COURT OF APPEALS
DECISION
DATED AND FILED

June 17, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0357

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

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

PLAINTIFF-APPELLANT,

V.

TERESA E. TUCKER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: PAUL C. GARTZKE, Reserve Judge. *Affirmed.*.

DYKMAN, P.J.[1] Ray A. Peterson, landlord, appeals from an order dismissing his eviction complaint against Teresa E. Tucker, his tenant. The trial court dismissed his complaint after concluding that Tucker paid the amounts due under the lease within the five-day period set out under § 704.17(2), STATS. We

[1] This appeal is decided by one judge pursuant to § 752.31(a), STATS.

conclude that the record, such as it is, supports the trial court's conclusion. We therefore affirm.

This case is unusual because most landlord-tenant rent cases involve assertions that rent payments were made late or not at all. This case, however, involves a landlord's claim that he was paid too early. We are limited somewhat because Peterson has only provided us with the portion of the trial transcript containing the trial court's decision. When the record is incomplete, this court's review is limited to whether the record, as filed, sustains the judgment. *See* ***State of Louisiana ex rel. Eaton v. Leis***, 120 Wis.2d 271, 272, 354 N.W.2d 209, 210 (Ct. App. 1984). While we can consider errors of law in a trial court's decision, we will assume, in the absence of a transcript, that every fact essential to sustain the trial court is supported by the record. *See* ***Austin v. Ford Motor Co.***, 86 Wis.2d 628, 641, 273 N.W.2d 233, 239 (1979).

We must first, however, determine what sanction is most appropriate for Tucker's failure to file a brief. We conclude that we will consider this appeal solely upon the record and Peterson's submission. Peterson has provided us with no authority to the contrary, and the lack of Tucker's brief will not hinder us significantly.

Tucker's lease, dated September 21, 1998, required her to pay $700 rent per month, plus a $10 late payment fee. Rent was due on the 21st of each month. Tucker apparently paid her September rent, and all but $1.22 of her October rent. But she probably failed to pay all her November rent, because on November 30, Peterson served her with a § 704.17(2), STATS., "quit or pay rent" notice. Section 704.17(2) provides that if the tenant pays the delinquent rent within five days, his or her tenancy is not terminated.

The trial court found that Dane County Department of Human Services paid a portion of Tucker's rent from funds that were Tucker's property. The record contains two checks from Dane County for $570.78. One is dated November 1, 1998, and the other is dated December 1, 1998. Both are made out to Peterson. There being no complete transcript, we will assume that the trial court found that Peterson received the December 1 check on or before December 7, the day upon which the five-day notice expired. The trial court concluded that Tucker had complied with § 704.17(2), STATS., when a sum sufficient to cover her delinquent November rent and the $10 delinquency fee was paid to Peterson prior to December 7.

Peterson asserts that Dane County's December 1 check could not be applied to Tucker's rent due November 21. He contends that: "Dane County as payee of Respondent's money was liable as a condition of its payee status to pay the money to where it was legally required to be paid (a payment of approximately $570.78 per month) in order to comply with their protective payee responsibility." But he cites no statute, rule, ordinance or other authority for this assertion. The two checks show conclusively that Dane County *did* pay the money where it was required to be paid—to Peterson himself. What Peterson seems to contend is that Dane County's December 1 check could only be applied to Tucker's December rent.[2] Peterson has provided no authority that the check could not be applied to Tucker's November rent and late-payment penalty. In ***State v. Shaffer***, 96 Wis.2d 531, 546, 292 N.W.2d 370, 377 (Ct. App. 1980), we warned future litigants that

[2] It appears that Dane County's November 1 check was also paid too early. Peterson makes no complaint about this early payment.

we would refuse to consider arguments unsupported by legal authority. We see no reason to depart from that statement now.

