COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1209

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

ROBERT L. PERKINS,

PLAINTIFF-APPELLANT,

V.

LEONARD E. SZYMKOWIAK,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Portage County: FREDERIC FLEISHAUER, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] In this small claims action, Robert Perkins seeks rent abatement and damages from his landlord, Leonard Szymkowiak. Perkins appeals the trial court's dismissal of his complaint, contending that the court erred

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a).

in determining that maintenance of the rain gutters was his responsibility and erred in concluding that Szymkowiak's actions and inactions did not affect the health and safety of Perkins and did not make the premises uninhabitable. We conclude the trial court did not err, and we affirm.

BACKGROUND

¶2 Perkins resides at 2633 Helen Street, Stevens Point, Wisconsin, under a residential lease agreement with Szymkowiak, the owner. In his complaint, Perkins alleged that he informed Szymkowiak of safety concerns caused by needed repairs to the roof gutters on March 12, 1999, again notified him of the need for these and other repairs on June 29, 1999, and notified him of repairs needed to the oven on December 27, 1999; however, Szymkowiak did not perform these repairs. Perkins asserted that the premises had become untenantable because of substantial violations materially affecting Perkins's convenience, health, and safety.

¶3 The relevant portions of the lease agreement are: "Yard, lawn, grounds maintenance and snow removal shall be obligation of tenant;" "Landlord, under sec. 704.07, shall keep the structure of the building in which the Premises are located and those portions of the building and equipment under Landlord's control in a reasonable state of repair;" "Tenant shall maintain the Premises under Tenant's control clean and in as good general condition as they were at the beginning of the term or as subsequently improved by Landlord, normal wear and tear excepted;" and "Landlord shall keep heating equipment in a safe and operable condition."

¶4 At the trial before the court, both parties appeared pro se. It was undisputed that Perkins had rented the premises from Szymkowiak for five years

and had renewed the lease each term. The court heard the testimony of each party and viewed the photographs presented by Perkins.

¶5 The court found that the ceiling was in need of repair, and concluded this was the landlord's responsibility under the lease. However, the court found the ceiling did not present a safety concern and did not make the premises uninhabitable. The court found that the rain gutters had not been maintained for two or three years, probably longer and found they are not part of the structure of the building. The court concluded that it was Perkins's responsibility under the lease to clean the gutters. The court found that the fact that the gutters were pulling away from the roof was a structural problem, and concluded it was Szymkowiak's obligation under the lease to repair that, as well as to repair the roof over the patio, which, the court found, was part of the structure of the building. The windows, the court found, were not part of the structure of the building, and Perkins was responsible for repair of a window if it got broken while he lived there. With respect to the oven, the court found the stove needed to be replaced because it was twenty-one years old, concluded this was Szymkowiak's responsibility; and found he had already done this.

¶6 The court found that the premises were not uninhabitable and there was not a health or safety issue. It concluded Perkins was therefore not entitled to rent abatement. The court observed that Perkins might have the right to move out because of Szymkowiak's failure to repair, but if he were going to live there, he did not have the right to abatement of the rent. The court also observed that Perkins might have a claim for damages if he repaired items that were Szymkowiak's responsibility after he notified Szymkowiak of the need for repair and Szymkowiak refused. However, the court found that Perkins had not proved the cost of any such repairs. The court also observed that the ice Perkins

complained of might be a safety issue, but the court was not satisfied that the ice was forming as the result of something that was Szymkowiak's responsibility as opposed to something that was Perkins's responsibility.

DISCUSSION

¶7 On appeal, Perkins contends the court erred in determining that maintenance of the rain gutters was the responsibility of Perkins. As we have stated above, the court found the cleaning of the rain gutters was the responsibility of Perkins under the lease, but their repair was the responsibility of Szymkowiak. Therefore, this issue, more precisely framed, is whether the court erred in determining that it was Perkins's responsibility under the lease to clean the gutters.

