COURT OF APPEALS
DECISION
DATED AND FILED

February 14, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP576 **Cir. Ct. No. 2005SC12399**

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

KATRINA WALSH N/K/A KATRINA OLMSTEAD AND JONATHAN OLMSTEAD,

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

V.

STEPHANIE MILLER AND JAMES STELLHORN D/B/A MILLER-STELLHORN INVESTMENTS,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed*.

¶1 DYKMAN, J.[1] Stephanie Miller and James Stellhorn (collectively, Miller) appeal from an order awarding damages to Katrina Walsh and Jonathan Olmstead (collectively, Walsh) in Walsh's small claims action arising from Walsh's tenancy in a house owned by Miller. Miller argues that the trial court erred in awarding damages to Walsh because (1) Walsh's tenancy ended on the last day of the written lease, thus bringing Miller's accounting of Walsh's security deposit within the required timeframe; (2) Miller was entitled to withhold the entire security deposit, and thus there was no false withholding of the deposit; and (3) Walsh retained a check from Miller that amounted to an accord and satisfaction, thus barring any further claims between the parties.

¶2 Walsh cross-appeals from the trial court's allowing Miller to amend her pleading to include a counterclaim for theft of two area rugs and the portion of the court's order awarding damages to Miller on that claim and on an un-pled claim for damage to wall-to-wall carpeting. Walsh argues that the court erroneously exercised its discretion in allowing the amendment because it was allowed only four days before trial, and thus did not provide Walsh enough time to prepare a defense. Walsh also argues that the evidence at trial was insufficient to support the theft claim.

¶3 We conclude that (1) Miller was required to provide an accounting of Walsh's security deposit within twenty-one days of Walsh vacating the premises rather than the last day of the written lease, because the parties orally agreed to terminate their lease as of that date; (2) Walsh's acceptance of a check

[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.

from Miller did not amount to an accord and satisfaction barring Walsh's claims; (3) the trial court properly exercised its discretion by allowing Miller to amend her pleading to assert a counterclaim and in considering damage to the wall-to-wall carpeting; and (4) the evidence was sufficient to support the trial court's award of damages for theft of the two area rugs.[2] Accordingly, we affirm.

Background

¶4 The following facts are taken from the trial court's findings.[3] Katrina Walsh and Jonathan Olmstead rented a house from Stephanie Miller and James Stellhorn for three years, beginning in 2002. In June 2005, Walsh and Olmstead notified Miller that they were interested in moving out early if another tenant could replace them. Miller told Walsh and Olmstead that if a new tenant did not replace them, they would be liable under their lease for its full term, which ended on July 31, 2005.

¶5 In July 2005, Miller asked Walsh if she could enter the house to paint since Walsh and Olmstead had closed on their new house. Olmstead called Miller and told her that they did not want anyone in the house at that time, because they had not finished cleaning, had not done a check-out and still had personal property in the house. Later in July, Olmstead went to the house to continue cleaning and found Miller, Stellhorn, and another person in the house painting. Miller told Olmstead that a new tenant was moving in on July 22. Olmstead

[2] For the reasons explained below, we need not address the parties' additional arguments.

[3] The parties acknowledge that although they disagreed over the facts at trial and presented conflicting testimony, the trial court's findings are supported by the record. Because the parties agree that the trial court's findings are not clearly erroneous, we rely on those facts for our analysis.

responded that that was fine as long as he and Walsh would be credited for the last nine days of rent for July that they had already paid. Miller responded, "Absolutely not."

¶6 Miller and Olmstead agreed to meet at the house on July 13 to do their check-out procedure. When Walsh arrived at the house on July 13, she found a woman there painting. Walsh told the woman that she did not have permission to be there or to use their air conditioning. Later that day, Walsh and Olmstead went to the house for the check-out. Neither Miller nor Stellhorn arrived. When Olmstead called Miller, Miller became angry. After Olmstead confirmed that he and Walsh had removed their possessions from the house, Miller told them to "[l]eave the fucking keys on the counter and get the hell out of my house." Although Miller refused to come to the house for the check-out, Stellhorn arrived and walked through the house with Walsh and Olmstead shortly thereafter. Walsh and Olmstead left some keys with Stellhorn and left the remaining keys in Stellhorn's mailbox later that evening. When Walsh and Olmstead left the residence, they took two area rugs with them. In a letter postmarked August 18, 2005, Miller mailed Walsh and Olmstead an accounting of their security deposit.

