

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-2168

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

LEONARD JONES,

PLAINTIFF-APPELLANT,

V.

LEON KRUCHTEN, SR.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: MARK A. FRANKEL, Judge. *Affirmed.*

DEININGER, J.¹ A former tenant, Leonard Jones, appeals a judgment in the net amount of \$1,703.68 entered in favor of his former landlord, Leon Kruchten. Tenant's apartment was damaged when police arrested him. Tenant contends that landlord waived all claims for damages to the apartment by

¹ This appeal is decided by one judge pursuant to § 752.31(2)(a), STATS.

failing to provide a written accounting of amounts withheld from tenant's security deposit. We disagree. Tenant is entitled to recover double the amount of his security deposit because landlord did not provide a written accounting of amounts withheld. Landlord, however, may recover the cost of repairing the apartment, offset by the amount of tenant's award. The trial court properly offset the tenant's award in entering judgment. We therefore affirm.

BACKGROUND

The facts are undisputed. Tenant leased an apartment and made a security deposit of \$440. Thereafter, police attempted to arrest tenant at the apartment for a weapons offense. Tenant refused to leave the apartment or to let the police enter. After a five-hour standoff, police attempted to enter the apartment by breaking through the door. Although the door broke, the police were unable to enter, because tenant had barricaded the door. Police then fired several rounds of tear gas through the windows of the apartment. Tenant then left the apartment, and the police arrested him.

Landlord withheld tenant's security deposit, but did not provide tenant with a written accounting of amounts withheld within twenty-one days, as required by the lease and by WIS. ADM. CODE § ATCP 134.06. The cost of repairing the damage to the apartment as a result of the arrest totaled \$2,603.68.

Tenant commenced a small claims action against landlord seeking the return of his security deposit. Landlord counter-claimed for the damage to the apartment. The matter was originally tried before a court commissioner. Tenant then requested a trial de novo under § 799.207(2), STATS. The trial court awarded tenant \$440 for the security deposit, plus an additional \$440 as double damages,

pursuant to § 100.20(5), STATS.² The court awarded landlord \$2,603.68 on his counter-claim. The court offset the awards and entered judgment for landlord in the amount of \$1,703.68.³ Tenant appeals the judgment.

ANALYSIS

Tenant contends that, under the terms of their lease, landlord has waived “his rights to make any claim against [tenant’s] security deposit” because landlord did not provide a written accounting of amounts deducted from the security deposit. Tenant is correct on this point. By the terms of the lease,⁴ and under WIS. ADM. CODE § ATCP 134.06,⁵ tenant is entitled to recover twice the

² Section 100.20(5), STATS., provides as follows:

Any person suffering pecuniary loss because of a violation by any other person of any order issued under this section may sue for damages therefor in any court of competent jurisdiction and shall recover twice the amount of such pecuniary loss, together with costs, including a reasonable attorney’s fee.

³ Although the offset was proper, the net amount was apparently miscalculated. The net judgment should be \$1,723.68 (\$2,603.68 - 880.00). Landlord has not cross-appealed the judgment, and neither party has raised the calculation error in this appeal. Correction of the error would favor landlord at the expense of tenant. We choose not to modify the judgment so as to avoid penalizing tenant for exercising his right to appeal.

⁴ The lease provided, in relevant part:

If any portion of the deposit is withheld, Landlord will provide a an accompanying itemized statement specifically describing any damages and accounting for any amount withheld. Failure to return the deposit or provide a written accounting within 21 days will result in the waiver of any claim against the deposit. The reasonable cost of repairing any damage caused by Tenant, normal wear and tear excepted, will be deducted from the security deposit.

⁵ WISCONSIN ADM. CODE § ATCP 134.06 provides, in relevant part:

(2) Return of security deposits. The landlord shall, within 21 days after surrender of the premises, return all security deposits less any amounts withheld by the landlord....

(continued)

amount of his security deposit, regardless of the condition in which he left the apartment. *See* § 100.20(5), STATS. (double damages to be awarded to one who suffers pecuniary loss on account of violation of trade practice regulations).

Tenant further contends that landlord waived *all* claims for damages to the apartment, not just claims against the security deposit. Tenant's assertion is wrong. Landlord's counter-claim is not a claim against tenant's security deposit, but against tenant personally. As we have discussed, landlord is liable for double the amount of the security deposit. The cost of repairing the apartment, however, exceeded double the amount of the security deposit, and we conclude that landlord may recover the cost of the excess damages.

The damages for which tenant is liable to landlord are not limited to the amount of the security deposit. By the terms of the lease, tenant agreed:

6. To obey all lawful orders, rules and regulations of all governmental authorities.

7. To keep the premises in clean and tenantable condition and in as good repair as at the beginning of the lease term, normal wear and tear excepted.

....

11. To be liable for all acts of negligence or breaches or this lease by Tenant and Tenant's guests and invitees.

....

(4) Security deposit withholding; statement of claims.
(a) If any portion of a security deposit is withheld by a landlord, the landlord shall, within the time period and in the manner specified under sub. (2), deliver or mail to the tenant a written statement accounting for all amounts withheld. The statement shall describe each item of physical damages or other claim made against the security deposit, and the amount withheld as reasonable compensation for each item or claim.

The trial court found that the damages to tenant's apartment were caused by tenant's own actions in response to lawful police orders. We will not disturb the trial court's findings of fact unless clearly erroneous. *See* § 805.17(2), STATS.; *Noll v. Dimiceli's, Inc.*, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983). Per the trial court's findings, tenant breached the lease and thereby caused damages to the apartment. Thus, tenant is liable to landlord for all damage to the apartment, regardless of the disposition of tenant's security deposit. The trial court found those damages to be \$2,603.68.

Based on the trial court's findings, tenant is entitled to \$880 in damages on his claim against landlord, and landlord is entitled to \$2,603.68 on his counter-claim against tenant. Offsetting the claim against the counter-claim is authorized under § 802.07(1), STATS., which provides, in relevant part:

A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. Except as prohibited by s. 802.02(1m) [which addresses claims in tort], the counterclaim may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

We have previously approved offsetting a tenant's successful claim for double the amount of an improperly withheld security deposit against a landlord's successful counter-claim for damages. *See Paulik v. Coombs*, 120 Wis.2d 431, 355 N.W.2d 357 (Ct. App. 1984). The net judgment entered in the trial court provides tenant with a full recovery of the damages to which he is entitled.

By the Court.—Judgment affirmed.

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

