COURT OF APPEALS
DECISION
DATED AND FILED

June 11, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3513

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

ALYSON MARKLEIN AND BETTIE LEWIS,

PLAINTIFFS-RESPONDENTS,

V.

HORIZON INVESTMENTS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: MORIA G. KRUEGER, Judge. *Affirmed and cause remanded with directions.*

EICH, C.J.[1] Horizon Investment Management appeals from a judgment awarding $1957 to Alyson Marklein and Bettie Lewis in their small claims action to recover their security deposit and unused rent for an apartment. The trial court found that Marklein and Lewis were constructively evicted from

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

the apartment and that Horizon, the landlord, had failed to meet its burden to show that it provided the required notice and itemized statement of its withholding of the security deposit. Horizon claims the trial court's findings were erroneous in several respects, arguing that: (1) Marklein and Lewis failed to state a claim for constructive eviction; and (2) the evidence is insufficient to sustain the court's double-damage award on their security-deposit claim.

Marklein and Lewis leased the apartment from Horizon for one year, commencing August 20, 1996. They paid a $709 security deposit and a full month's rent for August. Beginning in September, they paid rent on the first of every month. After moving in, they experienced several problems with the physical condition of the apartment and problems with insects, including roaches. Among other things, they complained of chipped, cracked and water-damaged walls, a defective stove, a broken telephone jack, damaged blinds, clogged tub drains, a missing window screen, and an inoperable toilet. Horizon promptly repaired some defects, repaired others in a delayed manner and failed to completely repair others. Horizon also took steps to exterminate the cockroaches and a related insect problem, but its efforts were unsuccessful. Marklein and Lewis also complained of problems with a maintenance employee and they eventually learned that Horizon had been cited for various code violations at the building, some of which were still outstanding.

After attempting to work with Horizon to solve the problems they were experiencing with the apartment, Marklein and Lewis wrote to Horizon on November 13, 1996, stating, in part, that "the lease is now nullified" and that "[o]ur experience … has been so negative, that we [have] decided to vacate the premises." They moved out by December 1, 1996.

When Horizon declined to return their security deposit, Marklein and Lewis filed this lawsuit. Horizon counterclaimed, seeking to recover rents for the remainder of the lease period. As indicated, the trial court ruled in their favor, awarding them filing fees and twice their security deposit of $709 plus $480 for twenty days' unused rent, and dismissed Horizon's counterclaim. The court found that Marklein and Lewis had been constructively evicted from the apartment, and that Horizon had failed to show that it complied with the law in withholding their security deposit. Horizon appeals.

I. Constructive Eviction

Horizon, disputing the trial court's constructive eviction finding, argues that it promptly repaired most of the problems and was not given the opportunity to cure the others. It also maintains that the apartment was not uninhabitable.

To constitute a constructive eviction, the condition of the property must impose something more than "[a] mere slight temporary inconvenience to the tenant." ***Kersten v. H.C. Prange Co.,*** 186 Wis.2d 49, 58, 520 N.W.2d 99, 103 (Ct. App. 1994) (quoted source omitted). Under § 704.07(4), STATS., the conditions complained of must be "hazardous to health" or "materially affecting the health or safety of the tenant." Constructive eviction is triggered when the defects are "substantial and of such duration that ... the tenant has been deprived of the full use and enjoyment of the leased property for a material period of time." ***Kersten,*** 186 Wis.2d at 58, 520 N.W.2d at 103 (quoted source omitted). When this occurs, "the tenant may remove from the premises unless the landlord proceeds promptly to repair ... or eliminate the ... hazard." Section 704.07(4).

To the extent Horizon challenges the trial court's findings of fact, we will reverse the trial court's determination only if it is clearly erroneous. Section 805.17(2), STATS.; ***Noll v. Dimiceli's, Inc.,*** 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983). To the extent Horizon argues that the court misapplied the law, we review its legal rulings independently. ***Kersten,*** 186 Wis.2d at 56, 520 N.W.2d at 102.

