COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2017AP374 **Cir. Ct. No. 2015SC017454**

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

KENNETH S. RAUFMANN,

PLAINTIFF-APPELLANT,

V.

JOHN L. TOOHEY AND BARBARA TOOHEY ENTERPRISES LIMITED PARTNERSHIP,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Reversed and cause remanded with directions.*

¶1 Before DUGAN J.[1] Kenneth S. Raufmann appeals the circuit court's judgment dismissing his claims and awarding damages to the John L. Toohey and Barbara Toohey Enterprises Limited Partnership ("Toohey") on its breach of contract counterclaim in this small claims landlord tenant dispute.

¶2 On appeal, Raufmann makes the following three central arguments: (1) the trial court did not properly apply the administrative code in determining that Toohey could accept his "earnest money"; (2) the trial court's determination that the parties entered into an oral rental agreement is not supported by the law, the language of the application, or the record; and (3) the trial court's conclusion that Toohey mitigated its damages is erroneous.

¶3 We uphold the trial court's determinations that Raufmann entered into an oral lease and that Toohey did not violate the administrative code. However, we agree with Raufmann that Toohey failed to prove that it mitigated its damages as required by WIS. STAT. § 704.29. Therefore, we reverse the judgment and remand this matter to the trial court for entry of judgment in favor of Raufmann in the amount of $1,190.

¶4 The following background facts, taken from the trial court's decision and supplemented by the trial testimony, provide essential context for our analysis. Additional relevant facts are included in the discussion.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

BACKGROUND

¶5 In July 2014, Raufmann was looking for an apartment, aided by his friends, Kelly and Michael Cannistra (collectively the "Cannistras"). Kelly made an August 1, 2014 appointment to see an apartment at Century Woods, a property leased and managed by Toohey, a Wisconsin limited partnership engaged in the business of leasing and managing rental properties that are located in Milwaukee County. Raufmann, accompanied by the Cannistras, went to the appointment. Raufmann liked the apartment and wanted to rent it.

¶6 Toohey gave Raufmann a document entitled "Standard Application for Occupancy" (the "application") to complete and told Raufmann that his credit would be checked. Kelly, having better penmanship than Raufmann, completed the form. Raufmann signed the application, without reading the following provisions above his signature:

> *If accepted, I hereby agree to enter into a lease as agreed or at least to rent the apartment on a month to month basis with a sixty-day notice to terminate Tenancy. If I refuse to accept the apartment after this application is accepted, my deposit may be used to pay Lessor's damages. I have been shown a copy of the lease and Non Standard Rental Provisions sheet to be used* and authorize current and future checking of my credit, employment and all references including providing said information to utility companies and other creditors. The Lessor shall be allowed sufficient time to check credit references before returning the earnest money deposit, but in no case more than [twenty-one] calendar days after acceptance of the earnest money.
>
> ….
>
> To the best of my/our knowledge, all of the above information is true. Misstatements or omissions of material facts will be sufficient cause for rejection.

(Emphasis added.) Toohey did not ask for, and Raufmann did not give, Toohey any money when he signed the application.

¶7 Toohey accepted Raufmann's application and informed Raufmann of the acceptance. A managing partner of Toohey, Kathleen Toohey, testified that on August 3, 2014, she ran a credit check on Raufmann, approved him, and relayed that fact to the on-site manager who would have called Raufmann immediately to tell him that he had been approved for the apartment.

¶8 On August 7, 8, and 9, 2014, Raufmann went to Century Woods to sign a lease and deliver two money orders for $395 and $795, a total of $1,190, for the apartment. Raufmann testified that the $395 was for a half-month's rent and the $795 was the security deposit.[2] On August 9, Raufmann delivered the money orders to the property manager, but no written lease was offered at that time. After Raufmann delivered the two money orders and did not have a signed lease, he changed his mind and no longer wanted to live at Century Woods. Raufmann never signed a lease and Toohey never asked Raufmann to sign a lease.

¶9 On August 11, Raufmann attempted to stop payment on the money orders. On August 12, he asked Toohey to refund the $1,190 he had paid by the money orders. Toohey declined because Raufmann had signed the rental agreement. Toohey retained $1,190 as unpaid rent for the period from August 15 through September 30, 2014. Toohey re-rented the apartment as of October 1, 2014.

[2] Raufmann testified that the lease was going to begin midmonth August.

