COURT OF APPEALS
DECISION
DATED AND FILED

October 22, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0170 **Cir. Ct. No. 02-SC-3120**

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

PARKVIEW OF CALEDONIA, LLC,

PLAINTIFF-RESPONDENT,

V.

JOSEPH WEISTO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

¶1 NETTESHEIM, J.[1] In Wisconsin, a landlord must return a security deposit or issue a statement accounting for amounts withheld within twenty-one days after a tenant surrenders a rental premises. WIS. ADMIN. CODE

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version.

§ ATCP 134.06(2), (4). Parkview of Caledonia, LLC, issued two withholding statements to its tenant, Joseph Weisto, within the twenty-one-day time limit claiming damages exceeding Weisto's $250 security deposit. Parkview then issued a third withholding statement beyond the twenty-one-day time limit claiming additional damages. Weisto appeals from a small claims judgment that awarded Parkview the entirety of his security deposit and an additional $565 in damages claimed within the twenty-one-day time limit. The trial court denied Parkview's damages claimed beyond the twenty-one-day time limit.

¶2 We affirm the judgment. We conclude that WIS. ADMIN. CODE § ATCP 134.06(2) and (4) permit a landlord to reissue or amend a withholding statement at anytime within the twenty-one-day time limit. We further conclude that the trial court's findings that the damages to Weisto's apartment unit exceeded "normal wear and tear" and that the cost of repairing the damages was reasonable were not clearly erroneous.

FACTS

¶3 On November 14, 2000, Weisto leased a Parkview apartment from the Oakbrook Corporation. He submitted a $250 security deposit. The lease contained the standard language that the security deposit would be withheld for the "reasonable cost of repairing any damages caused by Tenant, normal wear and tear excepted."

¶4 The lease terminated on January 31, 2002. On February 8, 2002, Parkview sent Weisto a Security Deposit Reconciliation. It included the following claims against the security deposit: $45 for cleaning, $50 for stain removal on the carpet, and $125 to repair a section of the carpet in the living room due to a

cigarette burn hole. This reconciliation indicated that Weisto would receive a $30 refund.

¶5 On February 15, 2002, Parkview sent a revised reconciliation indicating additional claims for repair which included $275 to "Kilz" all walls and ceilings, and $320 to paint the apartment, both due to damage from smoking. Both this and the previous reconciliation were provided to Weisto within the twenty-one-day time limit set by the administrative code at WIS. ADMIN. CODE § ATCP 134.06(2)(a).

¶6 On April 12, 2002, Parkview sent Weisto a third reconciliation that added a $100 additional charge to repair a cigarette burn in the vinyl kitchen floor. This reconciliation included the charges from the previous reconciliations and the bill totaled $665 after deduction of the security deposit.

¶7 On July 2, 2002, Parkview filed a complaint against Weisto with the Racine County Small Claims Court seeking the $665 as damages. On August 7, 2002, Weisto filed an answer and counterclaim alleging that Parkview had failed to comply with the twenty-one-day time limit set forth in WIS. ADMIN. CODE § ATCP 134.06(2)(a).

¶8 At the trial, Weisto, his former wife, Parkview's area and local managers and a carpet installer testified. Following final arguments, the trial court found that Weisto had damaged the premises beyond normal wear and tear and that Parkview's costs in repairing the damages were reasonable. The trial court further determined that Parkview was entitled to amend its statement on the security deposit within the twenty-one-day time period but could not do so beyond that time period. Accordingly, the trial court limited Parkview's recovery to those

items set forth in the two reconciliation statements issued within the twenty-one-day time limit.

¶9 On December 12, 2002, the court entered judgment in favor of Parkview for $666, which included $565, the amount of damages claimed within the twenty-one-day time period, and $101 in service and filing fees. Weisto's counterclaim was dismissed. Weisto appeals.

DISCUSSION

Timeliness

¶10 The return of security deposits is governed by WIS. ADMIN. CODE § ATCP 134.06(2), which provides:

> RETURNING SECURITY DEPOSITS. (a) Within 21 days after a tenant surrenders the rental premises, the landlord shall deliver or mail to the tenant the full amount of any security deposit held by the landlord, less any amounts properly withheld by the landlord under sub. (3).

Pursuant to § ATCP 134.06(4)(a):

> SECURITY DEPOSIT WITHHOLDING; STATEMENT OF CLAIMS. (a) If any portion of a security deposit is withheld by a landlord, the landlord shall, within the time period and in the manner specified under sub. (2), deliver or mail to the tenant a written statement accounting for all amounts withheld. The statement shall describe each item of physical damages or other claim made against the security deposit, and the amount withheld as reasonable compensation for each item or claim.

¶11 Weisto argues that Parkview's entire claim should have been barred because Parkview's third security deposit withholding statement was untimely under WIS. ADMIN. CODE § ATCP 134.06(2)(a).

