42, representing the full cost of replacing and installing a new dishwasher. We hold that this award was error. There is no evidence in the record to suggest that Gartz's use of the dishwasher represented anything other than normal wear and tear. We reverse this portion of the judgment.[5]

¶23 Finally, Gartz challenges the trial court's $84 award to J&J for the cost of carpet cleaning. Gartz argues that the provision in the lease requiring her to clean the carpet and to provide a receipt for such service is invalid. Gartz relies on WIS. ADMIN. CODE § ATCP 134.06(3)(b), which prohibits nonstandard rental provisions that permit a landlord to withhold money from a security deposit for reasons not identified under § 134.06(3)(a) unless the lease identifies the provision as a nonstandard rental provision in a separate document. While the administrative code places restrictions on withholdings from security deposit, it does not restrict a tenant from assuming ordinary maintenance obligations under the terms of the lease, *see, e.g.,* WIS. ADMIN. CODE § ATCP 134.08(5). Nor does the code restrict a landlord's right to seek damages against a tenant for a breach of such obligations by an independent action. Gartz misses this important, but subtle, distinction.

[5] Although we have determined that J&J is not entitled to reimbursement for a replacement dishwasher and its installation, we note that the record would not otherwise have supported an award greater than $50. Ritter testified as to the dishwasher's age and depreciated state at the time of Gartz's tenancy. The only estimate as to the amount owed by Gartz for the replacement of the dishwasher is Ritter's estimate of $50.

¶24 True, carpet cleaning for ordinary wear and tear is not an identified reason under WIS. ADMIN. CODE § ATCP 134.06(3)(a) for withholding from a security deposit. However, the lease in this case does not recite that J&J may withhold money from Gartz's security deposit for this cost. As such, the lease does not violate the administrative code. Instead, J&J brought an independent action via its counterclaim for recovery of this cost.

¶25 Gartz additionally relies on WIS. ADMIN. CODE § ATCP 134.08[6] in support of her contention that the carpet cleaning provision is a prohibited rental

[6] WISCONSIN ADMIN. CODE § ATCP 134.08, entitled "**Prohibited rental agreement provisions**" provides:

> No rental agreement may:
>
> **(1)** Authorize the eviction or exclusion of a tenant from the premises, other than by judicial eviction procedures as provided under ch. 799 Stats.
>
> **(2)** Provide for an acceleration of rent payments in the event of tenant default or breach of obligations under the rental agreement, or otherwise purport to waive the landlord's obligation to mitigate damages as provided under s. 704.29, Stats.
>
> **(3)** Require payment, by the tenant, of attorney's fees or costs incurred by the landlord in any legal action or dispute arising under the rental agreement. This does not prevent the recovery of costs or attorney's fees by a landlord or tenant pursuant to a court order under ch. 799 or 814, Stats.
>
> **(4)** Authorize the landlord or any agent of the landlord to confess judgment against the tenant in any action arising under the rental agreement.
>
> **(5)** Relieve, or purport to relieve the landlord from liability for property damage or personal injury caused by negligent acts or omissions of the landlord. This does not affect ordinary maintenance obligations assumed by a tenant under a rental agreement, in accordance with sub. (7) and s. 704.07, Stats.
>
> **(6)** Impose, or purport to impose liability on a tenant for:

(continued)

agreement provision. However, Gartz fails to identify the specific section under § ATCP 134.08 on which she relies. We have reviewed § ATCP 134.08 and conclude that the carpet cleaning provision is not prohibited under this section. Indeed, as noted above, § ATCP 134.08(5) contemplates a tenant's assumption of ordinary maintenance requirements under a lease agreement.

¶26 The lease provision requiring Gartz to have the carpet cleaned prior to vacating and to provide a receipt for the cleaning to J&J is initialed and dated by Gartz. Although Gartz testified that she complied with the provision by having the carpets cleaned, it is undisputed that she did not provide J&J with a receipt for the cleaning. As such, we conclude that the trial court did not err in awarding J&J $84 for costs it incurred in having the carpets cleaned.

J&J's Cross-Appeal

¶27 J&J appeals the trial court's ruling denying its claim for $640 in additional rent plus a $40 late rent fee. J&J argues that because the trial court determined that Gartz's notice was not effective until September 1, 2002, resulting in a termination date of November 1, 2002, the trial court erred in its determination that J&J is not entitled to additional rent for the month of October.

> (a) Personal injury arising from causes clearly beyond the tenant's control.
>
> (b) Property damage caused by natural disasters, or by persons other than the tenant or the tenant's guests or invitees. This does not affect ordinary maintenance obligations assumed by a tenant under the rental agreement, in accordance with sub. (7) and s. 704.07, Stats.
>
> **(7)** Waive any statutory or other legal obligation on the part of the landlord to deliver the premises in a fit or habitable condition, or maintain the premises during tenancy.

¶28 The trial court ruled that J&J had abandoned this claim:

> [A]s relates to any additional rent for the month of October I'm going to deny that request …. I'm satisfied that they effectively abandoned the request for additional rent for a variety of reasons, including that they did not unequivocally choose their remedies under the circumstances. They did, in fact—there were discussions relative to it with Miss Gartz.

