COURT OF APPEALS
DECISION
DATED AND FILED

October 1, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP911 **Cir. Ct. No. 2008SC8348**

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

TINA MARIE HOWELLS AND SHAW MAURICE JACKSON,

PLAINTIFFS-APPELLANTS,

V.

GROSSO INVESTMENT PROPERTIES, LLC,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed in part; reversed in part and cause remanded with instructions.*

¶1 VERGERONT, J.[1] This is a small claims action in which Tina Howells and Shaw Jackson (the tenants) claim that their former landlord, Grosso

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) & (3) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Investment Properties, LLC, unlawfully withheld their security deposit, and the landlord counterclaims that, in addition to the withheld security deposit, the tenants owe the landlord for cleaning and repair expenditures and other items. The circuit court determined that the security deposit was withheld in violation of Madison General Ordinances and the tenants were therefore entitled to $2,614.00, double the amount of the security deposit. It then determined that the landlord was entitled to a credit of $1,584.69 against that amount on its counterclaim and entered judgment in favor of the tenants in the amount of $1,029.31. The court also awarded the tenants attorney fees in the amount of $1,373.40, which was less than they requested.

¶2 The tenants appeal the amount the court determined they owe the landlord and the amount of attorney fees. For the reasons we explain below, we reverse and remand for further proceedings on the amount credited the landlord for unpaid rent and the amount of attorney fees incurred seeking attorney fees in the circuit court. In all other respects we affirm. We also deny the tenants' requests for attorney fees on appeal.

BACKGROUND

¶3 The tenants moved into the unit on or about September 1, 2006, with their five minor children, one of whom subsequently moved out. The whole family moved out on or about June 15, 2008, after giving the proper notice. Shortly after they moved out, the landlord sent a notice stating that the security deposit in the amount of $1,307 was being withheld and the tenants still owed $487.69 for a utility bill, $37.50 in unpaid rent for May and June 2008, and specified cleaning and repair costs.

¶4 The tenants filed this action seeking return of their security deposit and the landlord responded, disputing their entitlement to the return of the deposit and claiming that they owed $487.69. After the court commissioner determined that the landlord owed the tenants $1,293.95, the landlord sought a trial before the circuit court. *See* WIS. STAT. § 799.207(3)-(5).

¶5 In the circuit court, the tenants were represented by counsel and Kathy Grosso appeared on her own behalf and apparently on behalf of the LLC.[2] Pre-trial Grosso acknowledged in response to interrogatories that she did not provide the tenants with photographs that she took at the "walk through" she conducted just after the tenants moved out. At trial the testimony and evidence focused on whether, when the tenants moved out, the condition of the apartment in terms of cleanliness and other matters was worse than that due to normal wear and tear. The tenants agreed that they were responsible for repairs and parts for the garage door in the amount of $469.24 and the utility bill in the amount of $350.81, which came after the tenants moved out.

¶6 On the tenants' claim, the circuit court concluded that the landlord had violated provisions of MADISON GENERAL ORDINANCE § 32.07(5) regarding check-in and check-out forms, and § 32.07 (7) and (14) requiring the landlord to take photos of the items that were the subject of deductions from the security deposit for cleaning or damages and inform the tenant that they are available upon request. Therefore, the court concluded, under § 32.07(6) and (9) the landlord was

[2] The tenants named as defendants Grosso Investment Properties, LLC, the owner of the property, and Kathy Grosso, who performs tasks on behalf of the LLC and was the person with whom the tenants dealt. We refer to Kathy Grosso as "Grosso" and to the LLC and Grosso collectively as "the landlord."

prohibited from withholding any portion of the security deposit. Because the landlord had done so, the court concluded that the tenants were entitled to double the security deposit plus interest. The court determined that amount to be $2,614.00.

¶7 On the landlord's counterclaim, the court determined that, in addition to the garage repair and the utility bill, the landlord was entitled to $367.14 for cleaning by a cleaning service, $210.00 for carpet cleaning, $150.00 for removal of paint on the wood trim that had dripped when the tenants repainted the walls before moving out, and $37.50 in unpaid rent. With the credit for these items, the landlord owed the tenants $1,029.31.

¶8 The court also determined that the tenants were entitled to reasonable attorney fees. The court determined that the $155 hourly rate of tenants' counsel was reasonable but the number of hours expended was not, and it reduced the requested fee of $2,323.90 to $1,373.40.