¶12 Whether WIS. ADMIN. CODE § ATCP 134.06 permits a landlord to amend or reissue a security deposit withholding statement within the twenty-one-day time limit and whether an untimely amendment precludes any recovery presents a question of law that we review de novo. ***State ex rel. L'Minggio v. Gamble***, 2003 WI 82, ¶11, 263 Wis. 2d 55, 667 N.W.2d 1 ("The interpretation of an administrative regulation is a question of law that this court reviews de novo."). Our purpose in interpreting a regulation is to ascertain and give effect to the intent of the regulation. ***Brown v. Brown***, 177 Wis. 2d 512, 516, 503 N.W.2d 280 (Ct. App. 1993). In ascertaining the intent, our first resort is to the plain language of the regulation. ***Id***. If it clearly and unambiguously sets forth the intent, it is our duty merely to apply that intent to the facts and circumstances of the question presented. ***Id***.

¶13 Before addressing Weisto's appeal, we first reject Parkview's contention that the trial court erred in denying its claim for damages based on the third security deposit withholding statement. Parkview failed to file a notice of cross-appeal to preserve its right to challenge the judgment. *See* WIS. STAT. § 809.10(2)(b) (a respondent who seeks modification of the judgment appealed from in the same action shall file a notice of cross-appeal).

¶14 We therefore turn to whether WIS. ADMIN. CODE § ATCP 134.06 permits a landlord to amend or reissue a security deposit withholding statement within the twenty-one-day time limit. Based on the plain language of the regulation, we conclude that it does. Section ATCP 134.06(4) requires a landlord who withholds any portion of a security deposit to provide the tenant with an accounting of the withheld amounts within twenty-one days of the tenant vacating the rented premises. The only limitation set out in § ATCP 134.06(4) is the twenty-one-day time period. The provision does not limit the number of

withholding statements a landlord may issue within that time period. Had the legislature intended to limit a landlord to the issuance of one nonamendable withholding statement within the twenty-one-day time limit, it would have done so; it did not. We therefore conclude that the trial court properly allowed Parkview to recover damages under its first two withholding statements.

¶15 Weisto contends that the third untimely withholding statement should bar any and all recovery to Parkview. In support, Weisto cites to ***Baierl v. McTaggart***, 2001 WI 107, ¶40, 245 Wis. 2d 632, 629 N.W.2d 277, in which the court held "that a landlord who includes a provision specifically prohibited by WIS. ADMIN. CODE § ATCP 134.08(3) in a residential lease may not enforce the terms of that lease." Weisto reasons that ***Baierl*** stands for the proposition that any violation of the administrative code by a landlord nullifies any claim by that landlord. We disagree for two reasons. First, we do not accept Weisto's assertion that Parkview violated the administrative code by submitting an untimely withholding statement. Because the first two withholding statements issued by Parkview fell within the twenty-one-day time limit *and exceeded the amount of Weisto's security deposit*, Parkview was not improperly withholding any of Weisto's security deposit past the twenty-one-day time period. Had it done so, it would have been in violation of WIS. ADMIN. CODE § ATCP 134.06. Second, unlike the landlord/tenant relationship in ***Baierl***, the relationship between Weisto and Parkview was not premised upon an invalid lease. *See* ***Baierl***, 245 Wis. 2d 632, ¶¶1-2.

¶16 The purpose of WIS. ADMIN. CODE ch. ATCP 134 is to enforce fair trade practices between landlords and tenants. *See* ***Shands v. Castrovinci***, 115 Wis. 2d 352, 357, 340 N.W.2d 506 (1983). This provision protects and promotes the interests of both a landlord and a tenant by: (1) precluding a landlord from

withholding a security deposit for an unreasonable length of time, § ATCP 134.06(2); and (2) allowing a landlord to withhold a security deposit (or a portion thereof) for damage to the property provided the landlord provides the requisite written statement within the prescribed time, § ATCP 134.06(4). The trial court's ruling in this case is consistent with both the language and purpose of § ATCP 134.06.

¶17 Weisto additionally argues that Parkview's claims are barred by estoppel and the doctrine of laches. Weisto contends that because Parkview did not return Weisto's $30 under the initial withholding statement, promissory estoppel requires that Weisto be relieved of the judgment. In other words, Weisto seeks judicial enforcement of Parkview's "promise" to return $30, the remainder of his security deposit, to him. However, Parkview had a twenty-one-day time period during which to evaluate the vacated premises and determine any damages. *See* WIS. ADMIN. CODE § ATCP 134.06(2), (4). While Parkview's initial security deposit withholding statement indicated a refund of $30, its revised statement issued within the twenty-one-day time period indicated a balance due of $565. There is nothing in the record demonstrating a basis for invoking promissory estoppel.

