**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

March 26, 1998

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 97-3060-FT**

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

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**SIU KAI CHAN,**

**PLAINTIFF-APPELLANT,**

**V.**

**ALLEN HOUSE APARTMENTS MANAGEMENT,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Dane County: MARK A. FRANKEL, Judge. *Affirmed in part; reversed in part and cause remanded.*

VERGERONT, J.[1] Siu Kai Chan filed a small claims action alleging that his former landlord, Allen House Apartments Management, charged excessive amounts for cleaning the apartment after he moved out, which amounts

[1] This appeal is decided by one judge pursuant to § 752.31(2)(b), STATS.

were deducted from his security deposit. Chan also claimed Allen House Apartments violated certain related municipal ordinances. After a decision by the small claims court commissioner, Chan requested a trial de novo in circuit court. The court, after hearing the evidence, dismissed Chan's claim and awarded the landlord attorney fees in the amount of $50, later modifying that award to $15. Chan appeals the judgment dismissing his claim, contending that the trial court erred in applying the burden of proof in determining that the deductions from the security deposit were proper and that the court erred in allowing the deductions because the landlord's form violated MADISON, WI., GENERAL ORDINANCE § 32.07(6)(d).[2]

We conclude that the court erred regarding certain charges for cleaning. We also conclude that the landlord's form did not violate the ordinance. We therefore affirm in part and reverse in part.

Chan testified that when he moved into the Allen House Apartments he paid $200 as a security deposit and signed a lease for the term August 28, 1995 to August 18, 1996. When he moved in he filled out a form that the landlord provided him. The form is entitled "Check-in and Check-out Form" and lists numerous items in the apartment next to a column entitled: "Is it clean?" The pertinent items for purposes of this appeal and Chan's comments are as follows:

| | |
|---|---|
| Range/Oven | Some dirt and stain |
| Hood Fan | Some grease |
| Mir./Med. Cab. | Rust stain |
| Ceramic Tile | Stain around edge of bath tub |

[2] Although there were other disputes before the trial court, these are the only issues Chan raises on appeal.

| | |
|---|---|
| Toilet | Yes [it is clean] |
| Tub | Yes [it is clean] |

Tom Hofmeister, property manager for Allen House Apartments, testified that he did not check Chan in—the previous property manager did that—but he did check him out of the apartment. When a tenant moves out, Hofmeister inspects the premises using the same "Check-in and Check-out Form," although a new blank form may be filled out, rather than writing on the form completed by the tenant at check-in. In Chan's case, Hofmeister inspected his apartment and filled out a new form, circling "Check-out" in the title. These are the pertinent entries Hofmeister made in the "Is it clean?" column, together with the percentage of cleaning time he estimated would be required to clean each:

| | |
|---|---|
| Range/Oven | Wipe down .5 |
| Hood Fan | Dirty .10 |
| Mir./Med. Cab. | Dirty .5 |
| Ceramic Tile | Dirty .20 |
| Toilet | Dirty .15 |
| Tub | Dirty .15 |

On the check-out form he completed, Hofmeister wrote the total cleaning time of 1.10 minutes, Chan's new address, and noted: "All keys returned."

Hofmeister testified that when he did the check-out inspection, he did not have the form Chan completed at check-in, but he compared Chan's form to the form he completed before deciding what to charge Chan. He decided to charge Chan for cleaning some of the items checked as "dirty" on the check-in form "because some of the items were dirtier than others … that's a judgment call." Also, Hofmeister testified, the landlord may have sent someone in to clean an item marked dirty by a tenant when the tenant moves in, but that is not reflected

on the check-in forms filled out by the tenant. Tenants may be present at the check-out inspection if they wish to be, but Chan was not present. Hofmeister did not have a specific memory of how dirty Chan's apartment was, although he did testify in some detail to the toilet's dirty condition, apparently based on the amount of time he estimated it would take to clean it.

The charges for cleaning 1.10 hours at $15 per hour (for a total of $17.50) were deducted from Chan's security deposit before refunding the remainder to him.[3] Chan testified that he disputed the cleaning charges for the range, the hood and the ceramic tile in the bathroom because he had written on the check-in form that the range had dirt and stain on it, the hood had grease on it, and the ceramic tile in the bathroom had stain around the edge of the bathtub. He informed the company of his disagreement, but the company did not refund any of the cleaning charges.

With respect to the disputed cleaning charges, the trial court ruled:

> Next is the actual cleaning charges. Mr. Chan seems to be relying on the fact that there was some cleanliness problems at the time he checked-in. He did not clearly indicate or at least persuasively indicate that the range hood, tile and toilet and tub were in good condition.
>
> These were specifically noted and a very precise time for cleaning suggested of an hour ten minutes at a reasonable hourly rate of $15 an hour. I find it credible that these were items in need of cleaning and would find that that was an appropriate deduction.

