

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 21, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1922

Cir. Ct. No. 2014SC2314

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

GUY P. GANTA,

PLAINTIFF-RESPONDENT,

V.

RAY A. PETERSON D/B/A MASTER BUILDERS,

DEFENDANT-APPELLANT.

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

¶1 KLOPPENBURG, J.¹ In this landlord-tenant dispute, tenant Guy Ganta brought a small claims action against landlord Ray Peterson for failing to

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

“return” Ganta’s security deposit after Ganta’s lease with Peterson expired. Peterson counterclaimed for damages from Ganta as a tenant who remained in possession without Peterson’s consent after expiration of the lease under WIS. STAT. § 704.27.² The circuit court dismissed Peterson’s counterclaim, found that Ganta was entitled to return of the security deposit, and awarded Ganta damages and costs totaling \$5,384.40. Peterson appeals.³ For the reasons set forth below, I affirm in part and reverse in part. I also remand for the circuit court to award Ganta double the amount of the security deposit unlawfully withheld as required by WIS. STAT. § 100.20(5).

BACKGROUND

¶2 Guy Ganta and Ray Peterson entered into a one-year residential lease, with the term beginning on March 1, 2011. The parties renewed the lease two times, extending the lease through the end of February 2014. In January 2014, Ganta notified Peterson that he did not wish to renew the lease after it expires at the end of February 2014. Ganta moved out of the apartment at the end of the lease term, and a third party known as “Randy” occupied the apartment for some time thereafter.

¶3 In early March 2014, Ganta sent Peterson a letter indicating that he had moved out of the apartment and providing his new address for Peterson to

² Ganta and Peterson appear pro se on appeal, as they did in the circuit court.

³ Ganta asks for costs on the ground that this appeal is frivolous. I deny Ganta’s request because Peterson’s appeal is in part meritorious. See *Baumeister v. Automated Products, Inc.*, 2004 WI 148, ¶34, 277 Wis. 2d 21, 690 N.W.2d 1 (“In order to be awarded costs, fees, and reasonable attorney fees, the moving party must prove that the entire appeal presented was frivolous. If an argument advanced has arguable merit, then the appeal is not frivolous.”).

send him his security deposit in the amount of \$500. Peterson wrote back, “We will have to evict Randy if he does not provide a security deposit which we can then return to you.”

¶4 On March 21, 2014, Ganta filed a small claims action against Peterson, alleging that Peterson improperly withheld the \$500 security deposit. Peterson counterclaimed for damages from Ganta as a tenant who remained in possession without Peterson’s consent after expiration of the lease under WIS. STAT. § 704.27.

¶5 On April 30, 2014, Peterson filed a separate eviction action naming Ganta, Randy, and another individual as defendants. According to the parties, that eviction action was dismissed in May 2014, after the court in that case found that the three defendants had all moved out of the apartment.

¶6 At trial to the court on July 29, 2014, Ganta asked the court for the return of his security deposit and for damages caused by Peterson’s wrongful eviction action. The circuit court held that: (1) Ganta is entitled to return of the security deposit; and (2) Peterson’s counterclaim is frivolous because Peterson failed to present any evidence that Ganta did not vacate the apartment at the end of the lease term. The court awarded Ganta damages totaling \$5,384.40.⁴

⁴ Peterson spends much of his brief discussing additional facts not in the record. “Assertions of fact that are not part of the record will not be considered.” *Nelson v. Schreiner*, 161 Wis. 2d 798, 804, 469 N.W.2d 214 (Ct. App. 1991).

DISCUSSION

¶7 I understand Peterson to argue that the circuit court erred in dismissing his counterclaim for damages from Ganta as a tenant who remained in possession without Peterson’s consent after expiration of the lease under WIS. STAT. § 704.27, and in awarding Ganta damages for the allegedly higher rent paid by Ganta to his new landlord.⁵ For the reasons set forth below, I affirm the circuit court’s dismissal of Peterson’s counterclaim and I reverse the portion of the damages award to Ganta relating to the higher rent. I also remand to the circuit court and direct it to award double the amount of the unlawfully withheld security deposit to Ganta under WIS. STAT. § 100.20(5).