DISCUSSION

¶9 On appeal the tenants contend that the landlord did not meet its burden of proving that the amounts paid for the cleaning service and the carpet cleaning were necessitated by conditions that were beyond normal wear and tear and did not meets its burden of proving that they owed rent.[3] In addition, they

[3] The issue of the award of double the security deposit in favor of the tenants is not before us. The landlord does not appeal the court's determination that the tenants are entitled to double the security deposit, although she explains in her brief on appeal that she feels she did comply, or attempt to comply, with the check-in and check-out procedures.

contend the circuit court erroneously exercised its discretion in reducing the attorney fees. They also request attorney fees for this appeal.

I. Recovery by Landlord

A. Cleaning Costs

¶10 The landlord's claim that the tenants owe the cost for cleaning is based on its contention that these costs resulted from a condition of the unit that was dirty beyond that caused by normal wear and tear. *See* MADISON GENERAL ORDINANCE § 32.07(4) ("[t]he tenant shall place the dwelling unit in as [sic] overall clean condition, excepting ordinary wear and tear.") *See also* WIS. ADMIN. CODE § ATCP 134.06(3)(c) (Nov. 2006),[4] prohibiting the landlord from "withhold[ing] a security deposit for normal wear and tear…."[5]

[4] All subsequent references to the WISCONSIN ADMINISTRATIVE CODE are to the November 2006 version unless otherwise indicated.

[5] The rental agreement the tenants signed for the first year states: "Tenant shall maintain the premises. Special care shall be taken to use non-abrasive cleaners on the bathroom fixtures, and only recommended cleaners on the smooth top stove." The rental agreement presented to the tenants at the end of the first year had a more elaborate provision, which included the following: "Maintenance. Tenant agrees to maintain the premises and to keep it in a clean and tenantable condition inside and out…." Howells testified that she crossed off the year term on this second lease and inserted "month-to-month" and was not sure she gave it back to the landlord.

We are uncertain whether the tenants' view is that provisions such as this in a lease are necessary in order for a landlord to recover damages for cleaning that is necessitated by a condition that is beyond normal wear and tear or whether the tenants believe that MADISON GENERAL ORDINANCE § 32.07(4) alone imposes this obligation on a tenant. In any case, apart from their argument that we should adopt the standard applied in ***Maryland Arms Limited Partnership vs. Connell***, 2009 WI App 87, ¶9, ___Wis. 2d ___, 769 N.W. 2d 145, which we reject, *see* ***infra*** ¶¶11-12, we do not understand the tenants to argue that, as a matter of law, the landlord here may not recover for the costs of cleaning that are necessitated by conditions that go beyond normal wear and tear.

¶11 As a threshold matter, we consider the tenants' assertion that we should hold they are not liable for any expenditures by the landlord for cleaning unless the expenditures result from their negligence or improper use of the apartment. They rely on the recent decision in ***Maryland Arms Limited Partnership vs. Connell***, 2009 WI App 87, ¶9, ___Wis. 2d ___, 769 N.W. 2d 145, which holds that a landlord is obligated under WIS. STAT. § 704.07 to repair the premises when damage from a fire is not caused by the landlord's negligence or intentional act and not caused by the tenant's negligence or improper use of the premises. The question of the correct legal standard to apply presents an issue of law, which we review de novo. ***Republic Bank of Chicago v. Lichosyt***, 2007 WI App 150, ¶24, 303 Wis. 2d 474, 736 N.W.2d 153.

¶12 We decline to adopt the tenants' proposed standard for damages claimed by the landlord based on an alleged lack of cleanliness beyond that caused by normal wear and tear. ***Maryland Arms*** turned on the interaction of the specific subsection of WIS. STAT. § 704.07(2) (Duty of Landlord) relating to fire, § 704.07(2)(c), with § 704.07(3) (Duty of Tenant) and § 704.07(4) (Untenantability). In arriving at its construction of § 704.07, the court also relied on the Judicial Council Committee's note on § 704.07(2), which states in part: "Under this subsection the landlord is expected to make types of repairs of major proportions, which it is not reasonable to expect a tenant to make." ***Maryland Arms***, ___ Wis. 2d ___, ¶10. We are not persuaded that the court's reasoning on the allocation of responsibility for damages resulting from fire applies when the damages claimed are those resulting from the alleged lack of cleanliness beyond that caused by normal wear and tear.

