COURT OF APPEALS
DECISION
DATED AND FILED

November 8, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP3034 **Cir. Ct. No. 2006SC4675**

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

SAMANTHA BOETTGE,

PLAINTIFF-APPELLANT,

V.

GOLDLEAF DEVELOPMENT LLC,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Affirmed*.

¶1 DYKMAN, J.[1] Samantha Boettge appeals from a small claims judgment denying her claim against Goldleaf Development LLC to recover her

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

security deposit for the apartment it leased to her. Boettge claims that the court erred in finding that Boettge damaged the walls of the apartment and that the amount Goldleaf claimed for repairs was reasonable, because those findings were based solely on unreliable hearsay evidence. Boettge also claims that the trial court made a mathematical error when it calculated the number of hours it took to paint the apartment. We conclude that there was sufficient evidence to support the trial court's finding that Boettge's security deposit was properly withheld. We also conclude that the trial court's mathematical error was harmless. Accordingly, we affirm.

Background

¶2 Samantha Boettge leased an apartment from Goldleaf Development LLC for one year. After Boettge vacated the apartment, she received a notice that Goldleaf had applied her security deposit to repair damages and that she still owed Goldleaf money for additional repair costs and cleaning. Goldleaf provided Boettge with a "move-in/move-out" form and a "move-in ready checklist." The "move-in ready checklist" itemized the cost to repair each of the damages for which Boettge was responsible. Each was marked with an asterisk. On the "move-in/move-out" form, the total amount for repairs (as itemized on the "move-in ready checklist") plus cleaning came to $796.57. Since Boettge had paid a $700 security deposit at the beginning of her lease, Goldleaf asserted that she owed $96.57.

¶3 At trial, Boettge testified that she did not dispute that she was responsible for some damages, amounting to $91.42. However, she disputed the alleged damages to the walls and the need to paint the entire apartment. She testified that the walls were in "very good condition" when she vacated the

premises. Goldleaf's property manager, Maureen Morand, testified that the apartment walls required repainting following Boettge's tenancy, relying on Goldleaf's "move-in ready checklist" reflecting repairs after Boettge vacated the apartment. The trial court found that Goldleaf had properly withheld Boettge's security deposit to pay the repair costs for damage Boettge had caused. Boettge appeals.

Standard of Review

¶4 This case requires that we interpret the requirements of the small claims procedure statute, WIS. STAT. § 799.209. We interpret statutes de novo. ***Scholten Pattern Works, Inc. v. Roadway Express, Inc.***, 152 Wis. 2d 253, 257, 448 N.W.2d 670 (Ct. App. 1989).

¶5 This case also asks that we review the trial court's factual findings and credibility determinations. We may not disturb the trial court's factual findings unless they are clearly erroneous. ***Rivera v. Eisenberg***, 95 Wis. 2d 384, 388, 290 N.W.2d 539 (Ct. App. 1980). We accept credibility determinations and inferences drawn by the circuit court. ***Id.***

Discussion

¶6 Boettge contends that the circuit court's findings that she damaged the apartment walls and that Goldleaf's repair costs were reasonable were erroneous, because they were based solely on unreliable hearsay in the form of Goldleaf's "move-in ready checklist." Goldleaf contends that the trial court properly relied on the hearsay evidence to reach its findings because that evidence is admissible under an exception to the hearsay rule. We conclude that the trial court properly relied on the evidence in the record.

¶7 To determine whether the court was proscribed from relying on Goldleaf's hearsay evidence in the form of its "move-in ready checklist," we must interpret the language of WIS. STAT. § 799.209(2). *See* ***Scholten***, 152 Wis. 2d at 257. We begin with the plain language of the statute. *See* ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶¶44-45, 271 Wis. 2d 633, 681 N.W.2d 110. WISCONSIN STAT. § 799.209(2) provides:

> The proceedings shall not be governed by the common law or statutory rules of evidence except those relating to privileges under ch. 905 or to admissibility under s. 901.05. The court or circuit court commissioner shall admit all other evidence having reasonable probative value, but may exclude irrelevant or repetitious evidence or arguments. *An essential finding of fact may not be based solely on a declarant's oral hearsay statement unless it would be admissible under the rules of evidence.*

(Emphasis added.)

¶8 Goldleaf admits that its "move-in ready checklist" was hearsay. It argues that the court was allowed to rely on the document for an essential finding because the document qualified for admission under an exception to the hearsay rule. Goldleaf relies on WIS. STAT. § 908.03(6), which allows hearsay in the form of records of regularly conducted activity.[2] Boettge contends that Goldleaf's

[2] WISCONSIN STAT. § 908.03(6) provides:

> RECORDS OF REGULAR CONDUCTED ACTIVITY. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, or by certification that complies with s. 909.02(12) or (13), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness.

documents were not admissible under § 908.03(6) because the documents "indicate lack of trustworthiness" as stated in the statute. In support, Boettge argues that there are many inconsistencies in the evidence supporting Goldleaf's claim that she was responsible for paint damages during her tenancy, and the documents appear to have been altered anticipating litigation. We need not resolve this dispute. On our own review, we conclude that the circuit court did not err in relying on the hearsay evidence because it was written rather than oral.

