COURT OF APPEALS
DECISION
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Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1572-FT

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

MICHAEL COLLINS AND GAIL COLLINS,

PLAINTIFFS-RESPONDENTS,

v.

SOL DETENTE AND BONNIE DETENTE,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Racine County: RICHARD J. KREUL, Judge. *Affirmed.*

ANDERSON, J. Sol and Bonnie Detente request reexamination of the trial court's decision denying them one month's rent payment from Michael and Gail Collins. The Detentes take issue with the court's finding that they occupied the premises for their own exclusive use and made no effort to rerent after the Collinses vacated a rental house. We affirm the trial court because its findings in this area are not clearly erroneous.

In 1994, the Detentes leased a residence in Burlington to the Collinses. The term of the lease was three years and included a provision that the tenants could terminate the lease upon a two-month written notice. As a part of the lease, the Detentes gave the Collinses an option to purchase the residence. On May 29, 1997, the Collinses notified the Detentes that they would not exercise the option to purchase and would vacate the premises on July 31, 1997. The parties met at the residence on June 3, 1997, along with a real estate broker who inspected the premises in preparation for listing the residence for sale.

On July 1, 1997, Michael phoned the Detentes and notified them that he and his wife had vacated the premises the day before. Sol entered the residence on July 2 and 3 for the purpose of conducting an inspection and beginning any necessary repairs. Sol notified Michael in writing on July 7 that the $1200 security deposit was being withheld for the last month's rent of $850 and $1321.87 in alleged damages.

The Collinses subsequently commenced this small claims action alleging the Detentes had wrongfully withheld the security deposit and that the claimed damages were unreasonable. The Detentes counterclaimed for damages in excess of the security deposit.

The opening issue was whether the parties had reached an agreement during their June 3 meeting that if the Collinses vacated by the end of June, the Detentes would waive rent for July. The trial court found that there was no meeting of the minds and held the Collinses liable for one month's rent. The trial court then considered whether the Detentes made a reasonable effort to mitigate the tenants' damages as required by § 704.29(4), STATS. The court found that the Detentes converted the premises to their own use and made no effort to rerent.

"The landlord's position that she is entitled to both the exclusive use of the premises … for her own purposes in order to market and sell the same and full rent from the plaintiffs is untenable." The court concluded that because the Detentes did not make a reasonable effort to mitigate the Collinses' damages, the Collinses were entitled to a credit for one month's rent. The court ordered that reasonable damages of $420.27 be deducted from the security deposit and the balance of $779.73 be returned to the Collinses. The Detentes appeal the court's conclusion that they failed in their duty to mitigate the Collinses' damages.[1]

On appeal, the Detentes maintain that the finding that they took exclusive possession of the premises after July 1, 1997, is against the clear weight and preponderance of the evidence. Further, they complain that the Collinses failed to offer any testimony that the Detentes' efforts after July 1 were unreasonable; therefore, the trial court erred when it concluded they failed to mitigate damages.

Whether a landlord has acted reasonably in an attempt to mitigate damages is a finding of fact that we will not disturb unless clearly erroneous. *See* ***Ross v. Smigelski***, 42 Wis.2d 185, 198, 166 N.W.2d 243, 250 (1969). We will search the record for evidence to support the findings that the trial court made, not for findings that the trial court could have made but did not make. *See* ***Becker v. Zoschke***, 76 Wis.2d 336, 347, 251 N.W.2d 431, 435 (1977). It is not within our

[1] The Detentes do not appeal several other findings by the trial court. First, the trial court found that only $420.27 of the claimed $1321.87 in damages was proven by a preponderance of credible evidence. Second, the court found that the Collinses were entitled to double damages under WIS. ADM. CODE § AG 134.06(4)(b) (now renamed as § ATCP 134.06(4)(b)) and § 100.20(5), STATS., because the Detentes improperly deducted rent from the security deposit. The court's final finding was that the Collinses were entitled to $1000 in reasonable attorney's fees pursuant to § 100.20(5).

province to reject an inference drawn by a fact finder when the inference drawn is reasonable. *See* ***Onalaska Elec. Heating, Inc. v. Schaller***, 94 Wis.2d 493, 501, 288 N.W.2d 829, 833 (1980). It is for the trial court, not the appellate court, to resolve conflicts in the testimony. *See* ***Fuller v. Riedel***, 159 Wis.2d 323, 332, 464 N.W.2d 97, 101 (Ct. App. 1990). The trial court is the arbiter of the credibility of witnesses, and its findings will not be overturned on appeal unless they are inherently or patently incredible, or in conflict with the uniform course of nature or with fully established or conceded facts. *See* ***Chapman v. State***, 69 Wis.2d 581, 583, 230 N.W.2d 824, 825 (1975).

