Appeal Nos. 2004AP2507
2004AP3335

Cir. Ct. Nos. 2000CV475
2002SC172

WISCONSIN COURT OF APPEALS
DISTRICT II

J. DALE DAWSON AND GUDRUN DAWSON,

PLAINTIFFS-RESPONDENTS,

V.

ROBERT J. GOLDAMMER AND EILEEN K. GOLDAMMER,

DEFENDANTS-APPELLANTS.

FILED

Oct 26, 2005

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Snyder, P.J., Brown and Anderson, JJ.

Pursuant to WIS. STAT. RULE 809.61 this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

This appeal presents a single but significant issue of landlord-tenant rights and consumer protection. That is, where a tenant opts to enforce a lease, which is avoidable due to an illegal attorney's fees provision, does the prospectively enforced lease agreement include the attorney's fees provision?

BACKGROUND

Although a fair amount of procedural history accompanies this case, the facts central to the certified issue are straightforward. In 1995, J. Dale and Gudrun Dawson leased a parcel of property to Robert J. and Eileen K. Goldammer under a written four-year agreement denominated a "farm lease." The parcel is located partly in the town of Jackson in Washington county and partly in the town of Cedarburg in Ozaukee county. The lease made time of the essence with regard to rent payments on the first of each month, and provided that if the full rent was not paid by the tenth of the month, the Dawsons could immediately terminate the lease upon written notice to the Goldammers. Rent for the first four-year term was set at $1500 per month. Under the terms of the lease, the Goldammers had two renewal options of four years each. Furthermore, the lease contained a provision requiring the Goldammers to "pay and discharge all costs and attorney's fees and expenses that shall arise from enforcing any of the covenants of this lease by the lessor."[1]

The Goldammers exercised the first renewal option, which extended the lease until December 2003. Under the renewal terms, the Goldammers owed rent of $1750 per month. The Goldammers alleged that numerous problems with the property arose, including a damaged barn and septic system problems, and claimed a $200-per-month rent abatement. The Dawsons disputed these allegations but accepted the reduced rent payments from January 2000 until April 2000. As of May 2000, the Dawsons began rejecting the reduced rent. The

[1] The parties do not dispute that this provision is in direct violation of WIS. ADMIN. CODE § ATCP 134.08(3) (Oct. 2004), which prohibits the inclusion of a clause requiring a tenant to pay a landlord's legal expenses for enforcing a rental agreement.

Goldammers opened an escrow account and began depositing rent payments to that account. The Goldammers advised the Dawsons that when they were ready to accept the rent payments, the Goldammers would make payment from the escrowed funds.

Litigation ensued. On August 24, 2000, the Dawsons filed an action for declaratory judgment seeking a declaration that the lease had been violated by the Goldammers and had therefore terminated by its own terms. The Goldammers denied nonpayment of rent, filed a number of counterclaims, and requested a jury trial. On June 20, 2001, the Dawsons moved for summary judgment. The circuit court held that the Goldammers had paid the July 2000 rent in a timely manner. The court also determined that the parties had entered into an implied stipulation agreement, which required the Goldammers to deposit the rent into an escrow account pending the outcome of the case, and that the Goldammers were obligated to pay monthly rent of $1550 beginning in July 2000.

The circuit court sua sponte raised and relied upon ***Baierl v. McTaggert***, 2001 WI 107, 245 Wis. 2d 632, 629 N.W.2d 277, to rule that the attorney's fees provision in the lease agreement violated WIS. ADMIN. CODE § ATCP 134.08(3) (Oct. 2004), and rendered the lease unenforceable by *either* party, leaving the parties with a month-to-month tenancy. The Dawsons then gave the Goldammers notice terminating the month-to-month tenancy. The Goldammers did not vacate and the Dawsons followed with an eviction action.

The Goldammers appealed the circuit court's determination that the lease was null and void. In a published opinion, the court of appeals held that a tenant may seek enforcement of a lease that includes an attorney's fees provision in violation of WIS. ADMIN. CODE § ATCP 134.08(3). However, we rejected the

Goldammers' contention that ***Baierl*** not only permitted them to enforce the lease but also prevented the Dawsons from asserting their rights under the lease.

> [W]hile a landlord cannot seek damages for abandonment of a lease that has an ATCP violation, a tenant who seeks to prospectively enforce the lease has waived his or her rights pursuant to ***Baierl*** in the event of a breach on the part of the tenant. Accordingly, we conclude that by seeking to enforce the lease, the Goldammers are reaffirming the terms of the lease and the Dawsons' reciprocal right to enforce those provisions.

