COURT OF APPEALS
DECISION
DATED AND FILED

June 17, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP695 **Cir. Ct. No. 2006SC870**

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

TEAM PROPERTY MANAGEMENT, LLC,

PLAINTIFF-APPELLANT,

V.

TANYA TAPPA AND JAMES KRUTKE,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Ozaukee County: JOSEPH D. McCORMACK, Judge. *Affirmed.*

¶1 NEUBAUER, J.[1] Team Property Management, LLC, appeals from a small claims judgment in its favor against former tenants, Tanya Tappa and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

James Krutke, in the amount of $1339.76. Team Property contends that the trial court erred in its determination as to its mitigation of damages and in precluding recovery for certain claimed damages. We conclude that the trial court's findings as to both mitigation and damages are supported by evidence in the record and are not clearly erroneous. We therefore affirm the trial court's judgment.

FACTS

¶2 On September 5, 2006, Team Property filed a small claims eviction action against Tappa and Krutke demanding judgment for $945 in delinquent rent. The court entered a judgment for eviction on September 21, 2006. At Team Property's request, the small claims court scheduled a rent and damages hearing and notified Tappa and Krutke of their opportunity to file a written answer to Team Property's claims. On April 18, 2007, Tappa and Krutke did so, listing in detail the problems with the rental property. The tenants claimed that they had not damaged the premises and were justified in vacating the premises due to the condition of the apartment.

¶3 At a trial on February 26, 2008, the court heard sworn testimony from Krutke, Tappa, and Team Property owner John Niemczyk. Team Property submitted a summary of rent and damages claiming "Total Rent and Fees" in the amount of $9,322.26, and "Total Damages" in the amount of $3,275. Both Krutke and Tappa testified in detail regarding the claimed damages and condition of the apartment, and also submitted a video and photographs depicting conditions in their apartment and conditions in other units or areas of the rental that they believed affected the quality of air in their apartment.

¶4 At the close of the hearing, the trial court made the following findings regarding Team Property's claimed damages: (1) the leak in the ceiling

was not caused by faulty or unauthorized repairs by the tenants; (2) Team Property was not entitled to damages associated with the leak; (3) the carpeting was old and beat up upon move-in; but (4) the landlord was entitled to $700 in cleanup costs associated with the mess the tenants left.[2] As for rent, the court found that the landlord had not used "due diligence" in re-renting the premises and, therefore, denied Team Property's claim for rent with the exception of August rent ($675), August late fees ($337.50), and rent doubling ($457.26), for a total of $1469.76, less the security deposit of $1,200. The combined total of rent and damages ($969.76), plus the court's award of fees ($370), resulted in a judgment in Team Property's favor in the amount of $1339.76.

¶5 Team Property appeals.

DISCUSSION

¶6 Team Property raises two arguments on appeal. First, it argues that the trial court erred in its determination that it had failed to mitigate its damages pursuant to WIS. STAT. § 704.29.[3] Second, it argues that the trial court erred in its award of damages. In reviewing Team Property's claims, we bear in mind that when the trial court makes findings of fact, we shall not reverse those findings unless they are clearly erroneous. ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983). In addition, "when the trial judge acts as the

[2] For example, the summary of damages included $540 for "carpet and pad replacement," $375 to "replace broken toilet," and $315 related to the repair of electrical work. [R.25:2] The $700 awarded by the trial court related to Team Property's claim of $590 in cleanup and disposal costs and $150 for cleaning and disinfecting.

[3] We note that in its complaint and on appeal, Team Property cites to WIS. STAT. § 704.27; however, the correct reference for mitigation and damages is WIS. STAT. § 704.29.

finder of fact, and where there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses. When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact." ***Id.*** Here, the testimony amply supports the trial court's findings.

¶7 Turning first to mitigation, we observe that 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). According to WIS. STAT. § 704.29(2)(b), a landlord has a duty to make "reasonable efforts to rerent the premises" following an eviction for nonpayment of rent. "'[R]easonable efforts' means those steps that the landlord would have taken to rent the premises if they had been vacated in due course, provided that those steps are in accordance with local rental practice for similar properties." ***Id.***, subsec. (2)(a).

