COURT OF APPEALS
DECISION
DATED AND FILED

August 2, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1349 **Cir. Ct. No. 2014SC29724**

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

YEIMIDY LAGUNAS, KEVIN RADMER AND ERIC WUNDERLICH,

PLAINTIFFS-RESPONDENTS,

V.

WISCONSIN O'CONNOR CORPORATION,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: GLENN H. YAMAHIRO, Judge. *Affirmed and remanded with instructions.*

¶1 BRASH, J.[1] The Wisconsin O'Connor Corporation appeals a judgment in favor of plaintiffs Yeimidy Lagunas, Kevin Radmer, and Eric

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Wunderlich, and an order awarding plaintiffs attorney fees. The Wisconsin O'Connor Corporation argues that the notice of termination contained in a contractual lease entered into between the Wisconsin O'Connor Corporation and the plaintiffs is clear and unambiguous and, therefore, the roommates did not give adequate notice to terminate their lease. The Wisconsin O'Connor Corporation also argues that it sufficiently mitigated its damages and that the circuit court's award of attorney fees was unreasonable. We disagree and affirm.

BACKGROUND

¶2 In August 2013, Yeimidy Lagunas, Kevin Radmer, and Eric Wunderlich (the roommates) rented a three-bedroom apartment located at 1981 Prospect Avenue. In July 2013, Radmer contacted the apartment's owner, Paul O'Connor of the Wisconsin O'Connor Corporation,[2] to set up a meeting to view the apartment. In July 2013, the roommates first saw the apartment; O'Connor was not present at this showing. Following this showing, the roommates filled out a rental application for the apartment, which was accepted by O'Connor in August 2013.

¶3 On August 10, 2013, Radmer met with O'Connor to sign the lease. The lease agreement included a welcome letter, an eight page lease agreement, and a fifty-four page Separate and Specific Agreement section, which included sixty-two nonstandard rental provisions. All sections were typed single-space in small font. The package of documents also contained a pre-typed waiver form, drafted by O'Connor, stating that the roommates agree that the lease documents are "not

[2] All future references to O'Connor include both Paul O'Connor and the Wisconsin O'Connor Corporation.

long, are not complicated, and are not difficult to understand." Radmer spent approximately thirty minutes reviewing the various lease documents with O'Connor before signing them.

¶4 On August 14, 2013, Radmer again met with O'Connor, this time with Lagunas and Wunderlich, to complete the lease signing process. The roommates reviewed the lease documents on their own for approximately one to two hours; they reviewed the documents with O'Connor for an additional thirty minutes.

¶5 Page three of the lease agreement states: "Lessee and Lessor understand and agree that Lessee does not have to give to Lessor and that Lessor does not have to give to Lessee a notice about the Lease Term ending on 7/31/2014." Page four of the lease agreement states:

> If Lessee desires to terminate this Lease on or by 7/31/2014 … then Lessee shall provide to Lessor and assure that Lessor actually receives at Lessor's office and by 5/16/2014 a written notice terminating the Lease agreement….
>
> …
>
> Lessee and Lessor understand and agree that Lessor will not accept a notice to vacate that is less than seventy-five (75) days.

¶6 On August 17, 2013, Wunderlich moved into the apartment; the other two roommates moved in over the following days. In early June 2014, Radmer called O'Connor to explain that the roommates were confused and needed clarification on when the lease ended and if notice was necessary before moving out. O'Connor did not resolve this confusion.

¶7 On June 27, 2014, the roommates sent a letter to O'Connor stating their intention not to renew or extend the lease and asking O'Connor to confirm the official move-out date. O'Connor received the letter, but did not respond to the roommates or provide them with a move-out date. O'Connor also failed to notify the roommates that their notice was insufficient for a July 31, 2014 move-out date.

¶8 In July 2014, O'Connor sent the roommates a letter detailing specific instructions on how to clean the apartment mentioning recommended chemicals and cleaners. The roommates spent several hours cleaning the apartment, some taking time off work to do so. Lagunas also had family members help her with the cleaning. On July 31, 2014, the roommates moved out of the apartment. Thereafter, Lagunas conducted a final walkthrough with O'Connor and turned over the keys to the apartment. O'Connor then gave Lagunas a list of apartment damages she had to sign off on and agree to pay for.

