COURT OF APPEALS
DECISION
DATED AND FILED

July 27, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2965

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

CHUCK MESECK,

PLAINTIFF-RESPONDENT,

V.

DAVID LARSEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL G. MALMSTADT, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings.*

FINE, J. This is a small claims action. Chuck Meseck, a former tenant of David Larsen, sued Larsen to recover portions of a security deposit that Meseck claims Larsen withheld improperly. The trial court found for Meseck. Larsen's appeal asserts three claims of alleged trial-court error. First, he submits that the trial court should have recused itself because, Larsen argues, the trial court

was biased against him. Second, Larsen contends that the trial court erred in finding that Meseck did not underpay rent for five months, and, therefore, erred in concluding that Larsen unlawfully withheld those underpayments from Meseck's security deposit. Third, Larsen asserts that the trial court improperly relieved Meseck of Meseck's responsibility under the lease to pay for water and sewer charges. We affirm on point one, reverse on point two, affirm and reverse on point three, and remand to the trial court for further proceedings.

1. *Recusal.* This action was heard by the trial court on two days, March 25, 1998, and April 7, 1998. On March 25, Larsen appeared *pro se*; Meseck was represented by counsel. When he appeared for the April 7th hearing, Larsen was also represented by counsel. Larsen's lawyer asked the trial court to disqualify itself. The thrust of the recusal request was that during the course of the March 25th hearing the trial court had expressed its views on the merits of the case. The trial court declined to disqualify itself from the case.

"Section 757.19(2)(g), Stats., requires that a 'judge disqualify himself or herself from any civil or criminal action or proceeding when ... [the] judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.' Both aspects of this analysis are subjective: 'the determination of the existence of a judge's actual or apparent inability to act impartially in a case is for the judge to make.'" ***State v. Marhal***, 172 Wis.2d 491, 506, 493 N.W.2d 758, 765 (Ct. App. 1992) (quoting ***State v. American TV & Appliance of Madison, Inc.***, 151 Wis.2d 175, 183, 443 N.W.2d 662, 665 (1989)) (alterations in ***Marhal***). Here, the trial court determined that it was impartial.

That ends our inquiry; we are bound by the trial court's subjective analysis. *See* ***American TV***, 151 Wis.2d at 183–184, 493 N.W.2d at 665.[1]

2. *Rent.* The lease between Larsen and Meseck had the following provision for the payment of rent:

> Rent shall be discounted $75.00 per month, on an individual month to month basis, provided that rental payments are made on time as described above. If rental payment is one day or more late no discount shall be applied. ABSOLUTELY NO EXCEPTIONS WILL BE MADE!

(Bolding in original.) The "above" provided that "$975.00 per month" was "[p]ayable at [an address] on or before the first day of each month." Meseck does not dispute Larsen's contention that he paid rent after the first of the month for five months, and paid only $900 for those months. The trial court held that Meseck was nevertheless entitled to the discount because Larsen "gave [Meseck] every reason to believe that payments made before the 5th of the month would be considered timely." The trial court noted that the lease assessed a $10 "late charge" if the rent was "not paid by the 5th of the month." The trial court viewed what it termed these "two separate provisions"—the $75 discount and the $10 late-fee charge—as conflicting, and thus interpreted the lease against Larsen, who drafted it. It also found, contrary to Larsen's testimony, that Larsen never

[1] An objective determination that a judge is not impartial may subject the judge to discipline; it "has no effect on [his or her] legal qualification or disqualification to act." ***State v. American TV & Appliance of Madison, Inc.***, 151 Wis.2d 175, 185, 443 N.W.2d 662, 666 (1989). Moreover, a "trial judge may express his or her opinion" on issues as they arise "without being subject to recusal." ***State ex rel. Dressler v. Circuit Court***, 163 Wis.2d 622, 644, 472 N.W.2d 532, 542 (Ct. App. 1991). Additionally, the trial court acted well within its discretion in refusing to delay the hearing when Larsen proffered a video tape for viewing but did not either give sufficient advance notice so the appropriate equipment could be set up or show the video tape to opposing counsel sufficiently in advance of the hearing. *See* RULES 904.03 & 906.11(1), STATS. We perceive no bias.

demanded from Meseck what the trial court called "'late fees'" of $75 for each month that Meseck paid his rent after its due date, until he withheld the money from Meseck's security deposit.