¶13 As the tenants correctly assert, the landlord has the burden to prove, either as an affirmative defense or a counterclaim, that the landlord is entitled to

damages by proving the condition of the premises at the commencement and termination of the term, the extent of damage to the premises, and the cost of restoring the premises. ***Rivera v. Eisenberg***, 95 Wis. 2d 384, 387-88, 290 N.W.2d 539 (Ct. App. 1980). The tenants' assertion that the landlord here did not meet that burden is essentially a challenge to the sufficiency of the evidence to sustain the circuit court's determination that the landlord proved damages in the amount of $367.14 for cleaning and $210.00 for carpet cleaning necessitated by conditions beyond that caused by normal wear and tear.

¶14 In deciding whether the evidence is sufficient, we accept the circuit court's findings of fact unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2). The credibility of a witness and the weight to be accorded a witness's testimony is for the circuit court to decide, not this court. ***Lessor v. Wangelin***, 221 Wis. 2d 659, 665, 586 N.W.2d 1 (Ct. App. 1998). When more than one reasonable inference can be drawn from the credible evidence, we must accept the inference drawn by the circuit court. *See* ***Siker v. Siker***, 225 Wis. 2d 522, 528, 593 N.W.2d 830 (Ct. App. 1999) (citations omitted). Even if the court does not make an express finding of fact, we assume the court made those findings that are necessarily implicit in its conclusion, and we accept such implicit findings if they are supported by the record. ***Town of Avon v. Oliver***, 2002 WI App 97, ¶23, 253 Wis. 2d 647, 644 N.W.2d 260. In addition, because this is a small claims action,

we bear in mind that the circuit court has wider discretion on the type of evidence to admit and to consider in reaching its decision. *See* WIS. STAT. § 799.209.[6]

¶15 Applying this standard, we conclude there was sufficient evidence that the cost of cleaning the carpet in the amount of $210.00 was necessitated by conditions that were beyond normal wear and tear. Howells agreed that the unit was new when she and her family moved in, including appliances and fixtures, and there were no spots, stains or tears in the carpet. Grosso presented photographs of the carpet that, she testified, she took when she met the tenants at the unit to perform an inspection just after they had moved out.[7] A reasonable fact finder could conclude that the stains on the carpet were not caused by twenty-two months of normal wear and tear of a new carpet. The tenants submitted a video that, they testified, they took on the same day. The circuit court considered this, too, and found that the video showed soiled areas of carpeting that were more than normal wear and tear. This court has viewed the video and concludes that a reasonable fact finder could arrive at the conclusion the circuit court did on the condition of the carpet shown in the video.

¶16 Grosso submitted a bill for carpet cleaning of $335.00, from which she subtracted $125.00, which she indicated was the amount for regular carpet cleaning. The bill itself states that $125.00 was for cleaning and deodorizing the

[6] The tenants assert that the record must include the "court's reasoned application of the appropriate standard," citing to ***Gaertner v. 880 Corp***., 131 Wis. 2d 492, 498, 389 N.W.2d 59 (Ct. App. 1986). However, that case was discussing the scope of our review when the court's decision was committed to the discretion of the circuit court. The court's determination on the amount of damages to which the landlord was entitled on its counterclaim is not a discretionary decision.

[7] Although Grosso's testimony was interspersed with her argument, the court administered an oath that included all her testimonial statements.

carpet, $150.00 was for a "poterymachine scrub" because the "carpet was very dirty [and] wouldn't come clean," and $60.00 was for "remov[al of] numerous ink stains." The circuit court could reasonably find that the landlord had established that $210.00 was the cost of remediating the tenants' damage to the carpet beyond normal wear and tear.

¶17 We also conclude that there was sufficient evidence to support the circuit court's determination that, in addition to the carpet, the unit required cleaning "above and beyond that standard" because of conditions that showed "much more than normal wear and tear." Besides Grosso's testimony that the unit was dirty, the photos she took show stains or dirt in the medicine cabinet, in a drawer, in a cupboard, in the freezer, in and at the bottom of the refrigerator, and in the toilet. The video the tenants provided show stains in a bathroom drawer and dirt or stains on tiled areas of the floor and at the bottom of the refrigerator. Grosso testified that she had to have someone clean the apartment because of the condition it was in and she provided a bill for cleaning by The Maids for $367.14. The court implicitly found that this was a reasonable cost for the cleaning beyond that which would be "standard." Given the conditions revealed in the photos and video, we conclude this implicit finding has a reasonable basis in the record.

