

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 5, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 01-1623
STATE OF WISCONSIN**

Cir. Ct. No. 01 SC 14432

**IN COURT OF APPEALS
DISTRICT I**

B&W PROPERTIES,

PLAINTIFF-RESPONDENT,

V.

JACQUELINE OMEZIRI,

DEFENDANT,

ARTHUR BROWNE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: THOMAS R. COOPER, Judge. *Reversed and cause remanded with directions.*

¶1 WEDEMEYER, P.J.¹ Arthur Browne appeals from a judgment granting a Writ of Restitution evicting him from apartment #1 located at 2705 West Courtland Avenue, Milwaukee, Wisconsin. Browne claims the trial court erred by issuing the writ even though the landlord failed to follow the proper statutory procedures. Because this court agrees with Browne's position, the judgment is reversed and the cause is remanded to the trial court with directions to determine the appropriate damages.

I. BACKGROUND

¶2 The lease in this case commenced on November 1, 2000, for a term of twelve months until October 31, 2001. After the first year, the lease converted to a month-to-month tenancy. On May 1, 2001, the landlord served Browne with a written fourteen-day notice of eviction. On June 8, 2001, the trial court issued the Writ of Restitution ordering the eviction. Browne now appeals.

II. DISCUSSION

¶3 The landlord in this case, B&W Properties, was ordered by this court to file a response brief. B&W disregarded the order of this court and did not file a response brief. This court informed B&W that if it did not file a brief, "[t]he court will decide this appeal on the basis of the record and the appellant's brief." B&W was also advised that the decision of the circuit court could be summarily reversed as a sanction for B&W's failure to participate in this appeal.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (1999-2000).

¶4 Because of B&W's failure to file a brief to refute Browne's assertions, B&W concedes to the facts and argument as set forth by Browne. *Charolais Breeding Ranches, Ltd. v. FPC Securities*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Our analysis could end here. Nonetheless, our review also demonstrates that even if B&W had refuted Browne's arguments, this court concludes that the trial court erred when it issued the writ because B&W failed to follow the proper statutory procedures.

¶5 As noted, the lease in this case was for one year. At the time the eviction notice was served, the one-year lease was still in effect. The tenancy would not convert to a month-to-month lease until October 31, 2001. Accordingly, the eviction rules governing one-year leases apply.

¶6 The allegations in this case did not involve a failure to pay rent. Rather, the landlord alleged that the tenants breached the lease by making too much noise and having too much traffic in the apartment. Accordingly, the controlling statute here is WIS. STAT. § 704.17(2)(b). This statute provides in pertinent part:

If a tenant under a lease for a term of one year or less ... breaches any covenant or condition of the tenant's lease, other than for payment of rent, the tenant's tenancy is terminated if the landlord gives the tenant a notice requiring the tenant to remedy the default or vacate the premises on or before a date at least 5 days after the giving of the notice, and if the tenant fails to comply with such notice.... If within one year from the giving of any such notice, the tenant again ... breaches the same or any other covenant or condition of the tenant's lease, other than for payment of rent, the tenant's tenancy is terminated if the landlord ... gives the tenant notice to vacate on or before a date at least 14 days after the giving of the notice.

¶7 Both the five-day notice and the fourteen-day notice must be in writing. WIS. STAT. § 704.17(4). It is undisputed here that no written five-day notice was given to Browne. Accordingly, the landlord failed to follow the proper statutory procedures and the Writ of Restitution evicting Browne should not have been issued. The record reflects that the trial court was under the mistaken impression that the lease involved here was strictly a month-to-month lease, and therefore governed by WIS. STAT. § 704.17(1)(b), which requires only the written fourteen-day notice and not the written five-day notice. B&W's counsel did nothing to correct the trial court's mistake.

¶8 As a result, this court reverses the judgment granting the writ and remands the matter to the trial court with directions to determine what damages Browne should be awarded.

By the Court.—Judgment reversed and cause remanded with directions.

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

