COURT OF APPEALS
DECISION
DATED AND RELEASED

JUNE 14, 1995

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

NOTICE

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

No. 95-0472-FT

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

CLYDE KREUTTER,

Plaintiff-Respondent,

v.

MIDWEST MEDICAL HOMECARE, INC.,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Waukesha County: ROGER P. MURPHY, Judge. *Affirmed*.

ANDERSON, P.J. Midwest Medical Homecare, Inc. (Tenant) appeals from a judgment of the circuit court granting summary judgment in favor of Clyde Kreutter (Landlord). Because we conclude that there is no genuine issue as to any material fact regarding the Tenant's claim and the Landlord is entitled to judgment as a matter of law, we affirm.

This is a small claims action involving a dispute between a landlord and a tenant. The parties entered into a lease for office space which was to run from August 1, 1989 through July 31, 1990, at a rent of $400 per month. The lease provided:

> The term hereof shall begin the first day of August, 1989, and shall end at 5:00 o'clock P.M. on the thirty-first day of July, 1990 and thereafter from year to year under the same terms and conditions, provided, however, that either party may terminate this lease by giving written notice, sixty (60) days before the end of any term, of its intention to do so.

In May 1991, the Landlord gave written notice to the Tenant that the rent would increase by $50 per month beginning August 1. The Tenant began making these increased monthly payments on August 1, 1991. In May 1993, the Landlord again raised the rent by $25 per month beginning August 1. The Tenant began making these payments on August 1, 1993. On December 17, 1993, the Tenant gave the Landlord written notice of intent to terminate the lease as of February 28, 1994. The Landlord filed an action seeking to recover five months of rent due from March through July of 1994. The trial court held, and both the Landlord and the Tenant agree, that the Landlord's first notice increasing the rent terminated the written lease agreement. The written lease therefore was for one year.

The Tenant filed a motion for summary judgment in August 1994. An amended motion for summary judgment was subsequently filed. The Landlord filed a motion for summary judgment on September 19, 1994. In its decision, the trial court denied the Tenant's motion for summary judgment and

granted summary judgment in favor of the Landlord, stating: "[T]his Trial Court has found … that the said year-to-year periodic tenancy was not properly terminated on February 28, 1994, but properly terminated effective at the end of that year's periodic tenancy, on July 31, 1994." The Tenant appeals.

The Tenant argues that the "court erred in ruling that the relationship between the parties was a periodic yearly tenancy. The relationship was a periodic monthly tenancy which was lawfully terminated." In determining the type of tenancy involved in the present case, we must apply the facts to the applicable landlord/tenant statutes. This is a question of law which we review de novo. *See* ***Park Bank-West v. Mueller***, 151 Wis.2d 476, 482, 444 N.W.2d 754, 757 (Ct. App. 1989).

This case is before us on a motion for summary judgment. Questions of law are properly resolved on summary judgment. ***IBM Credit Corp. v. Village of Allouez***, 188 Wis.2d 143, 149, 524 N.W.2d 132, 134 (1994). In reviewing summary judgment determinations, we apply the same standards as the trial court. ***Posyniak v. School Sisters of St. Francis***, 180 Wis.2d 619, 627, 511 N.W.2d 300, 304 (Ct. App. 1993). A summary judgment motion will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Section 802.08(2), STATS.

We agree with the Tenant that § 704.03(2), STATS.,[1] does not apply to the present case. Section 704.03(2) provides:

> ENTRY UNDER UNENFORCEABLE LEASE. If a tenant enters into possession under a *lease for more than one year* which does not meet the requirements of sub. (1), and the tenant pays rent on a periodic basis, the tenant becomes a periodic tenant. If the premises in such case are used for residential purposes and the rent is payable monthly, the tenant becomes a month-to-month tenant; but if the use is agricultural or nonresidential, the tenant becomes a year-to-year tenant without regard to the rent-payment periods. Except for duration of the tenancy and matters within the scope of ss. 704.05 and 704.07, the tenancy is governed by the terms and conditions agreed upon. Notice as provided in s. 704.19 is necessary to terminate such a periodic tenancy. [Emphasis added.]

The lease was for a period of one year; therefore, § 704.03(2) is inapplicable.