¶9 On August 20, 2014, O'Connor mailed Lagunas a letter detailing charges to their security deposit, which ultimately serves as the basis for this lawsuit. The letter states that the roommates' entire security deposit was withheld due to repairs, replacements, cleaning, appliance checks, and unpaid rent for August and September 2014. The damages totaled $3464.06, meaning the roommates owed O'Connor an additional $1064.06.

¶10 On October 28, 2014, the roommates filed suit against O'Connor in small claims court claiming that O'Connor wrongfully withheld their security deposit. On January 15, 2015, the small claims commissioner ruled in favor of the roommates for $4536.14 plus costs and $750.00 in attorney fees. On January 28, 2015, O'Connor appealed the ruling of the small claims commissioner by filing a

demand for trial *de novo*. On April 15, 2015, following a court trial that took place on March 26, 2015, the circuit court ruled in favor of the roommates and awarded $4341.02 in damages plus costs and attorney fees. On May 20, 2015, the circuit court ordered O'Connor to pay the roommates $4170.00 in attorney fees. This appeal follows.

DISCUSSION

I. Ambiguity of Contractual Lease

¶11 O'Connor argues that the contractual lease is clear and unambiguous and, as a result, the roommates did not give sufficient notice to terminate their lease. We disagree.

¶12 The interpretation of a contract, statute, or administrative code is a question of law we review *de novo*. *See* ***Boelter v. Tschantz***, 2010 WI App 18, ¶6, 323 Wis.2d 208, 779 N.W.2d 467. The primary goal in interpreting a contract is to give effect to the parties' intentions. *See* ***Johnson Controls v. Employers Ins. of Wausau***, 2003 WI 108, ¶30, 264 Wis.2d 60, 665 N.W.2d 257. The parties' intentions are acquired by looking to the language of the contract. *See* ***Seitzinger v. Community Health Network***, 2004 WI 28, ¶22, 270 Wis. 2d 1, 676 N.W.2d 426. The language of a contract is interpreted "consistent with what a reasonable person would understand the words to mean under the circumstances." *See* ***id.*** Provisions within a contract should be interpreted "within the context of the contract as a whole." ***MS Real Estate Holdings, LLC v. Donald P. Fox Family Trust***, 2015 WI 49, ¶43, 362 Wis. 2d 258, 864 N.W.2d 83. "When the terms of a contract are plain and unambiguous, we will construe the contract as it stands." ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶14, 257 Wis.2d 421, 651 N.W.2d 345.

¶13 A contract is ambiguous, however, if its language is "susceptible to more than one reasonable interpretation." *See* ***Danbeck v. American Family Mut. Ins. Co.***, 2001 WI 91, ¶10, 245 Wis.2d 186, 629 N.W.2d 150. Where contractual language is ambiguous, extrinsic evidence is permissible to determine the intent of the parties. *See* ***Seitzinger***, 270 Wis. 2d 1, ¶22. We interpret ambiguous contracts against the drafter. *See* ***id.*** "If ambiguity exists, then the intent of the parties is a question of fact." ***Insurance Co. of N. Am. v. DEC Int'l, Inc.***, 220 Wis. 2d 840, 845, 586 N.W.2d 691 (Ct. App. 1998).

¶14 Findings of fact made by the circuit court are subject to a clearly erroneous standard of review. *See* ***State v. Walli***, 2011 WI App 86, ¶14, 334 Wis. 2d 402, 799 N.W.2d 898. "When the [circuit] court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and of the weight to be given to each witness's testimony." ***Lessor v. Wangelin***, 221 Wis. 2d 659, 665, 586 N.W.2d 1 (Ct. App. 1998). Therefore, "when a [circuit] court makes findings of fact as to the credibility of witnesses, we will not upset those findings unless they are clearly erroneous." ***Id.*** at 665-66.

¶15 Page three of the lease agreement states that "Lessee and Lessor understand and agree that Lessee does not have to give to Lessor and that Lessor does not have to give to Lessee a notice about the Lease Term ending on 7/31/2014." The lease agreement defines the lease term as beginning on August 17, 2013 and ending on July 31, 2014. Page three of the lease agreement further states that "there is no specific period whereby the Lease shall be automatically renewed or extended for a specific period." This language indicates that the lease term ends on July 31, 2014 regardless of whether notice is given by either party.