Dawson v. Goldammer, 2003 WI App 3, ¶11, 259 Wis. 2d 664, 657 N.W.2d 432 (Ct. App. 2002) (***Dawson I***). After our decision was released, the Dawsons amended their complaint, pursuing a declaration that the lease was void, an eviction, and money damages. The Goldammers realleged and incorporated all answers and counterclaims previously filed. The Dawsons moved to strike the counterclaims and, based upon the totality of the circumstances presented at the motion hearing, the circuit court granted the Goldammers' motion. The Dawsons moved for summary judgment on their declaratory judgment action. The court granted the Dawsons' motion, terminating the lease and evicting the Goldammers. The circuit court also granted the Dawsons' money judgment and ordered the Goldammers to pay the Dawsons' "actual attorneys' fees, costs and disbursements in an amount to be determined hereafter." The Goldammers appeal the award of attorney's fees and dismissal of their counterclaims.

DISCUSSION

The primary issue, as framed by the Goldammers, is whether a tenant must choose between accepting an illegal attorney's fees provision or

foregoing the lease agreement.[2] The unresolved question arises from the interplay of three legal rules. First, WIS. ADMIN. CODE § ATCP 134.08(3) prohibits the inclusion of a clause requiring a tenant to pay a landlord's legal expenses for enforcing a rental agreement. Second, ***Baierl*** holds that the illegal provision cannot be severed from the lease as a whole and therefore renders the contract unenforceable by the landlord. Finally, the court of appeals relied on ***Baierl*** to hold that "a tenant may seek enforcement of a rental agreement that includes an attorney's fees provision in violation of § ATCP 134.08(3)" but that tenants may not "pick and choose" which lease provisions will be enforced. ***Dawson I***, 259 Wis. 2d 664, ¶¶9, 11.

The question is one of severability, which requires an examination of the controlling administrative regulation and the intent underlying the provision. *See* ***Baierl***, 245 Wis. 2d 632, ¶¶18-19. The ***Baierl*** court concluded that allowing a landlord to sever the illegal clause and enforce the remainder of the lease would run counter to the policy goals of the Department of Agriculture, Trade, and Consumer Protection. *See* ***id***, ¶34. Regulatory objectives of WIS. ADMIN. CODE § ATCP 134.08(3) include "enforcement of private legal rights … in the realm of landlord-tenant relations" and "eliminating tenant intimidation." ***Baierl***, 245 Wis. 2d 632, ¶¶31, 35. Characterizing landlord-tenant relations as "an area fraught with consumer protection concerns," the court went on to say that a goal of § ATCP 134.08 is to "alleviate the residential tenant's limited bargaining power." ***Id.***, ¶25. The ***Baierl*** court concluded that allowing a landlord to sever the illegal

[2] The Goldammers also challenge the circuit court's appointment of a receiver to manage the Goldammers' assets. Although this issue is not certified, we respectfully request that the supreme court address the receivership question if it accepts certification of the primary issue.

attorney's fees provision and enforce the remainder of the lease would mean that "[l]andlords would have little incentive to omit such clauses and change their practice. A landlord could insert the clauses with relative impunity, knowing that the court will merely ignore this unfair trade practice by severing the clause." ***Id.***, ¶34.

In ***Dawson I***, the court of appeals relied on ***Baierl*** to conclude that even though a landlord cannot enforce a lease with an illegal attorney's fees provision, the tenant can. "[A] lease containing a provision violating a regulation is not necessarily void, but rather, may be unenforceable by one or both parties, and … under certain circumstances, a tenant could seek enforcement of a lease containing the illegal attorney's fees provision." ***Dawson I***, 259 Wis. 2d 664, ¶7. "Where a statute is intended to protect one party to a contract, that party may seek enforcement notwithstanding the violation of the statute enacted for their protection." ***Baierl***, 245 Wis. 2d 632, ¶20.