Horizon first argues that "the majority of the repairs [which Marklein and Lewis requested] were completed in a timely manner, usually on the same day." Some defects, however, remained or were left unrepaired for quite some time. The trial court specifically found that the insect problem had not been resolved and that repairs on the walls took "an inordinately long period of time." And while there is, as in most lawsuits, conflicting evidence on the point, the trial court's findings do find support in the record and thus are not clearly erroneous. Lewis testified, for example, that although a pest control service with which Horizon had contracted to treat a cockroach and gnat problem sprayed multiple times, she saw roaches throughout the time she occupied the apartment. The cracked and peeling walls, which Horizon failed to repair during their occupancy exacerbated the insect problem because, according to Lewis's testimony, gnats were residing in holes in the walls. According to Lewis, the presence of the gnats had not abated during the entire time. With respect to repairs on the walls, Lewis testified that on October 31, Horizon maintenance personnel started working on the walls and promised to complete the work the following day. Lewis stated that the apartment was left "really dirty" with "garbage" and their furniture was "moved ... around." They did not return the next day to complete repairs, and by

mid-November the walls remained in disrepair. Lewis apparently asked for repairs on August 20, when she moved in.[2]

With respect to Horizon's claim that it was not given an opportunity to correct the defects because it did not learn until November 13, 1996, of Marklein and Lewis's intent to leave the apartment, we agree that "if there is a substantial breach of a lease, the landlord is entitled to notice and has a reasonable time after notice is given to remedy the defect." ***First Wisconsin Trust Co. v. L. Wiemann Co.,*** 93 Wis.2d 258, 270, 286 N.W.2d 360, 366 (1980) (citation omitted); ***Kersten***, 186 Wis.2d at 59, 520 N.W.2d at 103. Lewis testified, however, that before November 13 she and Marklein had met with a Horizon employee, who told them: "[We've] never lost a court case ... good luck trying to beat us." Given Lewis's testimony concerning Horizon's inability or unwillingness to cure the various defects of which she had been complaining for some time, and the tenor of the meeting with the Horizon employee, the trial court could properly conclude that Horizon had rejected the opportunity to cure the defects.

Horizon next argues that there was no evidence to establish that the conditions of the apartment threatened Marklein's and Lewis's health or safety in any way. In so arguing, it relies largely on a building inspector's order to repair the cracked walls in approximately one month from mid-November and Lewis's admission on cross-examination that the building code violations did not make the

[2] The testimony shows that Horizon delayed performing other repairs. Summoned to repair a toilet in one of the bathrooms, a maintenance person placed the inoperable toilet in the bathtub where, according to Lewis, it remained for approximately two weeks. Horizon also concedes in its brief that the installation of a defective window screen took approximately two months to accomplish.

apartment uninhabitable. The trial court, however, rested its constructive-eviction ruling primarily on the unabated insect problem.[3] As we indicated, a pest control company attempted to exterminate the insects on multiple occasions without success. And while Lewis was unable to state the extent of the roach problem during cross-examination, she did say that after each spraying roaches were still present. Lewis had also testified that the apartment "had been infested by roaches earlier" and that the problem continued in spite of keeping the apartment "immaculately clean." With regard to the gnats, Lewis testified that there were always "one or two gnats flying around the apartment" and that at certain times the problem was worse.

The trial court also observed that other factors, such as the disrepair of the walls and an unwelcome visit from a Horizon maintenance employee, while not rendering the apartment uninhabitable in themselves, certainly made the apartment less habitable. Lewis testified that garbage associated with Horizon's uncompleted repairs to the walls was left in the apartment, and that she felt "uncomfortable" around one of the maintenance employees, who had "offended" and "harassed" her and Marklein. She said that, despite her request that this employee not work on the apartment, he continued to appear without prior notice.

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[3] The trial court stated:

> [C]onstructive eviction is, to a certain extent, a subjective determination. What one human being may be able to live with may be absolutely intolerable for another human being. It appears to me that Ms. Lewis became, perhaps, the most adamant and animated in her testimony when she talked about her abhorrence of living with insects.... Other people may not be as bothered by that particular detail of life; and again, I see that the defendants are at a disadvantage. They can only say what I guess was reported to them by their pest control people and I have, instead, the direct, and, as I've indicated, vehement testimony of a tenant as to the ongoing insect problem.