¶29 WISCONSIN STAT. § 704.29 governs the recovery of rent and damages by a landlord, including a landlord's obligation to mitigate such damages. It provides:

> **(1)** SCOPE OF SECTION. If a tenant unjustifiably removes from the premises prior to the effective date for termination of the tenant's tenancy and defaults in payment of rent … the landlord can recover rent and damages except amounts which the landlord could mitigate in accordance with this section, unless the landlord has expressly agreed to accept a surrender of the premises and end the tenant's liability. Except as the context may indicate otherwise, this section applies to the liability of a tenant under a lease, a periodic tenant, or an assignee of either.
>
> **(2)** MEASURE OF RECOVERY. (a) In this subsection, "reasonable efforts" mean those steps that the landlord would have taken to rent the premises if they had been vacated in due course, provided that those steps are in accordance with local rental practice for similar properties.
>
> (b) In any claim against a tenant for rent and damages, or for either, the amount of recovery is reduced by the net rent obtainable by reasonable efforts to rerent the premises ….
>
> **(3)** BURDEN OF PROOF. 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.
>
> **(4)** ACTS PRIVILEGED IN MITIGATION OF RENT OR DAMAGES. The following acts by the landlord do not defeat the landlord's right to recover rent and damages and do not constitute an acceptance of surrender of the premises:
>
> (a) Entry, with or without notice, for the purpose of inspecting, preserving, repairing, remodeling and showing the premises;
>
> (b) Rerenting the premises or a part thereof, with or without notice, with rent applied against the damages caused by the original tenant and in reduction of rent accruing under the original lease;
>
> (c) Use of the premises by the landlord until such time as rerenting at a reasonable rent is practical, not to exceed one year, if the landlord gives prompt written notice to the tenant that the landlord is using the premises pursuant to this section and that the landlord will credit the tenant with the reasonable value of the use of the premises to the landlord for such a period;
>
> (d) Any other act which is reasonably subject to interpretation as being in mitigation of rent or damages and which does not unequivocally demonstrate an intent to release the defaulting tenant.

¶30 Here, Gartz testified that she possibly had a conversation with Ritter about moving out of the apartment early: "I believe I did say possibly that I would be leaving early, and [Ritter] said, well, if I rent it out then I would reimburse you, be sure to mail your September rent …." Gartz then moved out of the apartment on September 3, 2002.

¶31 Ritter testified that when he received Gartz's notice, he contacted her, discussed her decision and asked her if she wished to vacate any earlier "in which case if [he] was able to get a tenant to … rent the apartment prior to the end of her lease term [he] would provide back any prorated amount." Ritter additionally testified that "from September on" he had made reasonable efforts to

rerent the premises including advertising in newspapers and having a sign out in front of the apartment. Despite his efforts, he was not able to rerent the apartment until January 2003.

¶32 We conclude that this evidence does not support the trial court's determination that J&J abandoned its claim or elected its remedies. WIS. STAT. § 704.29(1) provides that "the landlord can recover rent and damages except amounts which the landlord could mitigate in accordance with this section, unless the landlord has *expressly agreed* to accept a surrender of the premises and end the tenant's liability." (Emphasis added.) Here, there is no evidence that J&J expressly agreed to accept Gartz's surrender of the premises and end her liability. Both Gartz's and Ritter's testimony reveal J&J's compliance with § 704.29 by attempting to rerent the premises after Gartz's surrender. In addition, J&J presented unrefuted evidence that it had, in fact, made reasonable efforts to do so, thereby mitigating its damages pursuant to § 704.29(3). Finally, there is no indication, express or implied, that J&J was relieving Gartz from her obligation to pay rent until the end of her lease term.[7] In summary, this evidence does not show any abandonment by J&J of its right to rent should it fail to rerent the premises after Gartz had vacated the premises. Rather, the evidence demonstrates J&J's compliance with the dictates of § 704.29(3).

[7] The fact that J&J returned Gartz's security deposit in full without withholding its October rent, *see* WIS. ADMIN. CODE § ATCP 134.06(3)(a)1., does not indicate an abandonment of its claim. *See* ***Armour v. Klecker***, 169 Wis. 2d 692, 701, 486 N.W.2d 563 (Ct. App. 1992) ("[a] landlord, who believes he has a claim for rent that the tenants are legally obligated to pay, but does not wish to be subject to the penalties provided by statute, can return the security deposit and sue the tenant for damages").

¶33 Here, the trial court correctly determined that Gartz's lease term ended on November 1, 2002. As such, J&J is entitled to recover back rent for the month of October 2002 in addition to a $40 late fee pursuant to the terms of the lease. We therefore reverse that portion of the judgment that denied J&J's claim for $680 in back rent and late fees.

CONCLUSION

¶34 As to Gartz's appeal, we hold that the evidence supports the trial court's finding that Gartz's sixty-day notice became effective on September 1, 2002, with a lease termination date of November 1, 2002. Since J&J paid Gartz her security deposit within the twenty-one-day deadline following surrender of the premises, Gartz was not entitled to double damages. We further hold that the lease provision relating to the carpet cleaning is enforceable and therefore we uphold the trial court award to J&J for the cost of carpet cleaning.

¶35 As to J&J's cross-appeal, we conclude that absent evidence to support a finding of extraordinary wear and tear, the trial court erred in awarding J&J the costs relating to the new dishwasher. Finally, we conclude that in light of the trial court's correct determination that Gartz's lease did not terminate until November 1, 2002, and in the absence of evidence showing J&J abandoned its claim for additional rent and the late rent fee, the trial court erred in denying J&J's claim for these amounts.

¶36 We affirm in part, reverse in part, and remand with directions that the trial court enter judgment in the amount of $891.62 in favor of J&J.[8]

¶37 Costs are not awarded to either party.

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.

[8] The breakdown of the $891.62 award is as follows: (1) $84 for carpet cleaning, (2) $640 for additional rent, (3) $40 for late fee, and (4) $127.62 for statutory costs.