¶10 Subsequently, Raufmann filed a small claims action against Toohey alleging the following three claims: (1) unfair trade practices in violation of WIS. STAT. § 100.20(1) and WIS. ADMIN. CODE ATCP § 134.03(1)(2015); (2) unfair trade practices in violation of § 100.20(1) and WIS. ADMIN. CODE ATCP § 134.05(2)(a); and (3) theft by fraud in violation WIS. STAT. § 943.20(1)(b).[3] His claim for relief includes a request for statutory costs and disbursements. Toohey filed an answer, affirmative defense, and a breach of contract counterclaim. After a November 2, 2015, hearing, the court commissioner ordered dismissal of Raufmann's claims and Toohey's counterclaim. Raufmann appealed to the circuit court.

¶11 Following a *de novo* bench trial conducted on March 9 and April 11, 2016, the trial court issued a written order on October 13, 2016, holding that under the application Raufmann had entered into an oral month to month tenancy with a sixty-day notice to terminate provision and that Toohey was entitled to retain the monies paid by Raufmann as damages incurred as a result of Raufmann's decision not to rent the apartment. The trial court dismissed Raufmann's claims and directed the entry of judgment awarding Toohey damages of $1,190 plus costs and disbursements. Judgment was entered on October 13, 2014. On October 21, 2016, the clerk of court sent notice of entry of judgment pursuant to WIS. STAT. § 799.24(1).

[3] On appeal, Raufmann does not mention the theft by fraud claim. We deem the claim abandoned and do not further address it. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998) (issues raised before the trial court and not raised on appeal are deemed abandoned).

¶12 On November 2, 2016, Raufmann filed a motion for reconsideration pursuant to WIS. STAT. § 805.17(3). No ruling was issued by the trial court. However, under § 805.17(3), Raufmann's motion was deemed denied ninety days after the entry of judgment. On February 24, 2016, Raufmann filed a notice of appeal. He filed an amended notice of appeal on February 27, 2016.

¶13 As a threshold matter, Toohey contends that this court lacks jurisdiction over this appeal because Raufmann filed the appeal more than forty-five days after receiving the notice of entry of judgment or ninety days after entry of judgment. *See* WIS. STAT. § 809.10(1)(e). We begin by addressing that issue.

DISCUSSION

I. Raufmann's Appeal is Timely Because Raufmann's Motion for Reconsideration under WIS. STAT. § 805.17(3) was Proper.

¶14 Toohey asserts this court lacks jurisdiction over the appeal because Raufmann erroneously relies on his motion for reconsideration under WIS. STAT. § 805.17(3) as extending the time for appeal.

¶15 Toohey relies upon ***Highland Manor Associates v. Bast*** (***Highland I***), 2003 WI App 130, 265 Wis. 2d 455, 665 N.W.2d 388, *aff'd on other grounds*, 2003 WI 152, 268 Wis. 2d 1, 672 N.W.2d 709, which held that motions for reconsideration under WIS. STAT. § 805.17(3) were incompatible with the speed with which small claims eviction actions are to be resolved and, therefore, was excluded from the statutes and rules applicable in small claims procedure. *See* ***id.***, 265 Wis. 2d 455, ¶¶8-10. However, that holding was rejected by the Wisconsin Supreme Court, *see* ***Highland Manor Associates v. Bast*** (***Highland II***), 2003 WI 152, ¶¶3-4, 26, 268 Wis. 2d 1, 672 N.W.2d 709. Specifically, the Wisconsin Supreme Court held that a small claims litigant *could* file a motion for

reconsideration; however, the time for a party to an eviction action to file an appeal was not extended by filing such a motion. ***Id.***, ¶26.

¶16 This case is a small claims action but it is not an eviction action. Thus, as relevant to this case, ***Highland II*** establishes that Raufmann properly filed the motion for reconsideration under WIS. STAT. § 805.17(3).

¶17 In pertinent part, WIS. STAT. § 805.17(3) provides that, "[i]f within [ninety] days after entry of judgment the court does not decide a motion filed under this subsection on the record or the judge, or the clerk at the judge's written direction, does not sign an order denying the motion, the motion is considered denied and the time for initiating an appeal from the judgment commences [ninety] days after entry of judgment." However, because the clerk of court gave notice of entry of judgment, the time to initiate an appeal was limited to forty-five days from the entry of the final judgment. *See* WIS. STAT. § 808.04(1); ***Mock v. Czemierys***, 113 Wis. 2d 207, 210, 336 N.W.2d 188 (Ct. App. 1983) (appeal time under WIS. STAT. § 808.04(1) is reduced to forty-five days when the parties have been given timely notice of entry of judgment pursuant to WIS. STAT. § 799.24(1)). [4]