Chan also argued at trial that there were ordinance violations because MADISON, WI., GENERAL ORDINANCE § 33.07(6)(d) requires a separate

[3] There was another deduction from the security deposit which is not an issue on this appeal.

check-out form, and one that has "an obvious place for the tenant's forwarding address" and a "space for the rent credit due." Allen House Apartments used a combined check-in and check-out form. The court concluded that Allen House Apartments did not violate the statute when it used the same form as a check-in and a check-out form. The court apparently, by oversight, did not address Chan's argument concerning the requirements that there be an "obvious space for the tenant's forwarding address" or a "space for the rent credit due."

DISCUSSION

We first address Chan's challenge to the deduction from the security deposit for cleaning charges. In ***Rivera v. Eisenberg***, 95 Wis.2d 384, 388, 290 N.W.2d 539, 541 (Ct. App. 1980), we held:

> In an action to recover a security deposit, the essential elements of the lessee's claim are that a deposit was in fact made, and that the lessor has refused to return it. The absence of damages is not an element of the lessee's cause of action. It is for the lessor, either as an affirmative defense or a counterclaim, to allege and prove the lease is terminated, to prove the condition of the premises at the commencement and termination of the term, to prove the extent of damage to the premises and to prove the cost of restoring the demised premises.

The WISCONSIN ADMINISTRATIVE CODE and the MADISON GENERAL ORDINANCES both regulate what deductions a landlord may make from a tenant's security deposit. Except for reasons clearly agreed upon in writing under certain conditions, and except for nonpayment of rent and certain other items not pertinent here, "security deposits may be withheld only for tenant damage, waste or neglect of the premise…. However, nothing in [these subsections] shall be construed as authorizing any withholding for normal wear and tear or other losses or damages for which the tenant is not otherwise

responsible under applicable law." WISCONSIN ADM. CODE § 134.06(3)(a) and MADISON, WI., GENERAL ORDINANCE § 32.07(14). In addition, MADISON, WI., GENERAL ORDINANCE § 32.07(5) provides:

> (5) The tenant shall place the dwelling unit in as overall clean condition, excepting ordinary wear and tear, as when the tenancy commenced…. Charges shall not be deducted from the security deposit for activities which are customarily performed by the landlord or landlord's agents before a new tenancy commenced including, but not limited to, washing windows, shampooing carpets, occasional repainting or reupholstering furniture.

Chan contends that the trial court erred in shifting the burden of proof to him to prove that the items he objected to were in good condition when he moved out. This, Chan contends, is the landlord's burden under ***Rivera***. Chan also claims that Allen House Apartments did not meet its burden in this case because it presented no evidence comparing the condition of the items at the beginning of his tenancy and did not present evidence that the dirt that needed cleaning was beyond "normal wear and tear."

We may not set aside a trial court's finding of fact unless they are clearly erroneous, § 807.15, STATS. However, the question of which party has the burden of proof and whether that burden has been met is a question of law, which we review de novo. *See* ***Brandt v. Brandt***, 145 Wis.2d 394, 408, 409, 427 N.W.2d 126 (Ct. App. 1988). The proper construction of a regulation or ordinance is also a question of law. *See* ***DeRosso Landfill Co. v. City of Oak Creek***, 200 Wis.2d 642, 652, 547 N.W.2d 770, 773 (1996).

We understand from the trial court's ruling that the court was persuaded by Hofmeister's testimony that the items he marked as dirty were in need of cleaning beyond normal wear and tear when Chan checked out, and, in the

court's view, since Chan did not present sufficient evidence to the contrary, the charges (being reasonable in amount) were permissible deductions. If the court meant that, regardless of the evidence concerning the condition when Chan moved in, Chan had the burden of refuting the landlord's testimony on the condition when he moved out, that is an incorrect assignment of the burden of proof.

As to those items which Chan marked as "stained," "greasy" or "dirty" when he moved in, we conclude that, as a matter of law, the landlord did not meet his burden of proof that those items needed cleaning beyond the normal wear and tear when Chan moved out. Given the undisputed testimony that those items were stained, greasy or dirty when Chan moved in, the landlord needed to present some evidence from which a court could infer that the cleaning needed on those items when Chan moved out was not due to the dirt, stains or grease present when he moved in.

