

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 4, 2010

David R. Schanker
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. 2008AP2755

Cir. Ct. No. 2001CV321

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**WYNDHAM PROPERTIES, LLC AND
MARK E. CARSTENSEN CONSTRUCTION &
DEVELOPMENT, INC., A/K/A MARK E.
CARSTENSEN CONSTRUCTION, INC.,**

PLAINTIFFS-RESPONDENTS,

v.

KINGSTAD LAW OFFICES, S.C.,

**DEFENDANT-THIRD-PARTY
PLAINTIFF-APPELLANT,**

v.

ROBERT W. BAIRD & CO., INC.,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Judgment affirmed; appeal dismissed.*

Before Fine, Kessler and Brennan, JJ.

¶1 BRENNAN, J. Kingstad Law Offices, S.C., appeals a judgment entered following several decisions and orders granting summary judgment motions in favor of plaintiffs Wyndham Properties, LLC, and Mark E. Carstensen Construction & Development, Inc. (collectively referred to as “Wyndham” unless otherwise specified). The circuit court’s orders determined that Kingstad was liable to Wyndham for rent, late fees, interest, build-out costs, and attorney fees, flowing from the events surrounding Kingstad’s eviction from property owned by Wyndham in 2000. Kingstad argues that Wyndham accepted its surrender of the property on June 30, 2000, and that WIS. STAT. § 704.29 (2007-08)¹ relieves Kingstad’s liability for costs purportedly accrued after that date. Because Kingstad misapplies § 704.29, we affirm the circuit court.

¶2 Kingstad also attempts to appeal from the circuit court’s order dismissing Kingstad’s third-party complaint against Robert W. Baird & Co., Inc., the tenant who leased the space from Wyndham after Kingstad vacated the property. As will be set forth, we do not have jurisdiction over that claim.

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

BACKGROUND

¶3 This case was decided on several motions for summary judgment. The facts included here are undisputed. Additional facts are included in the discussion section as necessary.

¶4 In 1997, Kingstad moved into and leased office space owned by Wyndham. The two parties did not, however, enter into a written lease agreement until May 1998. As part of the written lease, Kingstad and Wyndham agreed that Wyndham's building contractor, Mark Carstensen Construction, would "build out" an unfinished portion of the office space Kingstad rented. The parties agreed that the build-out costs would be amortized over a five-year period and would be combined with the rent payments into one monthly payment. The build-out was completed, and Kingstad admitted that it was "a nice place."

¶5 Kingstad soon fell behind on its monthly payments. Beginning in August 1998, Kingstad either paid its rent late or did not pay at all. On June 20, 2000, Wyndham's counsel sent a letter to Kingstad by certified mail stating that Kingstad's tenancy was terminated for failure to pay rent, pursuant to the terms of the parties' written lease, and that Kingstad was required to vacate the premises no later than July 14, 2000. Kingstad failed to vacate the premises by July 14 and admits that it did not vacate the premises until July 31, 2000. Wyndham subsequently rented the office space to Baird.

¶6 In January 2001, Wyndham filed suit to collect from Kingstad unpaid rent, build-out costs, late fees, accrued interest, and attorney fees as provided in the parties' lease. Wyndham also asserted a claim, pursuant to WIS.

STAT. § 704.27, for statutory double rent for the period of time when Kingstad occupied the premises after its tenancy had been terminated. Sometime later, Kingstad filed a third-party complaint against Baird, alleging that Baird tortiously interfered with the lease between Kingstad and Wyndham.

¶7 Wyndham moved for summary judgment in August 2003. The circuit court granted partial summary judgment to Wyndham for the unpaid rent and late fees and set a five percent interest rate on the unpaid balances in a November 24, 2003 decision and order. The court reserved the issue of whether Wyndham was entitled to the entirety of the build-out costs in order to determine whether those costs had been mitigated by Baird's tenancy.² In October 2004, the court entered an order for attorney fees.³ Kingstad filed a motion for reconsideration after a change in the trial court judge due to judicial rotation.⁴ On February 23, 2006, the circuit court partially granted Kingstad's motion for reconsideration by vacating the attorney fees order and changing the interest rate from five percent to one and one-half percent.

¶8 Then, in February 2006, Wyndham filed another motion for summary judgment, this time dealing solely with the issue of mitigation of the build-out costs. At that same time, Baird also filed a summary judgment motion,

² The Honorable Maxine A. White issued the November 24, 2003 decision and order.

³ Judge White also issued the October 2004 order.

⁴ The Honorable Richard J. Sankovitz presided over the remainder of the case, including the entry of judgment.

asking the court to dismiss Kingstad's third-party claim against Baird for tortious interference. The circuit court granted both motions in a May 23, 2006 order. The order directed both Wyndham and Baird to submit proposed orders for judgment. After much litigation over the contents of the proposed orders for judgment, the circuit court entered judgment in Wyndham's favor on August 7, 2008, awarding it rent, late fees, build-out costs, and attorney fees. No judgment was ever entered with regard to Kingstad's third-party complaint against Baird. Kingstad appeals.

STANDARD OF REVIEW

¶9 We review a motion for summary judgment independently, employing the same standard as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). We shall affirm the circuit court's decision granting summary judgment if the record demonstrates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

DISCUSSION

I. WISCONSIN STAT. § 704.29

¶10 Kingstad argues that Wyndham accepted Kingstad's surrender of the property under WIS. STAT. § 704.29 on June 30, and therefore, Kingstad cannot be

held liable for monies allegedly due after that date.⁵ In so arguing, Kingstad misapplies § 704.29 and ignores the fact that it occupied the property until July 31.