¶18 There is an apparent conflict between these two statutes because read literally, "it is possible for the time to file an appeal to expire under [§] 808.04(1) before the time to file an appeal under [§] 805.17(3) begins." ***Salzman v. State***, 168 Wis. 2d 523, 530, 484 N.W.2d 337 (1992). ***Salzman*** resolved the issue, holding that "notice of entry of judgment still operates to

[4] The parties do not address the timeliness of the notice of judgment. Therefore we do not consider that potential issue.

reduce … [the] appeal time to forty-five days" and that "measurement of the forty-five-day time period … begins upon disposal of the motion for reconsideration as set forth under § 805.17(3)." ***Id.*** at 531 (footnote omitted; ellipses added).

¶19 Applying the foregoing to this case, Raufmann's motion for reconsideration filed on November 2, 2016 is considered denied on January 31, 2017. *See* WIS. STAT. § 801.15(1)(b). Raufmann had forty-five days from January 31, 2017, to file his notice of appeal. *See* ***Salzman***, 168 Wis. 2d at 531. The notice of appeal filed February 24, 2017 was well within that time period. Therefore, Raufmann's notice of appeal is timely. We now address the substance of Raufmann's appeal.

II. Sufficient Evidence Supports the Trial Court's Determination that Raufmann Entered into an Oral Lease with Toohey.

¶20 Raufmann argues that, notwithstanding the fact that the statutory or common law rules of evidence do not apply in small claims cases, the conclusion that Raufmann was approved for a tenancy with Toohey is not supported by any evidence other than "oral hearsay" and, therefore, cannot be sustained. Toohey argues that it accepted the application and approved Raufmann for the tenancy and that once accepted, the application created a month to month tenancy.

A. Standard of Review and Applicable Law.

¶21 A Wisconsin statute defines a lease as "an agreement, whether oral or written, for transfer of possession of real property ... for a definite period of time." *See* WIS. STAT. § 704.01(1). The statute provides that leases for less than one year may be formed orally. *See* WIS. STAT. § 704.03(1). The statute further provides that "[i]n any case where a lease or agreement is not in writing signed by

both parties but is enforceable under [§ 704.03,] the lease or agreement must be proved by clear and convincing evidence." *See* WIS. STAT. § 704.03(5).

¶22 To prove the existence of an oral lease, there must be some evidence that the parties intended to enter a landlord-tenant relationship. *See* ***Town of Menominee v. Skubitz***, 53 Wis. 2d 430, 435-36, 192 N.W.2d 887 (1972). The evidence may include the conduct of the parties which shows their intention to enter into a landlord-tenant relationship. *See* ***Schaller v. Marine Nat'l Bank of Neenah***, 131 Wis. 2d 389, 398, 388 N.W.2d 645 (Ct. App. 1986). "According to hornbook law, a contract consists of an offer, an acceptance and consideration. An offer and acceptance exist when mutual expressions of assent are present. Consideration exists if an intent to be bound to the contract is evident." ***Gustafson v. Physicians Ins. Co. of Wis., Inc.***, 223 Wis. 2d 164, 173, 588 N.W.2d 363 (Ct. App. 1998). When there is no genuine dispute of material fact, the existence and interpretation of a contract are questions of law that we review *de novo*. *See* ***Schlosser v. Allis-Chalmers Corp.***, 86 Wis. 2d 226, 244, 271 N.W.2d 879 (1978).

¶23 We approach Raufmann's contention regarding "oral hearsay" as a challenge to the sufficiency of the evidence to support the trial court's factual findings. "When considering the sufficiency of the evidence, we apply a highly deferential standard of review." ***Jacobson v. American Tool Cos., Inc.***, 222 Wis. 2d 384, 389, 588 N.W.2d 67 (Ct. App. 1998). Furthermore, we will not disturb the fact finder's determination and judgment if more than one reasonable inference can be drawn from the evidence. *See* ***Johnson v. Merta***, 95 Wis. 2d 141, 151, 289 N.W.2d 813 (1980).