¶16 Page four of the lease agreement, however, states that the lessee must give the lessor written notice to terminate the lease by May 16, 2014 if the lessee desires to leave the apartment by July 31, 2014. Page four further states the lessee must give the lessor at least a seventy-five day notice to terminate regardless of when the lease termination occurs. These various clauses conflict with each other, creating ambiguity—why would notice to terminate a lease be required when the language of the lease indicates that the lease term ends on July 31, 2014? As a result of this ambiguity, we look to extrinsic evidence. *See* ***Seitzinger***, 270 Wis. 2d 1, ¶22.

¶17 Testimony shows that the roommates were confused over the lease agreement. The roommates stated that there was a lot of conflicting language within the lease agreement. In addition, the entire document was typed single-space in small font making it difficult to read. The roommates testified that the lease agreement would have taken several hours, if not days, to understand. They were instead given, at most, a few hours to read through the lease. Radmer further testified that he called O'Connor in June 2014 to ask whether any notice was required to terminate the lease agreement. O'Connor, however, provided no answer to Radmer's questions and instead told him, "I don't know; look at your lease." The roommates further testified that they sent a written letter to O'Connor on June 27, 2014, explaining that they did not wish to renew their lease and asking O'Connor to confirm the official move-out date. O'Connor received the letter but did not respond, nor did he notify the roommates that their notice was insufficient because it violated the seventy-five day notice requirement as stated on page four of the lease agreement.

¶18 The circuit court found the roommates' testimony to be credible. Therefore, we have no reason to question the credibility of the witnesses, as the

circuit court serves as the ultimate arbiter of witness credibility. *See* ***Lessor***, 221 Wis. 2d at 665-66. Accordingly, based upon our review of the record as a whole, we conclude that the notice given by the roommates was sufficient under the terms of the lease agreement.

II. Failure to Mitigate Damages

¶19 O'Connor next argues that the circuit court erred in finding that he failed to mitigate damages as required by WIS. STAT. § 704.29(3), which states:

> BURDEN OF PROOF. The landlord must allege and prove that the landlord has made efforts to comply with this section. The tenant has the burden of proving that the efforts of the landlord were not reasonable, that the landlord's refusal of any offer to rent the premises or a part thereof was not reasonable, that any terms and conditions upon which the landlord has in fact rerented were not reasonable, and that any temporary use by the landlord was not part of reasonable efforts to mitigate in accordance with sub. (4)(c); the tenant also has the burden of proving the amount that could have been obtained by reasonable efforts to mitigate by rerenting.

The interpretation and application of a state statute are questions of law that we review *de novo*. *See* ***Boelter***, 323 Wis. 2d 208, ¶6. The circuit court ruled that the roommates met their burden of proving O'Connor's efforts to mitigate to be unreasonable. We agree.

¶20 Furthermore, "[a] landlord may withhold from the full amount of the security deposit only amounts reasonably necessary to pay for … [u]npaid rent for which the tenant is legally responsible, subject to s. 704.29, Stats." WIS. ADMIN. CODE § ATCP 134.06(3)(a)2. If a landlord violates WIS. ADMIN. CODE ATCP § 134.06, "it is required under the plain unambiguous language of sec. 100.20(5), Stats., to award double damages and attorney fees." ***Armour v. Klecker***, 169 Wis. 2d 692, 698, 486 N.W.2d 563 (Ct. App. 1992).

¶21 O'Connor never produced any legitimate ads for the apartment into evidence, nor did he provide any proof that he made showings of the apartment once he was notified of the roommates' desire to terminate the lease. The only piece of evidence O'Connor produced in support of his argument that he made sufficient effort to mitigate damages was a Craigslist ad. The circuit court, however, found that key information within the ad was missing. The circuit court also found that fields of information in the ad were highlighted in red, indicating that the ad was actually a screen-shot of a draft that was being edited. Furthermore, the circuit court found that O'Connor did not make any showings of the apartment to prospective renters.

¶22 On June 27, 2014, the roommates sent O'Connor a letter stating that they would be moving out by July 31, 2014. Again, the circuit court found the roommates' testimony to be credible. O'Connor, therefore, had approximately one month to find a new tenant, but nothing in the record indicates that O'Connor took any steps to do so. O'Connor, nonetheless, deducted two months rent for August and September 2014 from the roommates' security deposit, even though he did not mail the roommates the letter detailing charges to their security deposit until August 20, 2014.