A. Dismissal of Peterson’s WIS. STAT. § 704.27 Counterclaim

¶8 Peterson argues that Ganta did not “vacate the premises and release possession back to the landlord on termination of the lease,” and, therefore, the circuit court erred in dismissing Peterson’s WIS. STAT. § 704.27 counterclaim. “The interpretation of a statute is a question of law which we review *de novo*.” *State v. Bailey*, 2009 WI App 140, ¶14, 321 Wis. 2d 350, 773 N.W.2d 488 (quoted source omitted). “Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [circuit] court to judge the credibility of the witnesses.” WIS. STAT. § 805.17(2); *see also Bailey*, 321 Wis. 2d 350, ¶15. As I explain, I conclude that the circuit court did not err in

⁵ Peterson also contends that the circuit court’s “questions of Ganta were leading,” but does not develop any cognizable argument, and therefore, I do not address this further. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (appellate courts “may decline to review issues inadequately briefed”).

finding that Ganta had vacated the apartment and, therefore, in dismissing Peterson's counterclaim.

¶9 WISCONSIN STAT. § 704.27 is entitled "Damages for failure of tenant to *vacate* at end of lease or after notice" (emphasis added) and reads:

If a tenant *remains in possession without consent* of the tenant's landlord after expiration of a lease ... the landlord shall recover as minimum damages twice the rental value apportioned on a daily basis for the time the tenant remains in possession.

Id. (emphasis added).

¶10 Peterson argues that he was entitled to damages because Ganta did not "vacate" the apartment at the end of the lease term. Peterson contends that to "vacate" required "more than Ganta not living on the premises at the time of an eviction filing." However, Peterson cites to no legal authority supporting his contention. He quotes only a 1924 Texas case, and omits from his quotation the part of the opinion that defines vacate as including to "leave." *See Ruble v. Ruble*, 264 S.W. 1018, 1019 (Tex. Civ. App. 1924). Thus, I reject Peterson's suggestion that "vacate" means anything more than the conventional definition: "to move out or leave." BLACK'S LAW DICTIONARY 1782 (10th ed. 2014).

¶11 At trial, the circuit court asked Peterson several times, "[W]hat proof do you have to rebut Mr. Ganta's sworn testimony [that] he moved out on February 2[8], 2014?" Peterson was unable to offer any admissible evidence to support his assertion that Ganta had not moved out of the apartment after the lease expired. Peterson testified at trial that he had "no proof" that Ganta was living in the apartment after the lease terminated. He testified that he filed the eviction

“action to obtain the proof that [Ganta] was out or that the sheriff would put him out.”

¶12 Ganta, on the other hand, provided ample evidence to support his assertion that he moved out of the apartment at the end of the lease term. Ganta produced the last rent check he paid to Peterson, on which he wrote, “Rent feb end of lease.” He also presented a final electric bill, which the court found “indicat[es] that his utilities were disconnected on or about [February 28, 2014].” Ganta also testified that he transferred possession to Randy with Peterson’s consent, and that Randy gave Peterson a \$500 rent check, which Peterson deposited on February 25, 2014. And as previously noted above, Ganta wrote in his letter to Peterson in March that Ganta had moved out of the apartment. In that letter, Ganta also wrote, “[T]he apartment is now on a month to month with Randy ..., [en]closed I have a copy signed by Randy accepting the apartment as is.”

¶13 In sum, there is ample evidence in the record that supports the circuit court’s finding that Ganta vacated the apartment at the end of the lease term. Therefore, Peterson does not have a valid counterclaim against Ganta under WIS. STAT. § 704.27, and the circuit court did not err in dismissing the counterclaim. Peterson identifies no other basis for challenging the circuit court’s decision in favor of Ganta’s claim that he is entitled to return of his security deposit.

B. Damages Award in Favor of Ganta for Higher Rent

¶14 Peterson argues that the circuit court erred in awarding Ganta \$3,600 as damages for higher rent that Ganta paid, or will have to pay, due to entry on CCAP of the separate eviction action by Peterson, which the circuit court found to

be frivolous.⁶ Specifically, Peterson contends that the eviction action could not cause Ganta to be damaged by having to pay higher rent for Ganta's new apartment, because the lease on Ganta's new apartment began in January 2014, before the eviction action was filed in April 2014. As explained below, I agree.