¶24 The trial court's findings of fact will not be set aside, unless we conclude that they are clearly erroneous. *See* WIS. STAT. § 805.17(2). As part of

our analysis, we will accept the trial court's determination as to weight and credibility. *See* ***State v. Echols***, 175 Wis. 2d 653, 671, 499 N.W.2d 631 (1993). Such deference to the trial court's credibility determination is appropriate because it has the opportunity to observe the witness' demeanor and gauge the testimony's persuasiveness. *See* ***Johnson***, 95 Wis. 2d at 151-52. As a result, the trial court's finding on the credibility of a witness "will not be questioned unless based upon caprice, an abuse of discretion, or an error of law." ***Id.*** at 152. If a trial court does not expressly make a finding about the credibility of a witness, we assume it made implicit findings on a witness' credibility when analyzing the evidence. S*ee* ***Echols***, 175 Wis. 2d at 672-73.

B. Evidence Establishing that Raufmann entered into an Oral Lease with Toohey.

¶25 In considering Raufmann's sufficiency of the evidence challenge, the court notes that Raufmann testified at trial that "I wasn't approved [to lease the apartment] that day [August 1], but I had no idea that I was even approved." His attorney then asked: "I want to make sure we're clear on that. … [Y]ou weren't approved that day, but you weren't sure if you were ever approved?" Raufmann responded: "Right."

¶26 On cross-examination Raufmann participated in the following exchange:

> [ATTORNEY] And now, when you – when you went there on the 8th, 9th, 10th, and 11th,[5] you went there to sign the lease; is that correct?

[5] We note that Raufmann did not testify that he went to Century Woods on August 11, 2017.

[RAUFMANN]	Yes, I did.
[ATTORNEY]	The reason you were signing a lease is because you were going to be a tenant. *You had been accepted as a tenant; is that correct?*
[RAUFMANN]	I – *I have no idea. I never was told.*
[ATTORNEY]	Okay. Well, why would you think you'd sign a lease if you weren't accepted?
[RAUFMANN]	Why didn't they bring the lease.
[ATTORNEY]	Well, I don't know. But –
[RAUFMANN]	How can I be a tenant?
[ATTORNEY]	*At that point, you were there – you were there, and you paid them a half-month's rent and a security deposit because you were going to move in there?*
[RAUFMANN]	*Well, you're right.* I made a mistake, and I should have never gave them a cashier's check, and we'd never be in this predicament.
[ATTORNEY]	And you signed a document there, not a credit check, an application for tenancy?
[RAUFMANN]	Well, then I was misled.

¶27 The trial court's decision expressly addresses Raufmann's testimony that he did not know if he was ever approved for the apartment, noting that Raufmann also testified that he went to the property to provide two checks and to sign the lease. The trial court stated: "Why would he go to the property with [two] check[s] and to sign a lease if he was not approved. Such testimony is not believable." This credibility determination is not clearly erroneous and, therefore, we uphold it.

¶28 It is undisputed that Raufmann signed the application for the apartment, which stated *"[i]f accepted, I hereby agree* to enter into a lease as agreed or *at least to rent the apartment on a month to month basis with a sixty-day notice to terminate Tenancy.*" The trial court found that Toohey accepted Raufmann's application and approved him.

¶29 In making this determination, the trial court implicitly relied upon Toohey's managing partner's testimony that she ran a credit check on Raufmann on August 3, 2014, approved his application, and relayed that fact to the on-site manager who would have called Raufmann immediately to tell him that he had been approved for the apartment. This testimony is consistent with the timing of Raufmann's three trips to Century Woods to deliver the money orders and sign the lease. Raufmann has not shown that the trial court's credibility determination and its related finding that Raufmann was accepted for the apartment are clearly erroneous and, therefore, we must uphold such determinations.

¶30 Interpretation and application of the terms of an agreement are "questions of law that we review independently of the trial court's determination." *See* ***Bence v. Spinato***, 196 Wis. 2d 398, 408, 538 N.W.2d 614 (Ct. App. 1995). Under the terms of the application, Raufmann agreed that if his application was accepted, he would enter into a lease or, at a minimum, rent the apartment from month to month. Here, the application was Raufmann's offer to rent the apartment.

¶31 The trial court made the finding of fact that Raufmann offered to rent the apartment at least on a month to month basis with a sixty-day notice to terminate the tenancy and Toohey accepted that offer. It implicitly found that after accepting that offer, Toohey accepted Raufmann's money for one-half month's

rent and the security deposit. The trial court's findings are not clearly erroneous on this issue. Because Raufmann breached that oral lease, Raufmann's rent payment and security deposit could "be used to pay [Toohey's] damages."