¶8 Niemczyk testified that he was not able to rent the property from the time of the eviction in September until the expiration of the lease, which he indicates on his summary as March 2007.[4] In response to the court's inquiry as to his efforts to rent the unit, Niemczyk testified: "It was on Craigslist, we have three street signs on Highway 32, and we put up a brand-new banner immediately adjacent to that street which measures—its red and white, measures about 5 feet by 16 feet." When asked whether he had renewed the Craigslist advertisement, Niemczyk indicated that he believed it remained on Craigslist during the entire

[4] We note that the lease indicates a start date of March 1, 2006, and a termination date of "February 28, 2007, at 12:01 p.m." However, the walk-through report indicates a date of April 1, 2006, and Krutke testified to his belief that the tenancy commenced on that date.

time and that he did not think it was renewed.[5] Niemczyk also indicated that during the same time period, he rented three other units in the complex before renting the unit in question.[6] In its oral decision, the trial court found that Team Property had not used "due diligence to get the place rented." Given Niemczyk's testimony—including the lack of any indication that the condition of the apartment had been improved after Tappa and Krutke vacated—and the trial court's better position to judge local practice, we cannot say that the trial court's findings as to Team Property's efforts are clearly erroneous.[7]

¶9 Team Property contends that the trial court applied an incorrect standard of law because Tappa and Krutke never presented any evidence that Team Property had not made a reasonable effort to mitigate damages pursuant to WIS. STAT. § 704.29(3). This section, governing burdens of proof, provides in relevant part: "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." ***Id.*** Team Property's objection ignores the trial court's finding that Team Property had failed to meet its initial

[5] We note that the "help" or "faq" section on Craigslist indicates that a classified posting will be removed after forty-five days. *See* http://www.craigslist.org/about/help/faq#lifespan (last visited June 3, 2009). Thus, if Niemczyk did not repost his ad for the apartment, it would have expired in forty-five days, during most of which it would have been displaced by more recent ads.

[6] Team Property was entitled to do so. WISCONSIN STAT. § 704.29(2)(b) provides: "If the landlord has other similar premises for rent and receives an offer from a prospective tenant not obtained by the defendant, it is reasonable for the landlord to rent the other premises for the landlord's own account in preference to those vacated by the defaulting tenant."

[7] In concluding its inquiry into Niemczyk's efforts to mitigate, the trial court asked Niemczyk if there was anything else he would like to add to his testimony. Although Niemczyk did go on to testify about other issues, he did not provide any further information as to mitigation, for example, what the local practice was, whether he had made efforts or had opportunity to show the apartment, and the condition of the apartment during that vacant period.

burden of proof. Therefore, there was no need for Tappa and Krutke to present evidence that Team Property's efforts were unreasonable.

¶10 Turning to damages, we have reviewed the trial transcript at length. The trial court questioned both Krutke and Niemczyk regarding each item listed on Team Property's claim for damages. Tappa added testimony on certain issues as well. Not surprisingly, the parties' testimony regarding the original condition of the apartment and the cause of the damages varied greatly. For example, Team Property requested $400 for lock changes due to the tenants' failure to return keys; however, Krutke testified that he had only one key and that key was left in the apartment. As for Team Property's $375 claim for a broken toilet, Krutke testified that the toilet had cracked due to frozen water in the bowl.

¶11 The trial court's decision not to award damages for these claims reflects its determination that Krutke's testimony was more credible. While Krutke denied responsibility for certain damages, he admitted to leaving property and trash behind in the apartment, causing the trial court to award Team Property $700 in cleanup costs. Based on our review of the record, the trial court's findings as to damages are supported by evidence and are not clearly erroneous. *See* ***Lellman v. Mott***, 204 Wis. 2d 166, 171, 554 N.W.2d 525 (Ct. App. 1996) (If the facts could be reached by a reasonable factfinder based upon the evidence presented, a reviewing court is required to accept them.); ***Johnson v. Merta***, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980) (We review the record to locate evidence to support the trial court's findings, not for evidence to support findings the court did not make.).

CONCLUSION

¶12 In the end, this case presented a credibility call for the trial court. As stated earlier, "[i]t is the trial court's responsibility to weigh the evidence and to determine credibility. ***Johnson v. Miller***, 157 Wis. 2d 482, 487, 459 N.W.2d 886, 888 (Ct. App. 1990). "[W]here there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses. When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact." ***Noll***, 115 Wis. 2d at 644. Because there is evidence of record which supports the trial court's findings as to mitigation and damages, we affirm the judgment.

By the Court.—Judgment affirmed.

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