

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 8, 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. 2015AP456

Cir. Ct. No. 2015SC172

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

M. BLANK PROPERTIES, LLC,

PLAINTIFF-RESPONDENT,

V.

GEORGE COLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: MITCHELL J. METROPULOS, Judge. *Reversed and cause remanded.*

¶1 SEIDL, J.¹ George Cole appeals a judgment of eviction. Cole argues M. Blank Properties, LLC, (Blank) created a month-to-month periodic

¹ This is an expedited appeal decided by one judge. See WIS. STAT. RULE 809.17; WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

tenancy when it accepted his rent payments after expiration of his written lease, and it failed to give adequate notice before terminating the periodic tenancy. We agree and therefore reverse the judgment of eviction.

BACKGROUND

¶2 Cole entered into a one-year written residential lease with Blank, ending November 30, 2014. By June 2014, Blank realized Cole's wife was not listed on the lease as an adult household member and notified Cole he needed to add her. Cole objected, and Blank acknowledged the lease did not require Cole's wife to be listed. During the final five months of the lease term, the conversation turned to Blank's requirement that Cole add his wife to any lease renewal.

¶3 The parties' existing lease provided: "This Agreement is only for the stated term and is not automatically renewable. Landlord and Tenant must agree in writing if tenancy is to continue beyond the last day of the rental term. Any renewals or terminations must be completed 60 days prior to the end of this Lease." (Formatting altered.)

¶4 On November 12, Blank emailed Cole, stating: "I am contacting you [in] regards to renewing your lease. Will you be renewing or terminating[?] Let me know as soon as possible so we can start the process." Cole responded two days later that he "will be renewing for the 6 months." His wife then completed and signed the renewal application provided, but she failed to give her social security number. On November 26, Cole informed Blank he declined to provide the social security number due to the risk of identity theft. That same day, he mailed a rent check for December, which Blank received on November 28.

¶5 On December 2, Blank wrote to Cole summarizing its reasons for demanding the social security number and indicating the lease renewal could not be processed without it. On that same day, Blank cashed Cole’s rent check for December.

¶6 Subsequently, Blank delivered a fourteen-day lease termination notice, dated December 17, specifying grounds for termination as a breach of contract because “Landlord and Tenant did not come to an agreement to renew tenancy after the lease term was expired.” On December 29, Blank received Cole’s rent check for January 2015. Cole also delivered a letter from his attorney opining the fourteen-day termination notice was invalid and stating Cole remained open to discussing terms for continuation of the lease for a fixed period. Blank cashed Cole’s January rent check on January 6. Ten days later, it commenced a small claims action for eviction and unspecified damages.

¶7 An eviction hearing was conducted on February 13. Cole contended acceptance of his December rent check created a month-to-month periodic tenancy under WIS. STAT. § 704.25(2). Blank argued that, pursuant to a nonstandard rental provision in the lease, there could be no renewal of the original lease without a new written document. It further argued two exceptions under § 704.25 applied to defeat Cole’s statutory argument.

¶8 The circuit court ordered eviction at of the end of February, reasoning there was “no meeting of the minds” and “no current rental agreement.” Cole now appeals.

DISCUSSION

¶9 Cole argues Blank’s acceptance of the December rent payment created a periodic tenancy pursuant to WIS. STAT. § 704.25(2), and the tenancy was continued for a second month upon payment and acceptance of the January rent. Interpretation and application of statutes and lease contracts to undisputed facts present questions of law subject to de novo review. See *Kenyon v. Kenyon*, 2004 WI 147, ¶11, 277 Wis.2d 47, 690 N.W.2d 251 (application of a legal standard to undisputed facts); *Deminsky v. Arlington Plastics Mach.*, 2003 WI 15, ¶15, 259 Wis. 2d 587, 657 N.W.2d 411 (contract interpretation); *State v. Setagord*, 211 Wis. 2d 397, 405-06, 565 N.W.2d 506 (1997) (statutory interpretation).

¶10 WISCONSIN STAT. § 704.25, titled, “Effect of holding over after expiration of lease; removal of tenant[,]” provides as follows:

(1) REMOVAL AND RECOVERY OF DAMAGES. If a tenant holds over after expiration of a lease, the landlord may in every case proceed in any manner permitted by law to remove the tenant and recover damages for such holding over.