¶32 We note that Raufmann also argues that the trial court "adopted a position that would allow for a single apartment in an apartment complex to be without any rules or regulations or non-standard rental provisions." He also argues that the trial court's reading of the contract unreasonably ignored the last line of the application that "misstatements of fact or misrepresentation"[6] would be grounds for rejection and there is no language to suggest that this provision only applies to misstatements by a prospective tenant. These "arguments are not developed themes reflecting any legal reasoning. Instead, the arguments are supported by only general statements." ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). We decline to address these inadequately briefed issues. *See* ***id.***

III. The Oral Lease Did Not Violate WIS. ADMIN. CODE ATCP § 134 Because the Only Terms of the Oral Lease were Contained in the Application that Raufmann Accepted.

¶33 Raufmann argues that Toohey is liable for pecuniary losses and exemplary damages citing the facts that it admitted violating WIS. ADMIN. CODE ATCP § 134.03(1), which requires "rental agreements and rules and regulations established by the landlord, if in writing, shall be furnished to prospective tenants for their inspection before a rental agreement is entered into, and before any earnest money or security deposit is accepted from the prospective tenant" and that

[6] The line to which Toohey refers states "[m]isstatements of material facts or omission of material facts will be sufficient cause for rejection."

it should have known it was doing so. Toohey argues that it did not violate the administrative code.

¶34 Toohey admitted that it did not furnish written rules and regulations to Raufmann, but argues that no rules or regulations were applicable to the month to month lease. The trial court held that because Raufmann and Toohey had an oral month to month lease and there were no rules and regulations applicable to that agreement, Toohey did not violate WIS. ADMIN. CODE ATCP § 134.03(1). We agree.

¶35 Raufmann also argues that Toohey violated WIS. ADMIN. CODE ATCP § 134.05(3)(a) because Toohey failed to return the earnest money deposit. However, Toohey cites the WIS. ADMIN. CODE ATCP § 134.02(3) definition of earnest money as "the total of any payments or deposits, however denominated or described, given by a prospective tenant to a *landlord in return for the option of entering into a rental agreement in the future, or for having a rental agreement considered by a landlord*." Toohey contends that Raufmann's characterization of the money he gave to Toohey as earnest money is without support in the record.

¶36 Raufmann's reply brief does not address this contention. By failing to refute this argument, Raufmann has conceded the argument. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Moreover, the record establishes that the money Raufmann gave Toohey was a half-month's rent and a security deposit, not earnest money. Therefore, WIS. ADMIN. CODE ATCP § 134.05(3)(a) does not apply to the oral lease.

IV. There is no Evidence that Toohey Mitigated its Damages.

¶37 Raufmann argues that, without Toohey having offered any evidence of its efforts to mitigate its damages, based on the record, the only conclusion that the trial court "should have reached" is that Toohey was not allowed to withhold Raufmann's deposit as damages. Toohey maintains that the evidence of its efforts to mitigate damages is that by finding a new tenant, it actually mitigated damages

¶38 As noted by the trial court, WIS. STAT. § 704.29(3) requires a landlord to allege and prove that the landlord has made efforts to mitigate damages. The trial court found that, although Toohey presented no evidence of its efforts to mitigate its damages, Toohey re-rented the apartment as of October 1, 2014, "which is not an unreasonable time period," and that Toohey did not request damages for October because it was able to re-rent the apartment prior to the expiration on the sixty-day period at the end of October 2014. The trial court concluded that Toohey was entitled to retain the monies paid by Raufmann as damages.

¶39 The trial court specifically found that "no testimony was presented as to what attempts were made to try to rent this unit after … Raufmann changed his mind." The trial court concluded that Toohey did not offer any factual evidence that it made efforts to mitigate its damages. The only evidence Toohey offered was that it eventually rented the apartment. A conclusion that Toohey mitigated its damages merely because it rented the apartment is based on speculation, not evidence. Toohey offered no evidence of any efforts that it made to rent the apartment sooner or that the October 1, 2014 rental was the result of its efforts to mitigate its damages. The trial court's finding of fact regarding mitigation of damages is clearly erroneous and without support.

¶40 We find that Toohey failed to prove that it complied with WIS. STAT. § 704.29(3). Therefore, the trial court should have granted judgment in favor of Raufmann in the amount of $1,190.

CONCLUSION

¶41 Although we conclude that sufficient evidence supports the trial court's determination that Raufmann entered into an oral lease with Toohey and that the oral agreement was not subject to the terms of WIS. ADMIN. CODE ATCP § 134, we also conclude that there is no evidence that Toohey mitigated its damages. Therefore, we reverse the trial court's judgment and direct that it enter judgment in favor of Raufmann in the amount of $1,190.

By the Court.—Reversed and cause remanded with directions.

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