¶18 The tenants point to Jackson's and Howells' testimony that they cleaned the unit before Grosso came to view the unit on June 16, 2008. However, the circuit court could reasonably decide that, notwithstanding whatever efforts the tenants had made to clean before that date, the photos and video showed the condition of the unit on that date. The tenants also point to a form completed by a representative of the landlord, not Grosso, on May 28, 2008, that checked off the condition of numerous items without comments and made some notations on painting and minor repairs but none on lack of cleanliness. Howells acknowledges

she was told that this was a preliminary check-out, not a final check-out. A reasonable inference from the form and the testimony is that this form does not reflect a satisfactory result of an inspection for cleanliness but was aimed at something else entirely: the need for painting and repairs.

B. Unpaid Rent

¶19 The statement Grosso sent to the tenants showing what she believed they owed includes, "Balance of unpaid rent $37.50 for May and June rent shortages." In response to interrogatories, she attached an itemization of rent due and rent paid for 2008, according to which the tenants underpaid rent for May 2008 by $25.00 and underpaid rent for one half of June 2008 by $12.50. However, Grosso presented no evidence at trial to support this aspect of the landlord's claim, and it appears the unpaid rent was not mentioned. Our review of the trial transcript persuades us that this is likely due to a misunderstanding on whether the tenants were disputing that they owed this amount.

¶20 The transcript shows that, when Grosso began cross-examining Howells regarding damage to the garage door, counsel for the tenants stated that they did not object to awarding the landlord the amount requested for this repair. The following interchange then took place:

> MS. GROSSO: Are we just objecting to the cleaning then—
>
> [TENANTS' COUNSEL]: *Just on the cleaning.*
>
> MS. GROSSO: —is that her major problem.
>
> THE COURT: So no objection to $469.24 damage to the garage door, correct?
>
> [TENANTS' COUNSEL]: Correct.
>
> THE COURT: All right.

(Emphasis added.) When the tenants were done putting on their witnesses, in response to the court's question whether Grosso wished to testify, Grosso stated: "I wish to testify. I have bills from the cleaning, they're by reputable companies. I didn't do it myself. I'm not sure at this point what it is they're objecting to except the cleanliness." The discussion then proceeded to the bills for the cleaning, which were admitted, and Grosso's comments related only to those.

¶21 It appears to us from this record that Grosso may have understood from tenants' counsel's remark "just on the cleaning" that the unpaid rent was not disputed, even though counsel did not expressly so state and apparently did not intend that. The circuit court may also have thought this item was not contested because it included the unpaid rent claimed in the landlord's damages without any discussion. In these circumstances, we conclude the correct course is to remand to permit the court to take evidence on this issue.

II. Attorney Fees

¶22 The tenants are entitled to reasonable attorney fees in the circuit court under MADISON GENERAL ORDINANCE § 32.07(10) because of the landlord's violation of the ordinance provisions with respect to the security deposit.[8] The amount of fees to award is within the circuit court's discretion, and we do not substitute our judgment for that of the circuit court. ***Kolupar v. Wilde Pontiac Cadillac, Inc.,*** 2004 WI 112, ¶22, 275 Wis. 2d 1, 683 N.W.2d 58. Instead, we affirm if the court applied a logical rationale based on the correct law and facts of

[8] The tenants also cite to WIS. ADMIN. CODE ch. ACTP 134 (Residential Rental Practices) and WIS. STAT. § 100.20(5) as authority for attorney fees. We agree the analysis for attorney fees is the same under the ordinance and the statute/regulation.

record. ***Id.*** This deferential standard of review is based in part on the fact that the circuit court has the opportunity to observe the proceedings first hand. *See* ***id.***

¶23 The circuit court in a written opinion found that the tenants' attorney had extensive experience in landlord tenant law and found the hourly fee requested—$155—was a reasonable rate for an attorney of his experience in this area of the law. However, the court concluded that the number of hours—15.43—was not reasonable. The court stated that this case involved "plain factual and legal issues" and a "relatively simple trial…[with] straightforward testimony by the primary factual witnesses and uncomplicated exhibits." The court determined that the time requested for trial preparation was more than reasonably necessary and that the trial should have taken less time. Based on the handwritten notes apparently made by the court on the itemized statement of fees, it appears the court deducted 5.8 hours from the trial preparation time and 1.3 hours for the entry "draft and prepare petition for attorney fees and supporting affidavit and cover letter."[9]

