COURT OF APPEALS
DECISION
DATED AND FILED

June 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0260-FT

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

DOROTHY L. OSTOVICH,

PLAINTIFF-RESPONDENT,

v.

ROBERT SANDERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: FREDERICK P. KESSLER, Judge. *Affirmed.*

NETTESHEIM, J. Robert Sanderson appeals from a small claims judgment in favor of his former tenant, Dorothy L. Ostovich. The trial court found that Sanderson violated WIS. ADM. CODE § ATCP 134.06 when he failed to return Ostovich's security deposit within twenty-one days after she vacated the leased premises. The court awarded Ostovich her security deposit, double damages,

attorney's fees and costs. Because the trial court's findings are not clearly erroneous, we affirm.

Ostovich's complaint alleged that she and Sanderson entered into a residential lease on July 5, 1996. At that time, Ostovich paid Sanderson $1000 as a security deposit. When the tenancy terminated on July 31, 1997, Ostovich vacated the premises. As of September 10, 1997, Ostovich had not yet received a statement of itemization or her security deposit.

Ostovich alleged that Sanderson's failure to return her security deposit in a timely manner constituted a violation of WIS. ADM. CODE § ATCP 134.06. That regulation provides:

> (2) RETURN OF SECURITY DEPOSITS. The landlord shall, within 21 days after surrender of the premises, return all security deposits less any amounts withheld by the landlord. Deposits shall be returned in person, or by mail to the last known address of the tenant.
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> ….
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> (4) SECURITY DEPOSIT WITHHOLDING; STATEMENT OF CLAIMS. (a) If any portion of a security deposit is withheld by a landlord, the landlord shall, within the time period and in the manner specified under sub. (2), deliver or mail to the tenant a written statement accounting for all amounts withheld. The statement shall describe each item of physical damages or other claim made against the security deposit, and the amount withheld as reasonable compensation for each item or claim.

Ostovich requested double damages and attorney's fees pursuant to § 100.20(5), STATS.[1]

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[1] Section 100.20, STATS., governs methods of competition and trade practices. Subsection (5) provides:

> Any person suffering pecuniary loss because of a violation by any other person of any order issued under this section may sue for damages therefor in any court of competent jurisdiction and

(continued)

Sanderson responded that when Ostovich vacated the premises he asked her for her new address so that he could mail the security deposit and the damage notice. Ostovich declined to give Sanderson a forwarding address and instead told him to mail it to her address at his rental property. According to Sanderson, he mailed the security deposit and a list of damages to Ostovich's last known address on August 21, 1997. Neither the letter nor the check was ever returned to him.

At the trial, Ostovich testified that she never received a check or an itemization of damages, while Sanderson maintained that the items had been mailed within the required time period. Therefore, the central issue in this case—whether the security deposit was mailed within the twenty-one day time period—turned on the competing credibility of the two parties. As a reviewing court, we bear in mind that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Section 805.17(2), STATS.

Sanderson argues on appeal that the trial court's decision is inconsistent with and contrary to the great weight of the evidence produced at trial. Sanderson first contends that because the trial court found that he had indeed mailed the security deposit, it could not find in Ostovich's favor. In so arguing, Sanderson relies upon the following statement made by the trial court: "[Sanderson] sent her back $604, which if you were trying to make a meal out of [the security deposit] you would have sent … $210 or something like that." However, the trial court's statement was made in response to Sanderson's

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shall recover twice the amount of such pecuniary loss, together with costs, including a reasonable attorney's fee.

counsel's argument that the itemized damages were reasonable and that in returning only $604 Sanderson was not attempting to "make a meal" out of Ostovich's security deposit. That the court's statement was aimed at dispelling any question as to Sanderson's intentions is clarified by the court's statement immediately following: "So, that point—I'm not saying that he's sitting there trying to make a profit off of [the security deposit]." When viewed in context, the trial court's statement does not indicate a finding that Sanderson sent the money in a timely manner.[2]

Continuing on this theme, Sanderson also points to the trial court's statement that "both parties … are telling stories that both standing independently are very believable." The court additionally determined that the question of whether the damages were reasonable was not at issue, stating: "I appreciate that there's some items of dispute, but I felt that both parties were … testifying fairly honestly about their perceptions of what was due and what wasn't due." We disagree with Sanderson that these isolated comments detract from the court's ultimate decision to believe Ostovich's testimony over that of Sanderson's.

The first statement merely indicates that, *standing alone*, each party's testimony had a credible ring to it. However, when viewed in context of the entire evidence, the trial court chose to believe Ostovich. The second statement was targeted at the question of damages, not the dispute as to whether the notice and check were sent in a timely fashion.

[2] Because the trial court's statement did not constitute a finding that Sanderson mailed the letter, we need not address Sanderson's further argument that "the mailing of a letter creates a presumption that the letter was delivered and received." *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983).

Sanderson next points to the evidence and testimony he presented at trial in support of his contention that he sent the security deposit within the time limits of WIS. ADM. CODE § ATCP 134.06. At trial, Sanderson produced his check register as evidence that a check for $604 was entered in his checkbook on August 21, 1997. Sanderson additionally produced cash register receipts which reflected the amounts of the deductions made on the itemization of damages. However, Sanderson overlooks that reversal is not required simply because some evidence might support a contrary finding. *See* ***Cogswell v. Robertshaw Controls Co.***, 87 Wis.2d 243, 249, 274 N.W.2d 647, 650 (1979). Rather, we examine the record, not for evidence to support a finding which the trial court did not make, but for facts to support the finding the trial court did make. *See* ***Hawes v. Germantown Mut. Ins. Co.***, 103 Wis.2d 524, 543, 309 N.W.2d 356, 365 (Ct. App. 1981).

This is a case which classically invokes the trial court's "better position" as the fact finder to assess the competing credibility of the witnesses. *See* ***State v. Bunch***, 191 Wis.2d 501, 510, 529 N.W.2d 923, 926 (Ct. App. 1995). *See also*, RONALD R. HOFER, *Standards of Review—Looking Beyond the Labels*, 74 MARQ. L. REV. 231, 240 (1991). As an appellate court, we are " 'ill-suited to consider the variables that go into fact-finding.' … The trial court has a 'superior opportunity to get "the feel of the case." ' " *See* HOFER, *supra* at 240 (quoted sources omitted). From the printed transcript, we might well say that the competing versions of the disputed event as offered by Ostovich and Sanderson are a wash. However, that is precisely why we defer to a trial court's better opportunity to make the call in a case such as this.

Here, the trial court ultimately determined that the security deposit and the damage itemization notice had not been tendered by Sanderson in compliance with the law. This finding is supported by Ostovich's testimony that

she never received the items. We conclude that the trial court's findings are not clearly erroneous and are supported by Ostovich's testimony. Accordingly, we affirm.

By the Court.—Judgment affirmed.

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