If there were conflicting evidence on this point, we would remand to the trial court to make factual findings and apply the correct burden of proof, since we cannot find facts. *See* ***Wisconsin State Employees Union v. Henderson***, 106 Wis.2d 498, 501-02, 317 N.W.2d 170, 171-72 (Ct. App. 1982). However, there is no evidence, or reasonable inference from the evidence, to support a finding that the cleaning needed on the range/oven, hood fan, ceramic tile and mirror/medicine cabinet were not due to the dirt, grease and stains that Chan recorded when he moved in. We therefore conclude as a matter of law that the landlord did not meet its burden of proof on the propriety of the cleaning charges for these items.

We reach a different result with respect to the cleaning charges for the tub and toilet, which Chan recorded as "clean." The ordinance requires a tenant to leave a dwelling unit in "as overall clean condition, excepting ordinary

wear and tear, as when the tenancy commenced." MADISON, WI., GENERAL ORDINANCE § 32.07(3)(5). The only evidence was that these items were clean when Chan moved in, and there was no evidence from Chan on the condition when he moved out. The question then becomes whether Hofmeister's testimony was sufficient (if credited by the trial court, which it was) to meet the landlord's burden of proof that these items needed to be cleaned as a result of Chan's tenancy, excluding normal wear and tear. We conclude that it was sufficient.[4]

We now turn to Chan's assertion that the landlord's form violates MADISON, WI., GENERAL ORDINANCE § 32.07(6). That provides in pertinent part:

> (6) The landlord and tenant shall use a written CHECK-IN AND CHECK-OUT procedure.
>
> (a) The landlord shall furnish copies of check-in and check-out forms to tenants of each dwelling unit. The check-in form shall be provided to the tenant at the beginning of the tenancy and the check-out form shall be provided to the tenant prior to the termination of the tenancy.
>
> ….
>
> (d) All check-out forms shall be comparable to the check-in forms. All check-out forms shall provide an

[4] On appeal, Chan is challenging the cleaning charges for all six items. We recognize that at trial, Chan listed only the range, the hood fan and the ceramic tile when his attorney initially asked him which charges he disagreed with. After he described what he wrote on the check-in form concerning those items, his counsel asked whether there was anything else that he found dirty according to his check-in form. When he answered "yes," and asked if his counsel wanted him to go over all of them, the court answered "no" and his counsel then proceeded with other questions. In spite of Chan's listing only three objections, we considered all the items for which cleaning charges were made on this appeal for these reasons: (1) Other questions asked later at trial by Chan's counsel and the landlord's counsel addressed some of the other items for which charges were made; (2) the trial court may have inadvertently limited Chan's discussion of other objections; (3) the complaint did not limit the cleaning charges challenged.; (4) the landlord has the burden of proving the fact and amount of the deductions, ***Rivera v. Eisenberg***, 95 Wis.2d 384, 388, 290 N.W.2d 539, 541 (Ct. App. 1980); (5) no additional evidence or factual findings are necessary to address all of the items; and (6) Allen House Apartments does not object in its responsive brief that Chan waived the right to challenge the cleaning charge for any of the six items.

> obvious place for the tenant's forwarding address. All check-out forms shall also provide a space for the rent credit due and a space for the landlord's explanation for any portion of the rent credit deemed not due.
>
> (e) Acknowledgement of receipt of the check-in and check-out forms or combined check-in/check-out form shall not be made a form provision of a rental agreement.
>
> (f) The landlord has the burden of proving compliance with all provisions and procedures set forth in this subsection or forfeits all right to any portion of the security deposit.

We agree with the trial court that the ordinance does not prohibit a landlord from doing what Allen House Apartments did in this case: using the same form for a check-in form and a check-out form. The ordinance requires "check-in and check-out forms," para. (a). However, the ordinance also provides that "the check-out forms shall be comparable to the check-in forms," para. (d); and para. (e) refers to "the check-in and check-out forms or combined check-in/check-out form."

We also conclude that the form Allen House Apartments used did not violate other portions of para. (d). Chan's forwarding address was written on the check-out form Hofmeister prepared. There is nothing on the form about a rent credit, but there is no testimony that there was one and Chan does not assert there was. The plain language of the ordinance does not require pre-typed headings for "forwarding address" and "rent credit" on the check-out form, and we will not read such requirements into the ordinance.

In summary, we conclude that Allen House Apartments did not meet its burden of proving that the cleaning charges for the range/oven, hood fan, mirror/medicine cabinet and ceramic tile were for cleaning beyond normal wear and tear. This means that the charges for cleaning these items, forty minutes at

$15 per hour, or $10, were not properly deducted from Chan's security deposit. We also conclude that the check-out form did not violate MADISON, WI., GENERAL ORDINANCE § 32.07(6). We therefore affirm in part and reverse in part.

*By the Court.*—Judgment affirmed in part; reversed in part and cause remanded.

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