COURT OF APPEALS
DECISION
DATED AND FILED

August 18, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP423 **Cir. Ct. No. 2008SC436**

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

KARL JENSEN,

PLAINTIFF-APPELLANT,

V.

MIKE ZEMANOVIC AND TAYLOR KWAS,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dunn County: ROD W. SMELTZER, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Karl Jensen appeals a small claims judgment awarding him damages for breach of a residential lease. Jensen asserts he was entitled to the full four months' rent claimed, while the court only awarded one

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

month of rent. He argues the circuit court erred by considering parol evidence to determine terms of the lease. Jensen further argues the court made an erroneous factual finding that he did not sufficiently mitigate his damages. We reject Jensen's arguments and affirm.

BACKGROUND

¶2 Jensen did not request a transcript of the court trial. Therefore, the record on appeal is limited to the facts set forth in the circuit court's written decision, the lease, and a number of emails received as trial exhibits. Many of the court's findings of fact, however, simply restated the conflicting positions set forth in the emails, without explicitly resolving them in either party's favor.

¶3 Mike Zemanovic and Taylor Kwas entered into a residential lease for off-campus housing with Mark Kinney on November 14, 2007. The twelve-month lease was for a four-bedroom apartment, commencing June 1, 2008. Jensen purchased the property in late March 2008.

¶4 Shortly after signing the lease, Zemanovic and Kwas learned their two potential roommates were no longer interested. In late January 2008, they informed Kinney by email they were unable to find roommates and wished to be released from the lease. Zemanovic, however, claimed he had also called Kinney numerous times over the December/January winter break, but that Kinney failed to return his calls. In a series of emails on January 29 and February 3, Kinney refused to cancel the lease, stating he had only told Zemanovic and Kwas they could cancel the lease if they were unable to find roommates within a few days, and over seventy days had already passed. Zemanovic and Kwas claimed Kinney did not indicate any timeframe for backing out. Zemanovic, Kwas, and Kinney undertook various attempts to rent the property, without success.

¶5 The circuit court concluded Jensen failed to make sufficient attempts to mitigate by re-renting the property. The court then found it "fair and reasonable" to award Jensen $1,180, which was equivalent to one month of rent. Jensen subsequently moved for a new trial. His motion, however, did not state any grounds for relief and there is no transcript of the motion hearing. The circuit court denied the motion, and Jensen appeals.

DISCUSSION

¶6 Jensen first asserts the circuit court erroneously relied upon the parties' oral agreement to modify the written lease. He argues the parol evidence rule precludes the court from considering those oral statements because they were made prior to or at the time of signing the lease. There are several problems with this argument. First, it is not clear from either the emails or the court's decision when Kinney made the verbal promise to allow Zemanovic and Kwas to back out if they could not find additional roommates. *If* the court concluded there was an oral modification, we must assume the court found that it occurred after the lease was signed. *See* ***Butcher v. Ameritech Corp.***, 2007 WI App 5, ¶¶34-35, 298 Wis. 2d 468, 727 N.W.2d 546 (2006) ("[I]n the absence of a transcript we presume that every fact essential to sustain the circuit court's decision is supported by the record.").

¶7 The other problem with Jensen's assertion that the circuit court implicitly found an oral modification is that the court awarded him damages. If the court had made such a finding, then there would have been no breach when Zemanovic and Kwas backed out of the lease four months prior to occupancy. Further, there would then have been no reason for the court to determine whether Jensen made reasonable efforts to mitigate.

¶8 We conclude the circuit court either did not find an oral modification or, if it did, it found Zemanovic and Kwas gave notice beyond the time allowed to do so. Because the court awarded Jensen damages, these are the only reasonable conclusions. Regardless, because the court awarded damages, any reliance by the court on parol evidence would constitute harmless error. In fact, if we were to adopt Jensen's position, then it would have been error for the court to award him any damages.

¶9 Jensen asserts no reason in his initial brief why we should remand with directions to award the entire $4,720 claimed. In his reply brief, however, Jensen argues the record "does not support" the circuit court's finding that he failed to adequately mitigate his damages. As a general rule, we do not address issues raised for the first time in a reply brief. *See* ***Swartwout v. Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981). Even if we did consider Jensen's argument, we would be required to affirm the circuit court based on Jensen's failure to provide a transcript. *See* ***Butcher***, 298 Wis. 2d 468, ¶¶34-35.

By the Court.—Judgment affirmed.

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