

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 24, 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. 04-0582-FT
STATE OF WISCONSIN**

Cir. Ct. No. 03SC001194

**IN COURT OF APPEALS
DISTRICT IV**

SOCORRO ANGELICA ALFARO,

PLAINTIFF-APPELLANT,

v.

JERRY FRICK,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waupaca County:
PHILIP M. KIRK, Judge. *Affirmed.*

¶1 DYKMAN, J.¹ This is a landlord-tenant case. Socorro Angelica Alfaro appeals from a judgment awarding Jerry Frick \$600 and dismissing her

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2001-02), and expedited under WIS. STAT. RULE 809.17 (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

claim for the return of her security deposit. She claims that the trial court erred by enforcing the parties' written lease. She argues (1) that the parties mutually terminated the lease before the end of its term and, (2) that the periodic tenancy lease ended when Frick learned she had vacated the premises. We affirm because the lease was a tenancy for a term and because Alfaro did not prove by the greater weight of the evidence that the parties mutually agreed to terminate the lease.

FACTS

¶2 The parties dispute material facts, but uncontroverted documents and trial testimony establish the following: Alfaro leased a house from Frick for one year, beginning August 16, 2002. In the Spring of 2003, she bought a house. On June 11, 2003, she vacated the leased premises and paid no more rent. On September 3, 2003, she received a certified letter from Frick explaining that he had used her security deposit to repair the house and for back rent. The letter also included a statement of the amount Alfaro owed for rent and overdue utility bills.

¶3 Alfaro testified that on June 9, 2003, Frick asked her to vacate the house in four days. She complied. She testified that she returned her keys to Frick in person on June 13, 2003. She then unsuccessfully tried to contact Frick to inquire about her security deposit.

¶4 Frick testified that he never asked Alfaro to move out. He denied receiving the keys. Frick did not receive rent from Alfaro in June and called her but was unable to reach her. Then he went to the house and found it vacant. He cleaned and refurbished it, because it was "trashed."

¶5 Alfaro sued Frick under WIS. STAT. § 100.20(5) to recover twice the amount of her security deposit. Frick counterclaimed for unpaid rent. The trial

court concluded that Alfaro did not prove by the greater weight of the credible evidence that the parties mutually terminated the lease, and dismissed her claim. It found that the damage to the house was reasonable wear-and-tear and did not award Frick any damages for cleanup and repair. It applied the security deposit to owed rent and awarded Frick \$600. Alfaro appeals.

STANDARD OF REVIEW

¶6 The ordinary burden of proof in civil cases is by the greater weight of the credible evidence. *Nommensen v. Am. Cons't Ins. Co.*, 2001 WI 112, ¶16, 246 Wis. 2d 132, 141, 629 N.W.2d 301, 305. The plaintiff has the burden of proving the termination of a lease when it is in doubt. *Schmutzler v. Brandenburg*, 240 Wis. 6, 9, 1 N.W.2d 775, 777 (1942). Alfaro had to prove that the parties mutually terminated the lease. Whether Alfaro met this burden is a question of law which we review de novo. *See Brandt v. Brandt*, 145 Wis. 2d 394, 409, 427 N.W.2d 126, 131 (Ct. App. 1998). We affirm the trial court's finding of facts unless clearly erroneous. WIS. STAT. § 805.17(2). We cannot make findings of fact where the facts are in dispute. *Tourtillott v. Ormson Corp.*, 190 Wis. 2d 291, 294, 526 N.W.2d 515, 517 (Ct. App. 1994). When a trial court is the finder of fact, it is the ultimate arbiter of the credibility of witnesses and the weight to be given to each witness's testimony. *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 435, 651 N.W.2d 345, 352.

DISCUSSION

¶7 Alfaro contends that her periodic tenancy terminated when she surrendered the premises. She claims that she should be awarded her security deposit under WIS. STAT. § 704.19(6).²

¶8 WISCONSIN STAT. § 704.01(2) provides that a periodic tenant “holds possession without a valid lease and pays rent on a periodic basis.” Section 704.01(1) defines lease in part:

“Lease” means an agreement, whether oral or written, for transfer of possession of real property, or both real and personal property, for a definite period of time. A lease is for a definite period of time if it has a fixed commencement date and a fixed expiration date or if the commencement and expiration can be ascertained by reference to some event, such as completion of a building.

Alfaro’s lease was a tenancy for a term because it had a fixed commencement date of August 16, 2002, and a fixed expiration date of August 15, 2003. WISCONSIN STAT. § 704.19 does not govern the return of Alfaro’s security deposit.

¶9 Alfaro next argues that her lease ended June 13, 2003, by mutual agreement. Alternatively, she claims that it terminated on July 24, 2003, twenty-eight days after Frick discovered she had vacated the premises. Either date would make a September 3, 2003, return of the security deposit untimely.

² WISCONSIN STAT. § 704.19(6) provides:

If any periodic tenant vacates the premises without notice to the landlord and fails to pay rent when due for any period, such tenancy is terminated as of the first date on which it would have terminated had the landlord been given proper notice on the day the landlord learns of the removal.

¶10 The date a lease expires determines the date a security deposit must be returned. WISCONSIN ADMIN. CODE § ATCP 134.06(2) (1999) provides that a landlord must return a security deposit within twenty-one days of the end of the tenancy. Section ATCP 134.06(2)(b)(1) provides in part:

If the tenant vacates before the last day of tenancy provided under the rental agreement, and gives the landlord written notice that the tenant has vacated, surrender occurs when the landlord receives the written notice that the tenant has vacated.

It is undisputed that Alfaro did not give written notice that she had vacated the premises before the last day of the lease. Section ATCP 134.06(2)(b)(1), which requires written notice, does not apply.

¶11 The remaining issue here is whether the parties mutually agreed to terminate the lease on June 13, 2003. If the trial court believed Alfaro's testimony, Frick delivered the security deposit statement after the deadline. If the trial court believed Frick's testimony, then he delivered it on time. When a court cannot make a judgment based on credibility, it is deciding that the parties are equally credible or not credible. We conclude that it is appropriate for the trial court to defer to burden of proof principles when it cannot make a credibility determination.

¶12 The trial court found that Alfaro did not prove by the greater weight of the credible evidence that the parties mutually terminated the lease before it expired. The only evidence was her own testimony. Frick's testimony disputed her claim. He presented the lease agreement, which expired August 15. The parties do not dispute the validity of the lease. We agree with the trial court that, given the trial court's credibility determination, Alfaro did not meet her burden of proof.

CONCLUSION

¶13 The trial court did not err in deciding that Alfaro did not prove by the greater weight of the credible evidence that the parties mutually terminated the lease on June 13, 2003.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