Section 704.29(4), STATS., prescribes the landlord's duty to mitigate damages:

> ACTS PRIVILEGED IN MITIGATION OF RENT OR DAMAGES. The following acts by the landlord do not defeat the landlord's right to recover rent and damages and do not constitute an acceptance of surrender of the premises:
>
> (a) Entry, with or without notice, for the purpose of inspecting, preserving, repairing, remodeling and showing the premises;
>
> (b) Rerenting the premises or a part thereof, with or without notice, with rent applied against the damages caused by the original tenant and in reduction of rent accruing under the original lease;
>
> (c) Use of the premises by the landlord until such time as rerenting at a reasonable rent is practical, not to exceed one year, if the landlord gives prompt written notice to the tenant that the landlord is using the premises pursuant to this section and that the landlord will credit the tenant with the reasonable value of the use of the premises to the landlord for such a period;
>
> (d) *Any other act* which is reasonably subject to interpretation as being in mitigation of rent or damages and *which does not unequivocally demonstrate an intent to release the defaulting tenant*. [Emphasis added.]

The key to whether a landlord has acted reasonably is whether his or her acts, after the surrender of the premise, unmistakably demonstrate an intent to release the tenant from the obligations of the lease. Under this section, a landlord's entry upon the premises and taking possession of for the purpose of inspecting, preserving, repairing, remodeling or rerenting does not constitute an election of remedies because it is an equivocal act. *See* ***First Wis. Trust Co. v. L. Wiemann Co.***, 93 Wis.2d 258, 272, 286 N.W.2d 360, 366-67 (1980). On the other hand, the supreme court has held that under this section, "[W]hen the landlord occupies the premises for his own use or takes exclusive possession, he accepts the tenant's surrender and terminates the lease, and he cannot collect rent which would have accrued under the lease subsequent to the surrender." ***Id.*** at 272-73, 286 N.W.2d at 367.

After our review of the record, we conclude that the trial court's determination and findings were not clearly erroneous. In the winter of 1997, Sol asked Michael if he was going to exercise the option to purchase the residence even though the option did not run out until the fall. Sol explained that he wanted to know then because it was important to him to put the house on the market during the summer months when real estate sells faster. Michael did not answer Sol at that time; later Michael wrote him a letter on May 29, 1997, declining to exercise the option and terminating the tenancy. Immediately upon receipt of the letter terminating the tenancy, Sol contacted a real estate agent. Michael met with Sol on June 3; also present was the real estate agent who inspected the house prior to discussing a listing price and marketing strategies with Sol. Although the date Sol signed a listing contract with the real estate broker is not clear in the record, an offer to purchase the residence was accepted in late July and the transaction was closed on August 29, 1997.

The actions of the Detentes, starting during the winter, demonstrate their manifest intent to sell the residence and to sell the residence as quickly as possible. We fully agree with the trial court's conclusion that: "The landlord's position that she is entitled to both the exclusive use of the premises … for her own purposes in order to market and sell the same and full rent from the plaintiffs is untenable."

First Wisconsin Trust is instructive. There the landlord made reasonable attempts to find new tenants in the five months between the tenants vacating the building and the sale of the building. *See* ***id.*** at 266, 286 N.W.2d at 364. The landlord also rerented a portion of the premises during these five months. *See* ***id.*** Neither the entry onto the premises nor the rerental constituted an acceptance of surrender of the property because neither was an unequivocal act. *See* ***id***. at 272, 286 N.W.2d at 366-67. However, the sale of the building five months later constituted acceptance of the surrender of the premises and barred the landlord from the right to recover damages for future rent after the sale. *See* ***id***. at 274, 286 N.W.2d at 368.

In this case there is no evidence that the Detentes made an effort to find a tenant. Rather than choosing to advertise the residence for rent after receiving the May 29 notice terminating the tenancy, the Detentes chose to immediately list the residence for sale. This act illustrates a single-minded eagerness to sell the residence. From all of the surrounding circumstances and the conduct of the Detentes, the only conclusion that can be reached is that reached by the trial court: the Detentes' placing the residence on the market before the Collinses vacated and the Detentes' occupation of the residence on July 1 to prepare it for sale constitute an acceptance of the Collinses' surrender and a termination of the lease.

The Detentes also complain that the Collinses never presented any evidence that the Detentes' efforts to inspect and repair the premises were not part of a reasonable effort to mitigate damages. This objection ignores the requirement that the landlord must allege and prove reasonable acts that do not unequivocally demonstrate an intent to release the defaulting tenant. *See* § 704.29(3), (4), STATS. It is only after the landlord has come forward with his or her proof that the tenant has the burden of proving the efforts of the landlord were not reasonable. *See* § 704.29(3). The trial court found that the Detentes failed to meet their burden of proof—the Detentes failed in their duty to make a reasonable effort to mitigate damages. Therefore, there was no need for the Collinses to present evidence that the Detentes' efforts were unreasonable.

This case presented a credibility call for the trial court. "It is the trial court's responsibility to weigh the evidence and to determine credibility, and its findings in these areas will not be disturbed on appeal unless they are clearly erroneous." ***Johnson v. Miller***, 157 Wis.2d 482, 487, 459 N.W.2d 886, 888 (Ct. App. 1990). We conclude that the trial court's determination and findings were not clearly erroneous.

By the Court.—Judgment affirmed.

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