Unambiguous contractual language must be enforced as it is written. ***Dykstra v. Arthur G. McKee & Co.***, 92 Wis.2d 17, 38, 284 N.W.2d 692, 702–703 (Ct. App. 1979), *aff'd*, 100 Wis.2d 120, 301 N.W.2d 201 (1981). Contractual language is ambiguous only when it is "reasonably or fairly susceptible of more than one construction." ***Borchardt v. Wilk***, 156 Wis.2d 420, 427, 456 N.W.2d 653, 656 (Ct. App. 1990). Construction of a contract, including the determination of whether its terms are ambiguous, is a legal matter that we decide *de novo*. ***Ibid.***

The lease provisions that we consider here are not in conflict and are not ambiguous. Reading the lease as a whole, it is clear that rent was established at $975 per month, and that a late fee of $10 would be due if the rent was paid after the fifth of the month. If, however, the rent was paid timely, Larsen granted to Meseck a *discount*. The trial court did not recognize the distinction made by the lease between rent timely paid (for which there would be a $75 discount) and rent not paid "by the 5th of the month" (for which there would be a $10 late charge). Thus under the lease, Meseck would owe $900 if he paid rent on or before the first of the month, $975 if he paid the rent after the first but on or before the fifth of the month, and $985 if he paid rent on, for example, the sixth of the month. Larsen never attempted to assess a $10 late charge; he withheld from Meseck's security deposit that portion of the rent Meseck did not pay. This is specifically permitted by WIS. ADM. CODE § ATCP 134.06(3)(a) ("A landlord may withhold from a tenant's security deposit only for the following ... 2. Unpaid rent for which the

tenant is legally responsible, subject to s. 704.29, Stats.").[2] Accordingly, Larsen lawfully withheld $75 per month for five months from Meseck's security deposit.

3. *Utility*. The lease provided: "Utility charges are payable by Tenant except: None." (The word "None" was typed into the otherwise pre-printed form.) The trial court interpreted this provision to require payment for electricity and gas only. Larsen testified that the provision also required payment of water and sewer charges. Meseck testified that he believed he was only obligated to pay electricity and gas. The trial court concluded that the word "utility" was ambiguous and construed the lease against Larsen, who, as noted, drafted it. The trial court also noted that although Meseck placed electrical and gas service in his name, Larsen continued to pay the water and sewer charges, and did not alert Meseck that he viewed Meseck as responsible for these charges until he sent to Meseck the letter detailing the monies withheld from Meseck's security deposit. Accordingly, the trial court held that Larsen has improperly withheld water and sewer charges from Meseck's security deposit.

As noted, the trial court's interpretation of a contract is a matter that we review *de novo*. Here, the administrative regulations control. WIS. ADM. CODE § ATCP 134.04(3) provides: "UTILITY CHARGES. If charges for water, heat or electricity are not included in the rent, the landlord shall disclose this fact to the tenant before entering into a rental agreement or accepting any earnest money or security deposit from the prospective tenant." The Code thus defines "utility charges" as encompassing water, heat, and electricity. The lease provided the disclosure required by the Code. Moreover, it is immaterial that Meseck placed

[2] Section 704.29, STATS., is not applicable here.

gas and electric service in his name while Larsen paid the water bills directly. WIS. ADM. CODE § ATCP 134.06(3)(a)3 authorizes a landlord to withhold from a tenant's security deposit money that "the tenant owes under the rental agreement for utility service provided by the landlord but not included in the rent." Here, by operation of the lease and the Code, Meseck owed under the rental agreement utility service (which, as we have seen, the Code defines as including "water" service) that Larsen provided but was not included in the rental payments required by the lease.[3] Thus, Larsen lawfully withheld water-service charges from Meseck's security deposit.

The sewer-service charges are another matter. The Code does not include sewer service in its listing of what are "utility charges." Thus, here the lease is ambiguous, and the trial court properly construed it against Larsen, the drafter. *See* ***Dairyland Equip. Leasing, Inc. v. Bohen***, 94 Wis.2d 600, 609, 288 N.W.2d 852, 856 (1980). Accordingly, we agree with the trial court that Larsen should not have withheld sewer charges from Meseck's security deposit.

In sum, we hold as follows. First, the trial court did not err in declining to recuse itself from the case. Second, Larsen properly withheld from Meseck's security deposit $75 for each month that Meseck did not pay his rent on or before the first of the month. Third, Larsen properly withheld from Meseck's security deposit monies for water service, but did not properly withhold from Meseck's security deposit monies for sewer service. In light of this, we remand

[3] The Code recognizes that a tenant may assume the direct-bill burden of paying some utility charges, and also authorizes the landlord to withhold from the tenant's security deposit these monies if the landlord becomes ultimately responsible: "(a) A landlord may withhold from a tenant's security deposit only for the following: ... 4. Payment which the tenant owes for direct utility service provided by a government-owned utility, to the extent that the landlord becomes liable for the tenant's nonpayment." WIS. ADM. CODE § ATCP 134.06(3).

this matter to the trial court for a recalculation of damages and apportionment of attorneys fees under §100.20(5), STATS.

By the Court.—Order affirmed in part; reversed in part and cause remanded for further proceedings.

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