COURT OF APPEALS
DECISION
DATED AND FILED

October 25, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP278 **Cir. Ct. No. 2010SC676**

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

PATTI ANN LANGFORD,

PLAINTIFF-RESPONDENT,

V.

STEPHANIE ROBINSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Polk County: JAMES R. ERICKSON, Judge. *Reversed and cause remanded with directions.*

¶1 PETERSON, J.[1] Stephanie Robinson, pro se, appeals a small claims judgment entered against her on December 20, 2010. Although in her notice of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

appeal she does not reference the circuit court's January 19, 2011 order denying her motion for reconsideration, we construe the notice of appeal to encompass the January 19 order. *See* ***East Winds Props., LLC v. Jahnke***, 2009 WI App 125, ¶1, 320 Wis. 2d 797, 772 N.W.2d 738 (because the notice of appeal post-dated the order following the judgment, jurisdiction extended to the order even though the notice only mentioned the judgment).

¶2 On appeal, Robinson contends she was permitted to withhold Langford's deposit after Langford failed to enter into a rental agreement with her. We conclude that, pursuant to WIS. ADMIN. CODE § ATCP 134.05(3),[2] Robinson may be entitled to withhold some or all of Langford's deposit. We reverse and remand to the circuit court for factual determinations regarding the terms of the proposed rental agreement, the actual costs and damages Robinson incurred as a result of Langford's failure to enter into the agreement, if any, and whether Robinson appropriately mitigated those losses.

BACKGROUND

¶3 Langford viewed Robinson's 600 Michigan Avenue property in June 2010. Langford then met with Robinson and Robinson's husband, David, to rent the property. The Robinsons signed two copies of a lease and gave them to Langford. Langford allegedly signed the leases in the Robinsons' presence. Langford then took both leases with her to obtain her husband's signature. The Langfords, who were going to move into the property in July, scheduled a walkthrough with Robinson that coincided with their move-in date. They were

[2] All references to the Wisconsin Administrative Code are to the November 2006 version.

supposed to return the signed leases at the walkthrough. Prior to the walkthrough, Langford paid Robinson an $875 deposit and prorated first month's rent in the amount of $678.

¶4 Robinson forgot about the July walkthrough and failed to appear.[3] Langford, who did appear, was shown the premises by the former tenant and was unhappy with the property's condition.[4] When Robinson contacted Langford later that day, Langford informed her about the property's condition and told her that she no longer wanted to rent the property. Langford never moved into the Michigan Avenue property. Later that day, Langford and her husband moved into an apartment. The Robinsons re-rented the Michigan Avenue property in September 2010.

¶5 At the small claims trial, Robinson argued she should be permitted to keep Langford's deposit to mitigate the two months' lost rent. She asserted she stopped advertising the property as available for rent in June because she believed in "good faith" that Langford was going to rent the property. The court determined that, because Langford had failed to deliver a signed copy of the lease to Robinson, there was no enforceable lease and, consequently, Robinson could not retain Langford's money to mitigate against the lost rent.

[3] In her brief-in-chief, Robinson contends she was only running late to the appointment. However, before the circuit court, the parties agreed Robinson forgot.

[4] Specifically, Langford testified the basement was flooded, the appliances were dirty, the light in the bedroom did not work, the floors were gouged, and there were spots on the bathroom ceiling. At the hearing, David explained the basement was not flooded—the water was from the basement freezer that had just been defrosted by the former tenant. David conceded the oven was dirty but represented to the court that compensation for cleaning the oven was the only item deducted from the former tenant's security deposit.

¶6 Robinson moved for reconsideration, arguing the deposit and first month's rent were "properly accepted earnest money," and, pursuant to WIS. ADMIN. CODE § ATCP 134.05, she was justified in withholding the deposit to mitigate her loss after Langford failed to enter into a rental agreement. The court denied Robinson's motion, reasoning:

> The parties agreed to enter into a lease but [Robinson] failed or neglected to meet [Langford] at the premises to accept delivery of the written lease. The parties had agreed to meet on a date and time certain. [Robinson] failed or neglected to appear. [Langford] thereafter rented another place. [Langford] was entitled and justified in doing so.

DISCUSSION

¶7 On appeal, Robinson renews her argument that WIS. ADMIN. CODE § ATCP 134.05 allows her to withhold Langford's deposits. Specifically, she asserts the deposits constituted "a properly accepted earnest money deposit" and when Langford failed to enter into a rental agreement, Robinson was permitted to withhold the deposit. *See* WIS. ADMIN. CODE § ATCP 134.05(3)(a) ("A landlord may withhold from a properly accepted earnest money deposit if the prospective tenant fails to enter into a rental agreement after being approved for tenancy, unless the landlord has significantly altered the rental terms previously disclosed to the tenant.").

¶8 Robinson first asserts Langford's deposits constituted "properly accepted earnest money." Whether a deposit is an earnest money deposit or a security deposit depends on the presence of a rental agreement. Under WIS. ADMIN. CODE §§ ATCP 134.02(3), (10)-(12); 134.05(3)(b), earnest money is converted to a security deposit only after the landlord and applicant enter into a rental agreement. Both parties agree there was no rental agreement between them.

Because there was no rental agreement, any deposits given to Robinson constituted an earnest money deposit.

¶9 Next, Robinson contends she "properly accepted" the earnest money deposit. A landlord properly accepts the earnest money deposit from an applicant if the landlord identifies the dwelling unit for which that applicant is being considered for tenancy and then approves the applicant for tenancy. *See* WIS. ADMIN. CODE § ATCP 134.05(1), (2)(a). It is undisputed that Robinson, who signed the property leases and gave them to Langford, had identified the property and approved Langford for tenancy.

¶10 Because Robinson properly accepted Langford's earnest money deposit and, up until Langford's move-in day, fully anticipated Langford renting the property, Langford's failure to enter into the rental agreement allows Robinson to withhold her earnest money deposit as long as "[Robinson] has [not] significantly altered the rental terms previously disclosed to [Langford]."[5] *See* WIS. ADMIN. CODE § ATCP 134.05(3)(a).

¶11 Here, the parties dispute the condition of the property on the scheduled move-in date. The circuit court did not make factual findings regarding the property's condition and whether this condition significantly altered the rental terms. Therefore, we remand to the circuit court to make these factual findings.

[5] We observe that a landlord is required to return an earnest money deposit if the landlord "refuses to enter into a rental agreement with the applicant." *See* WIS. ADMIN. CODE § ATCP 134.05(2)(a)1. However, Robinson's forgetfulness in attending the walkthrough does not rise to the level of a refusal to enter into a rental agreement. *See* ***Nelson v. Labor & Indus. Review Comm'n***, 123 Wis. 2d 221, 225, 365 N.W.2d 629 (Ct. App. 1985) ("A voluntary act is intentional. Failure to act through forgetfulness may be negligent but it is not intentional.").

¶12 If Robinson did not significantly alter the rental terms, Robinson is permitted to withhold from Langford's earnest money deposit "an amount sufficient to compensate [her] for actual costs and damages incurred because of [Langford's] failure to enter into a rental agreement." WIS. ADMIN. CODE § ATCP 134.05(3)(b). Robinson, however, "may not withhold for lost rents unless [she] has made a reasonable effort to mitigate those losses …." ***Id.*** If the court determines Robinson may withhold from Langford's deposit, it must also determine Robinson's actual costs and damages and whether Robinson appropriately mitigated those losses. No costs will be awarded on appeal.

By the Court.—Judgment and order reversed and cause remanded with directions.

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