Peterson next argues that the trial court erroneously exercised its discretion in disrupting Dane County's protective payee function. This seems to be a variation of Peterson's earlier argument, because he argues: "The [Dane County] tender of the December 21 rent payment on December 1 was designated precisely for the purpose of paying $570.78 of [Tucker's] rent due December 21." We are unaware of how Peterson reaches this conclusion. The exhibit showing the December 1 check, and what is apparently an accompanying memorandum, contain no suggestion of this assertion. The closest the memorandum comes is a statement: "THE FOLLOWING IS A PAYMENT FOR: TUCKER TERESA 1344 E WILSON ST. MADISON, WI 53703" and "PAYMENT TYPE: RENT PAYMENT" There is nothing on this check or its memorandum requiring the proceeds of the check to be allocated only to Tucker's December rent.

Peterson next asserts that WIS. ADM. CODE § ATCP 134.02(11) and MADISON GEN. ORDINANCE § 32.07(2)(b) (1994) prevented him from applying Dane County's December check to Tucker's November rent. Section 32.07(2)(b) provides: "The sum of all payments and deposits, held as a security deposit shall not exceed the equivalent of one months rent." Section ATCP 134.02(11) provides: "'Security Deposit' means the total of all payments and deposits given by a tenant to the landlord as security for the performance of the tenant's obligations, and includes all rent payments in excess of 1 month's prepaid rent." Peterson asserts that he felt unprivileged to accept rent tenders before their due

date.[3] Yet, by accepting rent during the first week in December, which he contends was not due until December 21, he was doing just that.

Peterson could easily have allayed his concern about running afoul of WIS. ADM. CODE § ATCP 134.02(11) and MADISON GEN. ORDINANCE § 32.07(2)(b) by subtracting from Dane County's December 1 check the $1.22 owed on the October rent, as well as the November rent balance plus any delinquency owed, and returning the balance to Dane County. But we see nothing in the rule or the ordinance that could imperil Peterson. Section ATCP 134.02(11) is merely a definition of "security deposit," and § 32.07(2)(b) regulates money held as a security deposit. The December 1 check memorandum clearly shows that it is for "RENT PAYMENT," and not for a security deposit. If there are other statutes, rules, ordinances or cases that prohibited Dane County from sending its December 1 check, or prevented Peterson from keeping it, Peterson has failed to mention them.[4] We will not search even a complete record to supply facts necessary to support an appellant's argument, nor will we develop an appellant's argument. *See* ***State v. West***, 179 Wis.2d 182, 195-96, 507 N.W.2d 343, 349 (Ct. App. 1993), *aff'd* 185 Wis.2d 68, 517 N.W.2d 482 (1994), *cert. denied*., ***West v. Wisconsin***, 513 U.S. 955 (1994).

Finally, Peterson asserts that the trial court exhibited gross prejudice against him because it noted that, in past cases, Peterson had insisted on costs when he won lawsuits, so that it was fair to insist that Tucker receive costs in this lawsuit. The trial court told Tucker that although she had won this lawsuit, "I

[3] See footnote two.

[4] Tucker did not counter-claim against Peterson because he accepted her rent before it was due.

don't know how long this is going to be able to go on … these payments are intended to be made a certain way."

We need not consider whether a trial court's consideration of a litigant's past litigation constitutes prejudice. Were there prejudice, it would be harmless. Section 805.18, STATS., provides that we are to disregard errors that do not affect the substantial rights of the adverse party. The record shows that Tucker's costs were "$0.00." We cannot see how telling Tucker that she was fortunate to win this lawsuit, but that further rent defaults would not necessitate the same result, would be a comment adverse to Peterson. If Peterson's real concern is that the trial court's statements concerning his previous litigation led to its conclusion that Tucker had paid November rent, his concern is groundless. Regardless of how the trial court felt about Peterson, we have considered the trial court's conclusion de novo, and we agree with it. Had the trial court found for Peterson on these same facts, we would have reversed. We therefore conclude that the trial court's prejudice, if there was any, did not harm Peterson. Accordingly, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.