¶18 We likewise reject Weisto's attempt to invoke the doctrine of laches.[2] Weisto argues that the doctrine of laches applies due to Parkview's belated or untimely attempt to collect additional damages beyond the twenty-one-

[2] Laches is an equitable doctrine that may bar an action if these requirements are met: (1) the plaintiff unreasonably delayed in commencing the action, (2) the defendant lacked knowledge the plaintiff would assert the right on which the suit is based, and (3) the defendant is prejudiced by the delay. ***Sawyer v. Midelfort***, 227 Wis. 2d 124, 159, 595 N.W.2d 423 (1999).

day time period. Assuming arguendo that the doctrine of laches might apply to this situation, Weisto's argument nevertheless fails. While Parkview's third reconciliation statement was untimely, the fact remains that the first two statements were timely, and the trial court properly limited Parkview's recovery to the statements that were timely provided.

Sufficiency of Evidence

¶19 Weisto raises two challenges to the trial court's factual determinations that: (1) the damages exceeded the "normal wear and tear" permitted in the lease, and (2) the cost of the repairs claimed by Parkview was reasonable. In support of these challenges, Weisto cites to evidence that might support contrary findings than those made by the trial court.

¶20 Findings of fact by the trial court will not be upset on appeal unless they are clearly erroneous and against the great weight and clear preponderance of the evidence. ***Bank of Sun Prairie v. Opstein***, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979). When the trial judge acts as the finder of fact, the judge is the ultimate arbiter of the credibility of the witnesses. ***Id***. It is for the trial court, not the appellate court, to resolve conflicts in the testimony. ***Global Steel Prods. Corp. v. Ecklund Carriers, Inc.***, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269. It is not within our province to reject an inference drawn by a fact finder when the inference drawn is reasonable. ***Id***. We will search the record for evidence to support the findings that the trial court made, not for findings that the trial court could have made but did not. ***Id***. The trial court's findings will not be overturned on appeal unless they are inherently or patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts. ***Id***.

¶21 We have reviewed the transcript of the hearing and the evidence submitted in this case and conclude that the trial court's findings are not clearly erroneous. The trial court's findings as to the costs of the repair and the extent of the damage to the apartment are supported by evidence in the record. Parkview's evidence included photos of the actual damage, receipts for the costs of repair, testimony indicating the actual costs of repair, and the names of the persons and agencies involved in the repairs. While the terms of Weisto's lease permitted smoking, the trial court heard testimony that the smoke damage in Weisto's apartment was unusually bad. The trial court found this evidence to be credible and we see no reason to disturb that finding on appeal.

Statutory Awards and Frivolousness

¶22 Weisto requests this court to award attorney fees and double damages pursuant to WIS. STAT. § 100.25(5) based on the trial court's denial of Parkview's claims under the third and untimely withholding statement.[3] We decline to do so. While Weisto prevailed as to the third withholding statement, it remains that he was not entitled to the recovery of any portion of his security deposit and, in fact, judgment was entered in favor of Parkview for an additional $565, excluding costs. Therefore, Parkland did not wrongfully withhold any portion of Weisto's security deposit. As such, Weisto is not entitled to the remedies provided in § 100.25(5).

[3] The Department of Agriculture, Trade and Consumer Protection has exercised its rule-making authority under WIS. STAT. § 100.20(2)(a). ***Baierl v. McTaggart***, 2001 WI 107, ¶13, 245 Wis. 2d 632, 629 N.W.2d 277. The remedy for a wrongfully retained security deposit is governed by § 100.20(5) which provides, "Any person suffering pecuniary loss because of a violation by any other person of any order issued under this section may sue for damages therefor in any court of competent jurisdiction and shall recover twice the amount of such pecuniary loss, together with costs, including a reasonable attorney's fee." *See* ***Baierl***, 245 Wis. 2d 632, ¶7.

¶23 Parkview asks that we declare Weisto's appeal frivolous pursuant to WIS. STAT. § 809.25(3). In order to find Weisto's appeal frivolous, we would need to find that it was "filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another" or that Weisto or his attorney "knew, or should have known, that the appeal … was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." Sec. 809.25(3)(c).

¶24 Here, Weisto's appeal raised two primary issues under WIS. ADMIN. CODE § ATCP 134.06(2) and (4): whether a landlord may reissue or amend a withholding statement within the twenty-one-day time limit and whether an untimely withholding statement nullifies a prior timely statement. Because we know of no other cases addressing these questions, we cannot find Weisto's appeal to be frivolous.

CONCLUSION

¶25 We conclude that WIS. ADMIN. CODE § ATCP 134.06(2) and (4) permit a landlord to reissue or amend a security deposit withholding statement as long as it does so within the twenty-one-day time limit. We further hold that an untimely withholding statement does not nullify a prior timely statement. We also hold that there is sufficient evidence to support the trial court's findings as to the extent and cost of the damages claimed by Parkview. Finally, we reject Weisto's request for attorney fees and double damages under WIS. STAT. § 100.25(5), as well as Parkview's request that we declare Weisto's appeal frivolous.

By the Court.—Judgment affirmed.

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