¶8 To the extent this determination rests on findings of fact, we do not reverse the trial court's findings of fact unless they are clearly erroneous, and we give due regard to the court's ability to judge the credibility of the witnesses. *See* WIS. STAT. § 805.17(2). To the extent this determination involves an interpretation of the lease, if the lease provision at issue is not ambiguous, the interpretation is a question of law, which we review de novo. *See* ***Eden Stone Co., Inc. v. Oakfield Stone Co., Inc.***, 166 Wis. 2d 105, 116, 479 N.W.2d 557 (Ct. App. 1991). However, if the lease provision is ambiguous, then the intent of the parties is a question of fact for the finder of fact. *See* ***Armstrong v. Colletti***, 88 Wis. 2d 148, 153, 276 N.W.2d 364 (Ct. App. 1979).

¶9 We conclude the lease provisions describing the tenant's and the landlord's responsibilities for maintaining the premises and the provision regarding the tenant's responsibility for the "yard, lawn, grounds maintenance and snow removal" could, when read together, be reasonably interpreted to include cleaning the gutters either as the responsibility of the landlord or the responsibility

of the tenant. Therefore, we must decide whether the evidence supports the court's determination that the parties intended this to be Perkins's responsibility.

¶10 The evidence supports a finding that the premises is a house, rather than a residence with more than one unit. There was evidence of discussions between the parties about whose responsibility it was to clean the gutters, from which the court could find that Perkins stated he would clean the gutters. We cannot say that the court's finding that the parties intended cleaning the gutters to be Perkins's responsibility was clearly erroneous.

¶11 Perkins also contends the court erred in concluding that the premises were not uninhabitable. He contends that the cracks in the ceiling, the ice, and his being without an oven for four weeks while the landlord ordered a new stove, when considered all together, constitute a violation of the landlord's duties under WIS. STAT. § 704.07(2) and make the premises uninhabitable. We disagree

¶12 WISCONSIN STAT. § 704.07(2)(a) and (4) provide:

> (2) DUTY OF LANDLORD. (a) Unless the repair was made necessary by the negligence or improper use of the premises by the tenant, the landlord is under duty to:
>
> 1. Keep in reasonable state of repair portions of the premises over which the landlord maintains control;
>
> 2. Keep in a reasonable state of repair all equipment under the landlord's control necessary to supply services which the landlord has expressly or impliedly agreed to furnish to the tenant, such as heat, water, elevator or air conditioning;
>
> 3. Make all necessary structural repairs;
>
> 4. Except for residential premises subject to a local housing code, repair or replace any plumbing, electrical wiring, machinery or equipment furnished with the premises and no longer in reasonable working condition, except as provided in sub. (3) (b).

> 5. For a residential tenancy, comply with a local housing code applicable to the premises.
>
> ….
>
> (4) UNTENANTABILITY. If the premises become untenantable because of damage by fire, water or other casualty or because of any condition hazardous to health, or if there is a substantial violation of sub. (2) materially affecting the health or safety of the tenant, the tenant may remove from the premises unless the landlord proceeds promptly to repair or rebuild or eliminate the health hazard or the substantial violation of sub. (2) materially affecting the health or safety of the tenant; or the tenant may remove if the inconvenience to the tenant by reason of the nature and period of repair, rebuilding or elimination would impose undue hardship on the tenant. If the tenant remains in possession, rent abates to the extent the tenant is deprived of the full normal use of the premises. This section does not authorize rent to be withheld in full, if the tenant remains in possession. If the tenant justifiably moves out under this subsection, the tenant is not liable for rent after the premises become untenantable and the landlord must repay any rent paid in advance apportioned to the period after the premises become untenantable. This subsection is inapplicable if the damage or condition is caused by negligence or improper use by the tenant.

¶13 We have already held that the court did not err in concluding that the cleaning of the rain gutters was the responsibility of Perkins under the lease. Therefore, even if the ice was caused by the uncleaned gutters as Perkins contends, that is not the result of Szymkowiak's violation of a duty. Perkins does not suggest any other cause of the ice that could be attributed to a failure of Szymkowiak's duty, particularly in view of the fact that the lease specifically made Perkins responsible for the "grounds maintenance and snow removal." There was no evidence presented to the court that the cracks in the ceiling affected health or safety, and we will not consider assertions in Perkins's appellate brief as evidence. Finally, although Perkins was confined to stove-top cooking for four weeks until the new stove came, this does not constitute a condition "materially affecting the health or safety" of Perkins.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. § 809.23(1)(b)4.