We conclude from our independent review of the record that the Landlord was entitled to summary judgment as a matter of law pursuant to § 704.25(2), STATS. Section 704.25(2) provides:

> CREATION OF PERIODIC TENANCY BY HOLDING OVER. (a) *Nonresidential leases for a year or longer.* If premises are leased for a year or longer primarily for other than private residential purposes, and the tenant holds over after expiration of the lease, the landlord may elect to hold the tenant on a year-to-year basis.
>
> (b) *All other leases.* If premises are leased for less than a year for any use, or if leased for any period primarily for private residential purposes, and the tenant holds over after expiration of the lease, the landlord may

[1] 1993 Wis. Act 486, § 15 amended § 704.03(2), STATS., to make it gender neutral.

> elect to hold the tenant on a month-to-month basis; but if such lease provides for a weekly or daily rent, the landlord may hold the tenant only on the periodic basis on which rent is computed.
>
> (c) *When election takes place*. Acceptance of rent for any period after expiration of a lease or other conduct manifesting the landlord's intent to allow the tenant to remain in possession after the expiration date constitutes an election by the landlord under this section unless the landlord has already commenced proceedings to remove the tenant.

In the present case, the premises was leased for a year for nonresidential use, placing it under subsec. (a). The Tenant decided to pay the higher rate of rent and "hold over" after the expiration of the lease agreement. The Landlord elected to hold the Tenant on a year-to-year basis when it accepted rent after the expiration of the lease. *See* § 704.25(2)(c). There is no genuine issue as to any material fact and the Landlord is entitled to judgment as a matter of law; therefore, summary judgment was appropriately granted. *See* ***State v. Alles***, 106 Wis.2d 368, 391, 316 N.W.2d 378, 388 (1982) (stating that we will affirm a trial court's decision where the court reaches the correct result but for the wrong reason).

We do not read § 704.25, STATS., as narrowly as the Tenant suggests: "In this case the Landlord authorized the Tenant to remain on the premises after the expiration of the lease provided the tenant paid an additional fifty dollars per month in rent. A hold over as set forth in s. 704.25, Stats., occurs when a tenant remains in the premises without permission from the landlord." Although our research has been unable to uncover a suitable definition in the

statutes of the term "holding over," 49 AM. JUR. 2D, *Landlord and Tenant* § 378 (1995), provides helpful guidance:

> As a general rule, if a landlord notifies a tenant for a fixed term, before the termination of the term, that in case the tenant holds over beyond the term the rent will be increased by a specified amount, the tenant will become liable for the increased rental if he in fact holds over and either remains silent with reference to the notice or fails to express nonassent to the new terms.
>
> ….
>
> A landlord's notice of a change merely in the amount of rent does not, as to matters other than the amount of rent, affect the obligations or rights of the tenant impliedly arising by reason of his holding over.

In the present case, the Landlord notified the Tenant of the increased rent if the Tenant were to hold over. Nothing was ever said, nor was any agreement made, to change the tenancy to a term other than year-to-year. Therefore, the Tenant could not legally terminate the periodic tenancy before the end of the rental year. See § 704.19(2), STATS.

The Tenant also argues that "[t]he trial court erred by granting respondent summary judgment when a dispute of material fact exists regarding the mitigation of damages." We conclude that the Tenant waived the issue of mitigation of damages. Although the Tenant raised mitigation as an affirmative defense in its responsive pleading, it was not raised or argued at the summary judgment hearing. The Landlord is correct in that the Tenant should have raised the issue of mitigation at the summary judgment hearing by responding with affidavits or otherwise, but not by relying upon the mere allegations or denials of the pleadings. *See* § 802.08(3), STATS. The issue of mitigation was

waived by the Tenant's failure to properly raise the issue before the trial court. *See* ***Evjen v. Evjen***, 171 Wis.2d 677, 688, 492 N.W.2d 361, 365 (Ct. App. 1992).

The Landlord states in its brief: "The trial court did not properly grant the appellant damages for 200% of the appellant's security deposit because the lease which is the subject of this case is not a residential property." The Landlord raises this issue as the third issue in its series of arguments. We do not address this issue because the Landlord did not follow the correct appellate procedure. Section 809.10(2)(b), STATS., provides:

> *Cross-appeal*. A respondent who seeks a modification of the judgment or order appealed from … shall file a notice of cross-appeal within the period established by law for the filing of a notice of appeal, or 30 days after the filing of a notice of appeal, whichever is later. A cross-appellant has the same rights and obligations as an appellant under this chapter.

In order to argue for a modification of the trial court's order, the Landlord was required to file a cross-appeal.

By the Court.—Judgment affirmed.

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