¶15 Damage awards will be affirmed so long as there is any credible evidence to support the finding under any reasonable view. *Selmer Co. v. Rinn*, 2010 WI App 106, ¶28, 328 Wis. 2d 263, 789 N.W.2d 621. The appellate court “will not reverse the [circuit] court’s findings of fact on damages unless they are clearly erroneous.” *J.K. v. Peters*, 2011 WI App 149, ¶32, 337 Wis. 2d 504, 808 N.W.2d 141.

¶16 The parties do not dispute that Ganta's lease ended at the end of February 2014. Ganta testified that, due to the CCAP entry as to the separate eviction action, another landlord refused to rent an apartment to him, and as a result, Ganta is leasing a different apartment and paying \$100 more per month in rent than he would have had he not been refused by the other landlord. When asked how long he has been paying the extra \$100 per month, Ganta testified that he “was double leasing [and] obtained the apartment with a security deposit [in January],” and that he had signed a year-long lease with that new landlord. Ganta on appeal does not dispute that the eviction action entry in CCAP to which he was referring occurred after he had signed the new lease. Thus, there is no credible evidence supporting a finding that Peterson's April 2014 eviction action caused

⁶ Peterson does not specifically argue that the circuit court erred in awarding any other parts of the damages award. To the extent that Peterson makes a general request at the end of his brief that the full damages award should be reversed, he does not develop any argument as to why it should be reversed. *Pettit*, 171 Wis. 2d at 646 (appellate courts “may decline to review issues inadequately briefed”).

Ganta to have to pay higher rent pursuant to a lease executed in January 2014. Therefore, I reverse the \$3,600 damages award as unsupported by the evidence, and I direct the circuit court on remand to reduce the damages award by \$3,600.

C. Double Damages for Security Deposit

¶17 Finally, Ganta notes that the law allows for doubling of damages upon the unlawful withholding of a security deposit. The record reflects that Ganta had requested \$1,000, or double the amount of the \$500 security deposit unlawfully withheld by Peterson, before the circuit court. However, the damages awarded by the circuit court did not include double the amount of the \$500 security deposit. I remand with directions that the circuit court amend the damages award to double the \$500 security deposit as required by WIS. STAT. § 100.20(5).

¶18 WISCONSIN ADMIN. CODE § ATCP 134.06(2) provides that “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).” “If a landlord withholds amounts that do not represent an allowable claim under this section, he is in violation of the code.” *Armour v. Klecker*, 169 Wis.2d 692, 699, 486 N.W.2d 563 (Ct. App. 1992).

¶19 WISCONSIN STAT. § 100.20(5) 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 ... and *shall* recover twice the amount of such pecuniary loss, together with costs, including a reasonable attorney’s fee.” (Emphasis added). “Therefore, if a court determines that a landlord has violated [WIS. ADMIN. CODE § ATCP 134.06], it is *required* under the plain unambiguous

language of sec. 100.20(5), Stats., to award double damages and attorney fees.” *Armour*, 169 Wis. 2d at 697-98 (emphasis added).

¶20 It is undisputed that Peterson did not return any part of the \$500 security deposit to Ganta. I have concluded above that the circuit court properly dismissed Peterson’s counterclaim, which was Peterson’s only defense to Ganta’s claim that Peterson unlawfully withheld the security deposit. Thus, the circuit court properly concluded that Ganta is entitled to the return of the full amount of the security deposit, or \$500.

¶21 Having properly concluded that Ganta is entitled to return of the entire amount of the \$500 security deposit because Peterson withheld the security deposit in violation of WIS. ADMIN. CODE § ATCP 134.06, the circuit court was required to award Ganta double that amount, or \$1,000, under WIS. STAT. § 100.20(5). On remand, I direct the circuit court to award Ganta \$1,000 instead of the original award of \$500 for Peterson’s violation of the security deposit regulation.

CONCLUSION

¶22 For the reasons set forth above, I conclude that the circuit court did not err in dismissing Peterson’s counterclaim, but that the circuit court erred in finding that Peterson’s eviction action caused Ganta damage in the form of higher rent payments. I also direct the circuit court to award Ganta double the amount of the security deposit unlawfully withheld.⁷

⁷ Thus, on remand the original damages award of \$5,384.40 is to be reduced by \$3,600, and increased by \$500, for a net amount of \$2,284.40.

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

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