¶23 Again, nothing in the record indicates that O'Connor adequately attempted to mitigate his damages. O'Connor introduced one piece of evidence, an incomplete Craigslist ad, and he did not provide evidence that he conducted any showings of the apartment to prospective renters. We conclude, therefore, that O'Connor failed to mitigate his damages. Consequently, O'Connor was not legally entitled to withhold any alleged unpaid rent from the roommates' security deposit. *See* WIS. ADMIN. CODE ATCP § 134.06(3)(a)2. Accordingly, under the

plain language of WIS. STAT. § 100.20(5), the roommates are entitled to double damages and attorney fees.

III. Attorney Fees

¶24 O'Connor next argues that the circuit court's award for attorney fees was unreasonable. WISCONSIN STAT. § 100.20(5) "requires the court to award a tenant reasonable attorney's fees where a landlord has violated the provisions of WIS. ADMIN. CODE § ATCP 134.06." ***Pierce v. Norwick***, 202 Wis. 2d 587, 597, 550 N.W.2d 451 (Ct. App. 1996). The amount of attorney fees that are reasonable in each case is left to the discretionary determination of the circuit court, which we will uphold unless "the [circuit] court erroneously exercised its discretion." *See* ***Michael A.P. v. Solsrud***, 178 Wis. 2d 137, 153, 502 N.W.2d 918 (Ct. App. 1993). "'A [circuit] court properly exercises its discretion if it employs a logical rationale based on the appropriate legal principles and facts of record.'" ***Id.*** (citation omitted).

¶25 O'Connor argues that plaintiffs' claim for attorney fees was unreasonable for the actual time spent and work done while representing the roommates. O'Connor claims that the time logged by Knupp, counsel for the roommates, totaled more than what an experienced attorney should charge for his or her services. O'Connor further argues that Knupp is an experienced attorney who routinely represents clients in landlord-tenant disputes, and O'Connor claims that this case was not unique or difficult to resolve. This argument is misguided.

¶26 The award of attorney fees is reviewed on a clearly erroneous standard. *See* ***Michael A.P.***, 178 Wis. 2d at 153. Under this standard, nothing in the record shows that the circuit court erroneously exercised its discretion. Here, Knupp submitted an affidavit charting his fees for 30.10 hours at a rate of $150.00

per hour, totaling $4515. The circuit court reduced the requested amount by $345.00. The circuit court carefully reviewed Knupp's affidavit. Furthermore, the circuit court employed logic and reason to find that the awarded attorney fees were acceptable, which is evidenced by the fact that the original amount was reduced by $345.00. *See* ***Michael A.P.***, 178 Wis. 2d 137 at 153. Nothing in the record suggests that the circuit court erroneously exercised its discretion. Accordingly, we conclude that the circuit court's award of attorney fees was a reasonable exercise of discretion.

¶27 The roommates ask that we remand the case to the circuit court for an award of the attorney fees for defending this appeal. We recognize that the roommates are entitled to reasonable attorney fees. *See* ***Shands v. Castrovinci***, 115 Wis. 2d 352, 359, 340 N.W. 2d 506, 509 (1983). We note, however, that our review of the record in its entirety does not support the conclusion that this appeal is entirely without merit. Nevertheless, we remand this case to the circuit court so that it may conduct a hearing to determine reasonable attorney fees for this appeal.

¶28 Lastly, it should be noted that the circuit court addressed five issues in its ruling, even though O'Connor has only addressed three of those issues on appeal—the ambiguity of the notice to terminate requirements, the failure to mitigate damages, and the amount of attorney fees awarded. Any legal issues that are not briefed on appeal are waived. ***Atkinson v. Everbrite, Inc.***, 224 Wis. 2d 724, 730, n. 2, 592 N.W.2d 299 (Ct. App. 1999). Accordingly, we decline to address the circuit court's rulings regarding the nonstandard rental provisions and O'Connor's withholding of the roommates' security deposit for cleaning that constitutes normal wear and tear.

¶29 For the foregoing reasons, we affirm.

By the Court.—Judgment and order affirmed and remanded with instructions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)