COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1733-FT

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

DANIEL M. BOSS, AND CINDY L. BOSS,

PLAINTIFFS-RESPONDENTS,

V.

ROBERT J. KOCH, AND KAREN KOCH,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Richland County: MICHAEL KIRCHMAN, Judge. *Reversed and cause remanded with directions.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

PER CURIAM. Robert Koch and Karen Koch appeal a judgment dismissing their counterclaim against Daniel Boss and Cindy Boss for breach of a lease of agricultural land.[1] The issues are whether the Bosses unlawfully

[1] This is an expedited appeal under RULE 809.17, STATS.

terminated their lease with the Kochs, and whether the Kochs' damages are properly reduced to zero by their failure to mitigate. We decide both issues in favor of the Kochs, and therefore we reverse and remand for further proceedings.

The litigation arises from an agricultural tenancy by the Kochs on land owned by the Bosses. The case was commenced by the Bosses, who sought to recover unpaid rent, but only the Kochs' counterclaim is at issue on appeal.

The relevant historical facts, although disputed at trial, are undisputed on appeal. The trial court's findings of historical fact were based on its finding that Daniel Boss's version was more credible. The Bosses bought the property in 1991 or 1992, and some time thereafter Daniel Boss had a discussion with Robert Koch. They agreed that the Kochs' rental would continue on the same terms as with the prior owner. The tenancy continued in succeeding years without apparent changes in terms. In late November or early December 1995 they had another discussion. Boss said he wanted a higher rent, but Koch responded that he would not pay more. Boss said if Koch would not pay more, Boss would rent to someone else or put the land in the CRP. No agreement occurred, and Boss thought they both understood the tenancy to be over. The trial court found that Koch did not act to find replacement land until several months later.

The trial court concluded that Koch terminated the tenancy when he rejected Boss's demand for more rent. It further concluded that even if Boss unlawfully terminated the tenancy, Koch was entitled to no damages because he failed to mitigate them by taking prompt action to find replacement land. Koch appeals on these two issues.

Koch first argues that it was Boss who terminated the tenancy. The parties treat this issue as one of fact to be decided using the "clearly erroneous" standard. However, we regard the dispositive issue as one of law. Whether the facts fulfill a particular legal standard is a question of law. *See* ***Nottelson v. DILHR*****,** 94 Wis.2d 106, 115-16, 287 N.W.2d 763, 768 (1980). Deciding which party terminated the tenancy is a question of the legal significance of the historical facts.

When the parties made their first agreement to continue the tenancy on the same terms as the previous owner, they had an oral agreement, that is, a lease. *See* § 704.01(1), STATS. When that first year expired, but the tenancy nevertheless continued without discussion, it became a "periodic tenancy by holding over." *See* § 704.25(2)(a) and (c), STATS. This tenancy was on the same terms and conditions as the original lease. *See* § 704.25(3).

No law prevents the parties from having an oral negotiation to change the terms for the next year. If they agree, the result would be a new lease, on new terms. However, if they fail to agree, the parties must either abide by the terms of the periodic tenancy, or one of them must give the 90-day written notice of termination required by § 704.19(1), (2) and (3), STATS. Here, Boss told Koch that if they could not reach agreement, he would rent to someone else or put the land in the CRP. We conclude that this was a termination by the landlord, Boss. Koch was prepared to continue on the same terms, as would have occurred by statute, but it was Boss who was dissatisfied and said that the tenancy would be over unless the terms were changed.

The next question is whether this termination was unlawful because no written notice was provided. Boss argues that no written notice was necessary

because, as provided in § 704.19(2)(a)1, STATS., the parties "have agreed expressly upon another method of termination and the parties' agreement is established by clear and convincing proof." We reject this argument for two reasons. First, this provision appears to refer to a *prior* agreement on a different method of termination, that is, to an agreement about method that was made at some time before an attempt to terminate. Second, these parties did not "agree on another method of termination." They did not mutually agree to end the tenancy, or expressly agree that oral notice of termination was sufficient. Rather, at the end of their failed negotiation, they were in agreement only in understanding that Boss was going to terminate the tenancy. Although Koch may have understood that the tenancy would be terminated, we find no provision in the law that would make this oral notice sufficient; the statute requires written notice.

Koch's second argument is that the trial court erred by concluding that he can recover no damages because he failed to mitigate. Koch argues that this conclusion must be reversed because there is no evidence that land would have been available if he had acted promptly in December.

The parties agree that mitigation of damages is an affirmative defense that must be proved by the breaching party, which here would be Boss. *See* ***Kuhlman, Inc. v. G. Heileman Brewing Co.***, 83 Wis.2d 749, 752, 266 N.W.2d 382, 384 (1978). However, they disagree as to exactly what must be shown. Boss argues that he does not have to show anything more than that Koch acted unreasonably by waiting until March, and does not have to show that Koch would have been able to find other land.

An injured party cannot recover any item of damages "which could have been avoided." *See* ***id***. Boss argues that Koch could have avoided damages

by seeking a substitute rental. "[T]he burden is generally put on the party in breach to show that a substitute transaction was available …." RESTATEMENT (SECOND) OF CONTRACTS § 350 cmt. c (1981). Furthermore, to reduce Koch's damages to zero, there must also be evidence that comparable land could have been obtained *for the same price*. If Koch would have had to pay more to obtain the comparable land, he can recover the increased portion of the price, even if he took no action to mitigate. RESTATEMENT (SECOND) OF CONTRACTS § 350 cmt. c, illus. 6 and 7 (1981).

We have reviewed the record and the trial court findings, and we find no evidence to support a finding that Koch would have been able to find replacement land by acting promptly, or that he could have done so for a comparable price. The short passages of testimony cited by Boss lack any temporal specificity as to what Koch might have found in December, and contain no evidence as to the price of the available land. In fact, the record arguably supports an inference that comparable land would have cost more, as suggested by Boss's apparent ability to obtain a higher rental price for the land at issue here.

In summary, we conclude that Boss unlawfully terminated Koch's tenancy by failing to provide the required written notice, and that Boss has not shown that Koch failed to mitigate his damages. Therefore, we reverse and remand. Koch was claiming lost profits from growing crops on the rented land. It appears that the trial court did not make any findings as to whether Koch had established those damages, and also that Koch's counsel had intended to submit additional calculations on that point. Therefore, we remand for a determination of Koch's damages, if any.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.