¶7 In November 2005, Walsh brought a small claims action against Miller. Following the court commissioner's decision, Miller requested a trial de novo. Four days before trial, Miller moved to amend her pleading to raise the affirmative defense of accord and satisfaction and include a counterclaim for theft of the two area rugs. The trial court granted the motion. Following trial, the court issued findings of fact, conclusions of law, and a judgment. The court then acknowledged that the document was entered as a final judgment by the Clerk of Courts office, despite the fact that the issue of attorney's fees was still pending. The court vacated the judgment and instructed the parties to disregard the notice of

entry of judgment. The court also acknowledged a mathematical error in the original judgment calculation. Following a determination of attorney's fees, a final judgment was entered on January 19, 2007. Walsh appeals and Miller cross-appeals.

Standard of Review

¶8 Because the parties are not contesting the facts on appeal, we are presented only with questions of whether those facts fulfill particular legal standards. We review the application of facts to legal standards de novo. ***Johnson v. Rogers Mem'l Hosp., Inc.***, 2005 WI 114, ¶31, 283 Wis. 2d 384, 700 N.W.2d 27.

¶9 A trial court's decision on whether to allow an amendment to a party's pleading is within its discretion. ***Suchomel v. University of Wisconsin Hosp. & Clinics***, 2005 WI App 234, ¶14, 288 Wis. 2d 188, 708 N.W.2d 13. We uphold discretionary decisions when the trial court applies the proper legal standard and relies on the facts in the record to reach a decision that a reasonable court could reach. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis.2d 426, 663 N.W.2d 789.

Discussion

Miller's Appeal

¶10 Miller argues that she provided Walsh an accounting of her security deposit within the twenty-one days required under Madison General Ordinance § 32.07(7). That section states:

> Every landlord who accepts a security deposit shall, within twenty-one (21) days after a tenant surrenders the

> rental premises, return, in person or by mail, to the tenant at the tenant's forwarding address or at the tenant's last known address if a forwarding address is not provided to the landlord, either:
>
> (a) The full security deposit; or
>
> (b) A written, itemized statement showing the specific reason or reasons for the withholding of the deposit or any portion of the deposit ….

Subsection (8) provides that "[a] tenant surrenders the premises under Subsection (7) on the last day of tenancy provided under the rental agreement." Miller's argument rests on her assertion that the premises were surrendered on the last day of the written lease, which was July 31, 2005. Thus, Miller argues, the accounting postmarked August 18, 2005, fell within the required twenty-one days. We disagree.

¶11 WISCONSIN STAT. § 704.03(4) states that "[a]n agreement …. between the landlord and tenant to terminate a lease prior to its normal expiration date … may be either oral or written." The question, then, is whether Miller and Walsh orally agreed to terminate the written lease as of July 13, 2005. If they did, then July 13 would be the last day of the rental agreement between the parties.

¶12 We begin with the uncontested factual findings of the trial court. Prior to July 13, 2005, Walsh told Miller she desired to end her tenancy early if she could find a replacement tenant. Miller told Walsh she would remain liable through July if a new tenant was not found. Walsh then denied Miller's request to work on the house until Walsh completed cleaning and removing her property from the house, and had done the check-out. After Walsh discovered that Miller was working on the house without her permission, and that Miller had given permission for a new tenant to move in during the last nine days remaining on Walsh's written lease, Walsh stated that she would consent to the new tenant

moving in if she would be credited for those nine days of rent. Miller refused. On July 13, 2005, the date the parties had agreed to do a check-out at the house, a dispute arose between the parties resulting in Miller instructing Walsh to "[l]eave the fucking keys on the counter and get the hell out of my house." Walsh complied with this demand.

¶13 Because Miller emphatically expressed her desire to Walsh to end Walsh's tenancy early, demanding that Walsh vacate the premises and leave all her keys, and Walsh complied, we conclude that the parties orally agreed to terminate the written lease as of July 13, 2005. *See* WIS. STAT. § 704.03(4). Miller's argument that Walsh exercised control over the apartment until the end of the written lease because on July 12 she stated that she would not allow a new tenant to move in early without receiving rent credit is unavailing. We agree that, as of July 12, there was no agreement to terminate the lease, because Miller had not yet demanded Walsh vacate and leave her keys. It was Miller's demand on July 13 that demonstrated her agreement to terminate the lease on that date. Walsh complied with Miller's demand by surrendering the keys. The parties' landlord-tenant relationship ended on July 13.