¶9 WISCONSIN STAT. § 799.209(2) states that "[a]n essential finding of fact may not be based solely on a declarant's *oral* hearsay statement unless it would be admissible under the rules of evidence." (Emphasis added.) WISCONSIN STAT. § 908.01(3) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." WISCONSIN STAT. § 908.01(1) defines a "statement" as either oral or written. Because § 799.209(2) specifies that a small claims court may not rely on *oral* hearsay for an essential finding, it follows that there is no prohibition against a small claims court relying on *written* hearsay for such a finding. The hearsay evidence here was in the form of Goldleaf's written "move-in ready checklist." Thus, we conclude that the trial court did not err in relying on the written hearsay to reach its findings.

¶10 Boettge argues, however, that the evidence submitted by Goldleaf is inherently untrustworthy and did not meet Goldleaf's burden to establish the fact, cause, and amount of damages. *See* ***Rivera***, 95 Wis. 2d 384 at 387.

¶11 Boettge's arguments might be persuasive if made to a trial judge. When a trial judge acts as the finder of fact, the judge is the ultimate arbiter of the credibility of the witnesses. *See* WIS. STAT. § 805.17(2).[3] It is the function of the trier of fact, not of an appellate court, to resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from the evidence when more than one reasonable inference may be drawn. ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990). Resolving conflicts in the testimony includes deciding which witness to believe when the testimony of one contradicts the testimony of another. ***Global Steel Prods. Corp. v. Ecklund Carriers, Inc.***, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269.

¶12 At trial, Morand testified that the "move in/move out" form was Goldleaf's gross description of the appearance of the walls and the "move-in ready checklist" was an evaluation by Goldleaf's painters who more accurately described the existence of "flashing" after paint touch-ups that required complete repainting. Goldleaf's painters described the walls in Boettge's apartment as "dirty, sooty above nwt," and claimed that the entire apartment needed repainting. Morand stated that Goldleaf did not repaint for every tenant who smoked in an apartment, because not every smoker caused damage to the apartment walls. Boettge claimed at trial that the walls were "in very good condition" when she moved out. This testimony conflicted with Goldleaf's allegation of damage. Because there was conflicting evidence, whether the apartment walls were in fact

[3] WISCONSIN STAT. § 805.17(2) provides, in pertinent part: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

damaged and the cause of any damage was a credibility issue, and the court found Goldleaf's evidence more credible. The court was entitled to do so.

¶13 Boettge argues that even if the trial court properly found that painting the entire apartment was needed, the court erred in calculating the hours Goldleaf claimed. The trial court found that seventeen hours was the amount of time Goldleaf claimed it took to paint the apartment. Boettge claims that the correct sum of hours needed to paint the entire apartment, marked with asterisks on the "move-in ready checklist," was fifteen hours. But even if the court erred in calculating the number of hours painted, Boettge would still be responsible for $635.50 for painting, plus the amount she did not dispute, $91.42. This would total $726.92. Since the $700 security deposit was still less than the amount that Boettge would owe absent the mathematical error she contends, the court's error was harmless.

¶14 Boettge additionally claims, however, that the trial court made no finding as to damages other than Goldleaf's repainting the walls. Boettge argues that since the court did not "explicitly find that any other damages were proven," her security deposit should not be withheld for the cost to repair the remaining damages. She claims that since the painting damage costs were $635.50, she should recover $64.50 of her security deposit. We disagree, and conclude that the record supports the court's finding that Goldleaf properly withheld the entirety of Boettge's security deposit.

¶15 At trial, Boettge testified she did not dispute responsibility for some of the damages Goldleaf alleged. These damages amounted to $35.17 in costs and 1.5 hours of labor at $37.50 an hour, totaling $91.42. Thus, the only evidence in the record was that Goldleaf claimed that amount of damages, and Boettge agreed

that she was responsible for that amount. As the court observed in its order, the only dispute was the withholding of the remaining amount of the security deposit based on Goldleaf's claimed need to repaint the entire apartment. Thus, the court's finding that Goldleaf had proven that Boettge had damaged the apartment walls and that its repainting charges were reasonable, together with the undisputed evidence that Boettge was responsible for an additional $91.42 in damages, supports the court's finding that Boettge had no right to recover her security deposit.[4] There is no basis in the record for us to conclude that the court's finding was erroneous. Accordingly, we affirm.

By the Court.—Order Affirmed.

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

[4] Goldleaf does not argue that Boettge is barred from raising the issue of the damages she conceded at trial by judicial estoppel. While we need not address the doctrine of judicial estoppel because our conclusion that the record supports the court's finding that the security deposit was properly withheld is dispositive, we note that it is a dangerous practice to concede issues at trial that one wishes to raise on appeal. *See generally* ***State v. English-Lancaster***, 2002 WI App 74, ¶18, 252 Wis. 2d 388, 642 N.W.2d 627 (judicial estoppel "prevent[s] a party from adopting inconsistent positions in legal proceedings…. to preserve the integrity of the judicial system and prevent litigants from playing 'fast and loose' with the courts").