(2) CREATION OF PERIODIC TENANCY BY HOLDING OVER.

....

(b) *All other leases.* If premises are leased for ... any period primarily for private residential purposes, and the tenant holds over after expiration of the lease, the landlord may elect to hold the tenant on a month-to-month basis

....

(c) *When election takes place.* Acceptance of rent for any period after expiration of a lease or other conduct manifesting the landlord’s intent to allow the tenant to remain in possession after the expiration date constitutes an election by the landlord under this section unless the landlord has already commenced proceedings to remove the tenant.

(3) TERMS OF TENANCY CREATED BY HOLDING OVER. A periodic tenancy arising under this section is upon the same terms and conditions as those of the original lease except that any right of the tenant to renew or extend the lease, or to purchase the premises, or any restriction on the power of the landlord to sell without first offering to sell the premises to the tenant, does not carry over to such a tenancy.

(4) EFFECT OF CONTRARY AGREEMENT. This section governs except as the parties agree otherwise either by the terms of the lease itself or by an agreement at any subsequent time.

....

(6) NOTICE TERMINATING A TENANCY CREATED BY HOLDING OVER. Any tenancy created pursuant to this section is terminable under s. 704.19.

WISCONSIN STAT. § 704.19, in turn, provides that, unless the “parties have agreed expressly upon another method of termination[,]” a “periodic tenancy ... can be terminated by either the landlord or the tenant only by giving to the other party written notice” Secs. 704.19(2)(a), (2)(a)1. “At least 28 days’ notice must be given” Sec. 704.19(3).

¶11 In its response brief, Blank now concedes “Cole’s position that a holdover tenancy was created for the month of December when [it] accepted the December rent payment.” However, it argues that the fourteen-day notice terminating vacancy, dated December 17, was valid and therefore terminated the tenancy at the end of December, and that acceptance of January rent did not create a periodic tenancy.

The fourteen-day notice

¶12 We first reject Blank’s argument that the fourteen-day notice was enforceable. Blank relies on the WIS. STAT. § 704.25 provision that periodic tenancies are “upon the same terms and conditions as those of the original lease” to assert that the following original lease provision was still in force: “Landlord and Tenant must agree in writing if tenancy is to continue beyond the last day of the rental term.”

¶13 Blank’s argument fails because the original lease provided that the requisite written agreement to continue the tenancy must be made at least sixty days prior to the end of the lease period. Because the periodic tenancy was only month-to-month, the original lease provision could never apply. Consequently, there was no agreement by the parties that would negate the WIS. STAT. § 704.19(3) requirement that a termination notice must be given at least twenty-eight days prior to the end of the lease period. *See also* WIS. STAT. § 704.19(2)(b)1. (periodic tenancy can be terminated only at the end of a rental period). Blank’s December 17 fourteen-day notice therefore could not have effectively terminated the periodic tenancy until the last day of January. *See* WIS. STAT. § 704.19(5).² Thus, Blank’s small claims summons and complaint, filed

² WISCONSIN STAT. § 704.19(5) provides:

If a notice specified [an] ... inaccurate termination date, because it does not allow the length of time required under sub. (3) or because it does not correspond to the end of a rental period in the case of a periodic tenancy, the notice is valid but not effective until the first date which could have been properly specified in such notice subsequent to the date specified in the notice

January 16, should have been dismissed because the periodic tenancy was not terminated until January 31.

Acceptance of January rent payment

¶14 Blank also argues that acceptance of the January rent payment “did not constitute an election by [Blank] to create a holdover tenancy,” because it had already “commenced proceedings” under WIS. STAT. § 704.25(2)(c) by giving the fourteen-day notice. This argument fails because Blank, by its own admission, had already created a periodic holdover tenancy by acceptance of the December rent payment, and that *existing* tenancy could only be terminated with a minimum of twenty-eight days’ notice as explained above.

¶15 Because Cole had a valid periodic tenancy through the last day of January, Blank’s January 16 summons and complaint for eviction and damages should have been dismissed. Consequently, the circuit court erroneously granted the judgment of eviction.

By the Court.—Judgment reversed and cause remanded.

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

