

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 13, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-2454

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

L'WANDA WARRENDORF,

PLAINTIFF-APPELLANT,

V.

DONALD OSBORNE AND TERESA K. ROSACKER,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Polk County:
JAMES R. ERICKSON, Judge. *Reversed and cause remanded with directions.*

MYSE, J. L'Wanda Warrendorf appeals a judgment assessing her former tenant, Teresa K. Rosacker, with \$447.64 for rent and damages to Warrendorf's rental property. Warrendorf argues that the small claims court erred by failing to assess Rosacker with rent accruing under the lease after the tenancy was terminated; by failing to award her damages for various other breaches of the lease; and by failing to assess Rosacker and her co-tenant, Donald Osborne, jointly

for the damages. Because Warrendorf may be entitled to recover for the rent that accrued after Rosacker vacated the premises under § 704.29, STATS., and because this court cannot review the alleged other errors in the small claims proceedings due to the failure to report those proceedings, the case is reversed and remanded with directions to apply § 704.29.

Rosacker and Osborne jointly signed a lease establishing a several-month-long tenancy with Warrendorf. From the start of the lease period Warrendorf began to encounter difficulty collecting rent from Rosacker and Osborne. Warrendorf ultimately served notice to quit or pay rent, and Rosacker and Osborne voluntarily left without paying. Warrendorf brought this action at the end of the lease term seeking compensation for damages to the apartment and for Rosacker's and Osborne's failure to pay for telephone calls and rent due under the lease.

Osborne failed to answer the complaint and default judgment was entered against him for \$1,837.87. That judgment is not at issue in this appeal. Rosacker answered the complaint against her and appeared at trial. After a "significant discussion" was held off the record, the small claims court entered judgment against Rosacker for \$388.64 plus costs. The court reached this amount after adding Rosacker's rental contribution to other amounts for damages to the apartment. The court refused to award Warrendorf the amount for rent accruing after the tenants vacated the apartment but before the lease expired. Warrendorf appeals.

Warrendorf first claims that the trial court erred by refusing to award her damages for unpaid rent accruing after Rosacker vacated the premises. Warrendorf argues that Rosacker is jointly and severally liable under the lease for

rent because Rosacker co-signed the lease and the lease was never terminated. Rosacker does not dispute that she was a tenant, and her one-sentence reply to this argument is: “She ordered me to pay rent or get out, I got out.”¹

This court agrees with Warrendorf that Rosacker may be liable for rent under the lease despite the fact that Rosacker vacated the premises after receiving notice to quit or pay rent. In its decision denying such relief, the trial court erroneously treated the words “tenancy” and “lease” as synonymous and concluded that Rosacker’s lease was terminated at the same time her tenancy was terminated. Although it is undisputed that § 704.17(2)(a), STATS., did terminate Rosacker’s tenancy, her lease remained intact.

Section 704.17(2)(a), STATS., provides that a “*tenancy* is terminated if the landlord gives the tenant notice requiring the tenant to pay rent or vacate” and the tenant does not then pay the rent. (Emphasis added.) The statute nowhere provides that a *lease* is also terminated under those circumstances. The terms “lease” and “tenancy” are distinct legal concepts. This distinction is highlighted by the terms’ separate treatment in the definitions section of ch. 704, STATS. (Landlords and Tenants). Essentially, a “lease” is defined as an agreement creating a tenancy. Section 704.01(1), STATS. “Tenancy,” while that word is not itself defined in the statute, is conceptually distinguished from “lease” by the referral to it as “including a tenancy under a lease, a periodic tenancy or a tenancy at will.” Section 704.01(4), STATS.² Section 704.17(2)(a), STATS., therefore does

¹ Rosacker’s brief is a single page document explaining her reasons why the small claims result should stand. No legal support is given for any of her arguments.

² “Tenancy” is elsewhere defined as the “[p]ossession or occupancy of land or premises under lease.” BLACK’S LAW DICTIONARY 1465 (1990); *see also* WEBSTER’S THIRD NEW INT’L DICTIONARY 2354 (1976) (“the temporary possession of something that belongs to another”).

not support the trial court's conclusion that Rosacker's lease was terminated and that Warrendorf cannot collect those damages that accrued after Rosacker terminated her tenancy.

Another provision of ch. 704, STATS., does permit Warrendorf to collect for rent that accrued after Rosacker vacated. Section 704.29(1), STATS., states:

If a tenant unjustifiably removes from the premises prior to the effective date for termination of the tenant's tenancy and defaults in payment of rent, or *if 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 in accordance with this section, unless the landlord has expressly agreed to accept a surrender of the premises and end the tenant's liability. (Emphasis added.)

The plain meaning of this statute permits Warrendorf to collect rent even though Rosacker had been removed from the premises for failing to pay rent. By discussing the need for mitigation, the statute encompasses the landlord's right to collect rent that accrued after the tenant vacated or was removed. The trial court erred by not applying this statute. This case is therefore remanded and the trial court is instructed to apply § 704.29(1), STATS., to Warrendorf's claim.

Warrendorf next argues that the small claims court erred in assessing other damages against Rosacker because the court failed to hold both tenants jointly and severally liable for damages to the apartment. While Warrendorf is correct that both tenants should be jointly and severally liable because they co-signed the lease, this court is unsure whether the trial court actually committed the alleged error because most of the relevant discussion took place off the record. On

remand of this matter the trial court is therefore advised to place its proceedings on the record.

By the Court.—Judgment reversed and cause remanded with directions.

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