¶14 We also reject Miller's argument that the trial court's conclusion that Miller had "illegally terminated" the lease as of July 13 means that only a constructive eviction could have ended the lease, because an agreement between the parties to terminate the lease would not have been illegal. Whether the facts of this case meet the legal standards of constructive eviction or termination of the lease are legal questions that we review de novo. *See* ***Johnson***, 283 Wis. 2d 384, ¶31. We are not bound by a trial court's legal conclusions. ***State v. Olson***, 2001 WI App 284, ¶6, 249 Wis. 2d 391, 639 N.W.2d 207. Because the parties agreed to end their rental agreement on July 13, 2005, and Walsh vacated on that date,

Walsh surrendered the premises on that date. Miller was therefore required to provide an accounting of Walsh's security deposit within twenty-one days of that date. Because she did not do so, we affirm the trial court's award of damages for violation of this provision.[4]

¶15 Miller next argues that the trial court erred in awarding Walsh damages for breach of her right to quiet enjoyment. Miller argues that Walsh did not sue for breach of her right to quiet enjoyment or for trespass, limiting her claim to invasion of the rental premises contrary to Madison General Ordinance § 32.05. Miller contends that because § 32.05 only allows forfeiture to the city, but not private recovery, the court erred in awarding damages to Walsh. Miller also contends that Walsh did not prove any damages for breach of her right to quiet enjoyment, because Walsh was no longer residing at the premises and there was no claim of damage to her property there. We disagree.

¶16 First, we reject Miller's argument that Walsh did not state a claim for trespass. Small claims procedure is more relaxed than in other proceedings, allowing the parties to present arguments as necessary for a full disclosure of the facts. *See* WIS. STAT. § 799.209(1). Walsh clearly argued that Miller repeatedly entered her rental housing without permission, thus asserting a claim for trespass. *See* ***Wendt v. Manegold Stone Co.***, 240 Wis. 638, 642, 4 N.W.2d 134 (1942). Thus, Walsh asserted a claim for civil damages.

[4] Miller argues that we should disregard Walsh's claim that there was an agreement to terminate the lease because this was not the argument she made to the trial court, under the equitable doctrine of judicial estoppel. *See* ***State v. Petty***, 201 Wis. 2d 337, 347, 548 N.W.2d 817 (1996). We decline to do so. Instead, we rely on the rule that we may affirm a trial court's decision on other grounds even if we do not agree with its reasoning. *See* ***State v. Holt***, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985).

¶17 Next, we reject Miller's claim that Walsh was not entitled to damages absent proving actual damages to her possessions. A claim for intentional trespass supports an award of punitive damages, even when only nominal damages are proven. *See* ***Jacque v. Steenberg Homes, Inc.***, 209 Wis. 2d 605, 621, 563 N.W.2d 154 (1997). Thus, the trial court could award punitive damages for Miller's intentional disregard of Walsh's rights in repeatedly invading her rental housing without permission.[5] *See* WIS. STAT. § 895.043(3).

¶18 Miller next argues that Walsh did not establish that Miller wrongfully withheld her security deposit under Madison General Ordinance § 32.07(5). Walsh responds that Miller prevailed on this claim in the trial court and thus has no grounds to appeal. Our review of the record reveals that the trial court found that Miller complied with § 32.07(5). We therefore need not address this argument further. *See* WIS. STAT. § 809.10(4) (appellant may only appeal from adverse rulings). Still, we do not agree with Miller's assertion that Walsh's failure to dispute Miller's assertion that she did not wrongfully withhold any portion of the security deposit is a concession as to this issue.

¶19 Finally, Miller contends that Walsh's retention of a check that Miller mailed to her in August 2005 amounted to an accord and satisfaction of any dispute between the parties, thus barring Walsh's claims. We disagree. Miller's argument rests on the assertion that the check was offered as a settlement and then retained by Walsh. *See* ***Hoffman v. Ralston Purina Co.***, 86 Wis. 2d 445, 448-49,

[5] Again, we note here that we may affirm a trial court's decision on other grounds. *See* ***Holt***, 128 Wis. 2d at 124-25.