We are satisfied that, taken together, these problems were more than a "mere slight temporary inconvenience" for Lewis and Marklein, and that, on the evidence, the trial court could properly find that their cumulative effect was to deprive the tenants "of the full use and enjoyment of the leased property for a *material period of time*," ***Wiemann,*** 93 Wis.2d at 269, 286 N.W.2d at 365 (citation omitted) (emphasis in original), and that the defects "materially affect[ed] the[ir] health [and] safety" within the meaning of § 704.07(4), STATS. In other words, the court's ruling that Marklein and Lewis were constructively evicted from their apartment finds support in both the evidence and the law.[4]

II. Security Deposit

Horizon's arguments concerning the security deposit center on WIS. ADM. CODE § ATCP 134.06(2) and (4), which require a landlord to either return the tenant's security deposit or provide an itemized list accounting for any money withheld within twenty-one days after the tenant moves out. The trial court concluded that Horizon had failed to show that it provided either the notice or the list to Marklein and Lewis. Horizon claims this was error because the evidence shows that it presented Marklein and Lewis with an itemized schedule showing the deductions it took from the security deposit within the twenty-one-day period.

The schedule on which Horizon relies is a series of calculations that show, among other things, a charge of $709 for rent due—without excluding or providing any credit for the unused portion of the August rent. We have held that where, as here, an apartment is considered uninhabitable, a landlord who deducts

[4] Because we so conclude, it becomes unnecessary to consider Horizon's counterclaim for breach of the lease. *See* § 704.07(4), STATS. (tenant not liable for rent after premises become untenantable).

rent due from the security deposit is in violation of WIS. ADM. CODE § ATCP 134.06 because the landlord is entitled to deduct only "[r]ent for which the tenant is legally responsible." *See* WIS. ADM. CODE § ATCP 134.06(3)(a)1; ***Armour v. Klecker,*** 169 Wis.2d 692, 698-99, 486 N.W.2d 563, 565-66 (Ct. App. 1992). We specifically noted in ***Armour*** that "[i]t is no defense to this code provision that the landlord believed he [or she] had a claim against ... [the tenant] for lost rents." ***Id***. at 699, 486 N.W.2d at 566. The trial court's award of double damages is thus appropriate because § 100.20(5), STATS., permits such awards for violations of WIS. ADM. CODE § ATCP 134.06. *See* ***Armour***, 169 Wis.2d at 699-700, 486 N.W.2d at 566.

This itemized schedule also shows that charges for carpet cleaning and other cleaning were deducted from the security deposit, which normally would constitute legitimate deductions under the code. *See* WIS. ADM. CODE § ATCP 134.06(3). The trial court, however, after considering the evidence, concluded that the propriety of these charges was questionable. With respect to the carpet cleaning, Lewis testified that when the next tenant moved in, new carpet was installed in the apartment. Lewis also submitted a written statement from the new tenant as an exhibit to support her testimony. Horizon countered this evidence with the schedule, which the trial court apparently found either less credible or deserving of less weight than Lewis's testimony—and the weight and credibility of the evidence are for the trial court, not this court, to assess. ***Leciejewski v. Sedlak***, 116 Wis.2d 629, 637, 342 N.W.2d 734, 738 (1984).

Finally, Marklein and Lewis seek to recover attorney fees for the cost of defending this appeal. Horizon correctly observes in its brief that they "would only be entitled to an award of attorney fees in the event Horizon violated the Wisconsin Administrative Code." Marklein and Lewis offer no argument

other than a general citation to ***Shands v. Castrovinci,*** 115 Wis.2d 352, 340 N.W.2d 506 (1983), which holds that reasonable appellate attorney fees are recoverable under § 100.20(5), STATS., in a tenant's action to recover a wrongfully withheld rental security deposit. Among other things, the statute permits recovery of attorney fees by anyone suffering pecuniary loss from a violation of applicable provisions of the administrative code regulating the landlord-tenant relationship. We held in ***Armour*** that "[i]f a landlord withholds amounts that do not represent an allowable claim under [provisions of the code relating to claims against tenant security deposits] he [or she] is in violation of the code." ***Armour***, 169 Wis.2d at 699, 486 N.W.2d at 566. It follows that Marklein and Lewis are entitled to recover reasonable attorney fees for defending this appeal, and we remand to the circuit court to determine the appropriate award, which should be added to the judgment which we herewith affirm.

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

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