¶11 WISCONSIN STAT. § 704.29(1) states in relevant part:

[I]f the tenant is removed for failure to pay rent or any other breach of a lease, the landlord can recover rent and damages except amounts which the landlord could mitigate ... *unless the landlord has expressly agreed to accept a surrender of the premises and end the tenant's liability.*

(Emphasis added.) “‘Surrender’ entails the tenant’s giving up of the lease before its expiration and the landlord’s acceptance of the tenant’s relinquishment of rights.” *CCS N. Henry, LLC v. Tully*, 2001 WI App 8, ¶10, 240 Wis. 2d 534, 624 N.W.2d 847. A landlord accepts a tenant’s surrender “when the landlord occupies the premises for his own use or takes exclusive possession” of the premises. *First Wisconsin Trust Co. v. L. Wiemann Co.*, 93 Wis. 2d 258, 272, 286 N.W.2d 360 (1980). The interpretation of § 704.29 and the application of that statute to the facts of this case are questions of law that we review *de novo*. See *Marotz v. Hallman*, 2007 WI 89, ¶15, 302 Wis. 2d 428, 734 N.W.2d 411.

⁵ Wyndham argues that Kingstad conceded before the circuit court that it owed rent and late fees for its tenancy in July 2000, and therefore, waived its right to contest that issue on appeal. In response, Kingstad argues that he conceded to owing rent and late fees for July 2000 only for purposes of summary judgment and that he raised the applicability of WIS. STAT. § 704.29 before the circuit court, thereby preserving the issue for appeal. Regardless, while “[i]t is the often-repeated rule in this State that issues not raised or considered in the [circuit] court will not be considered for the first time on appeal,” the “rule ... is not absolute and exceptions are made.” *Wirth v. Ehly*, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980). Because the facts are not in dispute and the substance of the claim is easily determined, we will address Kingstad’s claim on the merits, and need not determine whether the claim was waived before the circuit court. See *id.* at 443-44.

¶12 Kingstad contends that prior to June 12, the date on which Wyndham notified Kingstad that Kingstad had violated the terms of the parties' lease and that Kingstad was to vacate the premises, Wyndham entered into a written agreement with Baird. According to Kingstad, that agreement named Baird as Kingstad's successor tenant, commencing on June 30. Kingstad argues, pursuant to WIS. STAT. § 704.29, that under the terms of Wyndham's agreement with Baird, Wyndham accepted Kingstad's surrender of the premises on June 30, the date on which Baird was to succeed Kingstad as tenant.

¶13 Even accepting Kingstad's recitation of the facts as true, under no understanding of WIS. STAT. § 704.29 can Kingstad be seen as surrendering the property on June 30 when Kingstad admits that it did not vacate the property until July 31. Kingstad did not "relinquish[] [its] rights" to the property while it was still occupying the premises. See *CCS N. Henry*, 240 Wis. 2d 534, ¶10. Nor did Wyndham "occup[y] the premises for [its] own use or take[] exclusive possession" of the premises if Kingstad was still occupying the office space. See *First Wisconsin Trust Co.*, 93 Wis. 2d at 272. To say otherwise defies common sense and is contrary to the plain meaning of the word "surrender."

¶14 WISCONSIN STAT. § 704.29 has been consistently interpreted to allow a landlord to accept a tenant's surrender of the property and thereby extinguish the tenant's *future* obligations to the landlord. See *CCS N. Henry*, 240 Wis. 2d 534, ¶21 (holding that § 704.29 does not require a landlord to credit a former tenant for payments received from a successor-tenant incurred before the successor-tenant's tenancy began). The statute has never been interpreted to negate a tenant's obligations incurred while a tenant still occupied a property. Accordingly, because Wyndham did not seek payment for damages accrued after

July 31, the date on which Kingstad vacated the office space, the circuit court did not err in determining that § 704.29 did not apply.

II. Third-Party Complaint

¶15 Kingstad also argues that the circuit court improperly granted Baird's motion for summary judgment, thereby dismissing Kingstad's third-party complaint against Baird for tortious interference. In response, Baird moved to dismiss the appeal on the grounds that the May 23, 2006 circuit court order granting its summary judgment motion was final as to Baird, and therefore, Kingstad's November 3, 2008 notice of appeal was untimely. *See* WIS. STAT. §§ 808.03 and 808.04(1) (requiring initiation of an appeal within forty-five days or ninety days of entry of a final judgment or order depending on notice of entry to the parties).

¶16 In an October 13, 2009 order, we held that the circuit court's May 23, 2006 order was *not* final because it contemplated that an additional document—a proposed judgment—would be filed by Baird. *See Fredrick v. City of Janesville*, 92 Wis. 2d 685, 686, 285 N.W.2d 655 (1979) (holding that “the test to determine whether a decision is a final order or judgment is ‘... whether the [circuit] court contemplated that an additional formal document would be entered with respect to the matter covered in the decision’”) (citation omitted; omission in *Fredrick*). Because Baird never filed the proposed judgment, judgment was never entered, and there is no final order on record from which an appeal of the circuit court's order dismissing the third-party claim can be taken. *See id.*; *see also* WIS. STAT. § 808.03(1). While in its reply brief, Kingstad ignores the substance of our October 13, 2009 order and instead argues that Baird conceded the merits of Kingstad's argument by failing to address them on appeal, it remains the case that

there is no final order from which to appeal the dismissal of the third-party claim. Because there is no final order, we are without jurisdiction to review this claim. *See Thomas/Van Dyken Joint Venture v. Van Dyken*, 90 Wis. 2d 236, 241, 279 N.W.2d 459 (1979).

By the Court.—Judgment affirmed; appeal dismissed.

Not recommended for publication in the official reports.