273 N.W.2d 214 (1979). However, there is nothing in the record indicating that Miller offered the check as a settlement rather than as a refund of the amount of the security deposit she believed she owed Walsh. There is no evidence of negotiations to settle any claims between the parties or that the check was offered or received as a settlement. We thus find no grounds to bar Walsh's claims on the basis that there was an accord and satisfaction of those claims.[6]

Walsh's Cross-Appeal

¶20 Walsh argues first that the trial court erroneously exercised its discretion in allowing Miller to amend her pleadings four days before trial to assert a counterclaim for theft of the area rugs. We disagree. As noted above, procedural rules in small claims actions are relaxed, and trial courts are to conduct the proceedings in a manner that allows a full resolution of the disputes between the parties. *See* WIS. STAT. § 799.209. Additionally, trial courts have discretion to amend pleadings, and may amend pleadings at any time if the opposing party is not prejudiced by the pleading. *See* ***Suchomel***, 288 Wis. 2d 188, ¶14. Walsh contends that she was prejudiced because she was not prepared to defend against the claim of theft. However, Walsh does not explain how she was prejudiced. She claims only that she did not have time to prepare a defense or coordinate witnesses, without explaining what that defense would have been or what the

[6] Miller also argues that even if the check is not an accord and satisfaction, it must be accounted for in the judgment. We note that the evidence at trial was that Walsh retained the check, but had not yet cashed it. If Miller believes this resulted in an error in the court's mathematical calculations, her remedy was to bring this to the trial court's attention in a postjudgment motion. *See* ***Schinner v. Schinner***, 143 Wis. 2d 81, 92-93, 420 N.W.2d 381 (Ct. App. 1988). For the same reason, we do not address Miller's argument in response to Walsh's cross-appeal that there was a mathematical error in the court's revised computation of damages. *See* ***id.***

witnesses would have testified to. Absent any showing that Walsh was prejudiced by the amendment, we fail to see how the trial court's allowing the amendment was an erroneous exercise of discretion.

¶21 Next, Walsh argues that the trial court erroneously allowed an offset to her damages in the amount that Miller claimed as damage to wall-to-wall carpeting in the house. Walsh argues that because Miller did not specifically plead a counterclaim based on damage to the wall-to-wall carpeting, the offset was improper. We disagree. Again, we note that the procedure for small claims actions is relaxed. *See* WIS. STAT. § 799.209. The issue of the damage to the wall-to-wall carpeting was raised and argued in the trial court. We find no error in the court addressing this issue in its judgment.

¶22 Finally, Walsh argues that the evidence was insufficient to establish theft of the area rugs. We disagree. WISCONSIN STAT. § 895.446(1) allows recovery for damages[7] against a person for conduct in violation of WIS. STAT. § 943.20. Section 943.20 criminalizes theft, defined as the act of intentionally taking and carrying away the property of another without the owner's consent, with intent to permanently deprive the owner of possession of the property. Walsh argues that the evidence was insufficient to establish that she took the area rugs without Miller's consent, or that she intended to permanently deprive Miller of possession of the rugs. However, Miller testified that she never gave permission

[7] Walsh's argument that Miller conceded that she suffered no loss due to the theft of the area rugs is unavailing. Walsh points to the part of Miller's reply brief in which she argues that the reason she did not assert a counterclaim for damage to the wall-to-wall carpeting was because prior to Walsh's action to recover the security deposit, Miller had retained the deposit to cover any damages to the apartment. We do not construe this argument as a concession that Miller suffered no damages through theft of her area rugs.

for Walsh to take the rugs, and the trial court was entitled to believe that testimony. *See* ***State v. Schmidt***, 2004 WI App 235, ¶13, 277 Wis. 2d 561, 691 N.W.2d 379. Although Walsh argues that Miller's actions implied consent, the trial court was similarly entitled to find that they did not, and that Walsh knew that she did not have permission to take the area rugs. Additionally, we reject Walsh's argument that the fact that she was willing to pay the fair market value of the rugs negates a finding that she intended to permanently deprive Miller of that property when she took them away. A thief's belated offer to pay for stolen goods does not negate the theft. *See* ***State v. Blaisdell***, 85 Wis. 2d 172, 180, 270 N.W.2d 69 (1978). Because the record supports the trial court's finding that Miller established her right to damages for Walsh's theft of the area rugs, we affirm.

By the Court.—Judgment affirmed.

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