¶24 With respect to the time apparently deducted from the preparation time, we conclude the circuit court did not erroneously exercise its discretion. Before trial Grosso had already admitted in response to discovery that she had not notified the tenants of the photographs and she also set out her recollection and account regarding the check-in and check-out sheets. Thus, the matter of proving violations of the ordinance provisions on the notice of the photographs and on the

[9] While 1.3 hours is included in the notation's itemization of time that adds up to the 7.1 hours the court deducted, this entry is not circled, as are the other entries included in the itemization. Thus, while it appears the tenants are correct that this entry was deducted from the total number of hours, we are not entirely certain.

check-in and check-out forms was, as the circuit court found, relatively simple. As for the contested items of damages, the court could reasonably conclude that both the preparation and the trial on these took longer than reasonably necessary.[10] The tenants called two witnesses besides Howells and Jackson—a former landlord and the tenants' Section 8 case worker—with whom counsel spoke prior to trial, according to the time record he submitted. However, the testimony of both was minimally probative, if probative at all, on the issue of the condition of this unit on the date in question.

¶25 We are mindful that the purposes of fee-shifting statutes and ordinances are served by awarding fees that reasonably compensate attorneys for their work. However, it does not follow that this requires the circuit court to award fees for all the hours spent. It is the circuit court's role to decide what number of hours is reasonable, and the role of this court is limited to reviewing that decision for an erroneous exercise of discretion.

¶26 As for the apparent deduction for all time spent preparing the fee petition, we agree with the tenants that, unless a fee-shifting statute or ordinance precludes awarding fees for the time spent seeking fees, the rule is that the attorney is entitled to reasonable fees for this work, too. *See* ***Chmill v. Friendly Ford-Mercury of Janesville, Inc.***, 154 Wis. 2d 407, 414-415, 453 N.W.2d 197 (Ct. App. 1990). Therefore, if, as it appears from the notations, the court deleted all the time spent on the fee petition here, that was an error of law. However, as already noted, we are not completely certain this is what the court did. *See* ***supra***

[10] It does not appear the court made any reduction in hours because the tenants did not prevail against the landlord's counterclaim.

¶23 n.9. Moreover, if the court did make this error of law, it does not follow that the tenants' counsel is entitled as a matter of law to the full amount requested; the court must still exercise its discretion to decide what is a reasonable amount of time for the fee petition. Accordingly, we reverse and remand the amount of attorney fees awarded with instructions to the court to include in the award a reasonable fee for time expended in preparing the fee petition, if that is not already included.

III. Attorney Fees for Appeal

¶27 The tenants argue that they are entitled to reasonable attorney fees for this appeal under ***Shands v. Castrovinci***, 115 Wis. 2d 352, 340 N.W.2d 506 (1983). ***Shands*** holds that fees under WIS. STAT. § 100.20(5) for pecuniary loss for violations of WIS. ADMIN. CODE ch. ATCP 134 include fees for appellate review undertaken to attack or defend a circuit court's decision. ***Id.*** at 359. In ***Shands*** the tenant successfully defended on appeal the circuit court's order in the tenant's favor. ***Id.*** at 356. On this appeal we have affirmed on the challenges involving the cleaning costs and are reversing and remanding for further proceedings on the unpaid rent of $37.50 and on 1.3 hours of the 7.1 hours deducted from the hours requested for attorney fees. We conclude the tenants have not substantially prevailed on this appeal, and they provide no authority for entitlement to appellate attorney fees in these circumstances. Accordingly, we deny the request for appellate attorney fees.

CONCLUSION

¶28 We reverse and remand the award of $37.50 in unpaid rent credited to the landlord and direct the court to take evidence on this issue and make a determination whether the landlord is entitled to this amount. We also reverse and

remand the amount of attorney fees awarded with instructions to the court to include in the award a reasonable fee for time expended in preparing the fee petition if that is not already included. On all other issues we affirm. We deny the request for attorney fees on appeal.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with instructions.

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