The question remains, however, whether the tenant can sever the attorney's fees provision and enforce the remainder of the lease or whether the tenant must abide by the lease in its entirety. The Dawsons assert that the Goldammers had a choice: they could become month-to-month tenants or they could enforce all of the provisions, including liability for attorney's fees, of the lease agreement. They argue that the "Goldammers do not enjoy enforceability with impunity – including liability for attorneys fees." For support, they turn to ***Dawson I***, where we held:

> Although we conclude the Goldammers may seek enforcement of the lease, this decision does not grant the Goldammers license to avoid their obligations under the lease. The Goldammers appear to argue that ***Baierl*** not only permits them to enforce the lease, but also prevents

> the landlord from asserting his or her rights under the lease. The Goldammers want the best of both worlds.
>
> Here … the tenants seek to prospectively enforce the lease. The tenants are aware that the attorney's fees provision is prohibited by the ATCP regulation but nonetheless are opting for specific performance. In so doing, the tenants may not pick and choose which of the provisions they will adhere to in the future and then rely on the rationale in ***Baierl*** to prevent the landlord from asserting his or her rights under the lease. By the tenant's very action, he or she wants enforcement of the lease and is responsible for the terms of the lease.

Dawson I, 259 Wis. 2d 664, ¶¶10-11. Furthermore, the Dawsons' current argument is supported by the general rule that we seek to enforce contracts deliberately made by the parties. *See* ***Burstein v. Phillips***, 154 Wis. 591, 594, 143 N.W. 679 (1913). The Goldammers are clearly aware that the existing lease includes an illegal attorney's fees provision, and the circuit court, after remand, confirmed that the Goldammers knew of their ability to avoid the lease and its attorney's fees provision in favor of a month-to-month tenancy.[3]

The Goldammers respond that nothing in ***Dawson I*** requires a tenant to be bound by a provision specifically prohibited by WIS. ADMIN. CODE § ATCP 134.08(3). They assert that "[w]hen a tenant chooses to rely upon the lease, rather than declare it unenforceable, as permitted under ***Baierl***, the tenant thereafter must comply with and accept every lease provision, other than ones specifically prohibited by law." They advocate the severability of the illegal provision. Long-standing case law confirms that a "lawful promise made for a lawful consideration

[3] For example, at the motion hearing on January 23, 2004, the circuit court advised the Goldammers as follows: "Is that what you want to do? Enforce the terms of the lease, or do you want to be a month-to-month tenant? You understand that … you take that lease with every obligation that you have on it as tenants…. Everything. And that includes the attorney's fees clause, everything."

is not invalid merely because an unlawful promise was made at the same time and for the same consideration." ***Simenstad v. Hagen***, 22 Wis. 2d 653, 661-62, 126 N.W.2d 529 (1964) (citation omitted).

Because this is a case of first impression, the Goldammers provide no case law or other authority to support their reading of ***Dawson I***; however, they maintain that a fair interpretation of ***Dawson I***, considering the holding in ***Baierl*** and the regulatory objective of protecting tenant rights, requires severability of the illegal provision where the tenant opts to enforce the lease. However, a tenant's decision to enforce a lease that contains an illegal provision implicates the long-held contract law principle that contracts deliberately made should be enforced. *See* ***Burstein***, 154 Wis. at 594. This suggests that the tenant can deliberately forego the benefits of WIS. ADMIN. CODE § ATCP 134.08(3) and the protection it affords by choosing to enforce a lease that contains an illegal attorney's fees provision.

Finally, it should be noted that on April 15, 2005, the State brought suit against the Dawsons in Milwaukee County Circuit Court Case No. 2005CV2845. The State alleges several violations of WIS. ADMIN. CODE ATCP ch. 134, including WIS. ADMIN. CODE § ATCP 134.08(3). The State seeks to have the circuit court: (1) restore all pecuniary loss suffered by the Goldammers, including the award for attorney's fees, (2) impose forfeitures for each code violation established in the lease, (3) enjoin the Dawsons from further violations, and (4) award the State expenses related to investigation and prosecution of the case. The State's attempt to undo the circuit court's award of attorney's fees and impose a forfeiture for the violation of § ATCP 134.08(3) presumes that the

attorney's fees provision was severable and the Goldammers have the ability to enforce the remainder of the lease.[4]

CONCLUSION

Although no Wisconsin case law currently addresses this precise question, the parties both offer reasonable interpretations of ***Dawson I*** to support their arguments. The supreme court can resolve the competing interpretations and define public policy on this unresolved issue. Accordingly, we respectfully request that the Wisconsin Supreme Court accept jurisdiction over this appeal.

[4] We note that a decision on the severability of the attorney's fees provision will provide the legal community with an analytical framework for evaluating other provisions of a lease that purportedly violate WIS. ADMIN. CODE ATCP ch. 134, but where a tenant seeks to prospectively enforce the lease.