

STATE OF WISCONSIN
COURT OF APPEALS - DISTRICT III
CASE NO. 2011AP002030

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CLERK OF COURT OF APPEALS
OF WISCONSIN

Eugene L. Graf
d/b/a Graf Enterprises, LLC

Plaintiff-Appellant

v.

Frank A. Lechner
d/b/a Wolverine Lube & Wash, LLC

Defendants-Respondents

BRIEF AND APPENDIX OF DEFENDANTS-RESPONDENTS
FRANK A. LECHNER D/B/A WOLVERINE LUBE & WASH, LLC

APPEAL FROM THE BARRON COUNTY CIRCUIT COURT
THE HONORABLE JAMES D. BABBITT PRESIDING

PENDERGAST LAW OFFICE

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Wisconsin Statutes

Wis. Stat. § 799.01. iii, 2, 7

STATEMENT OF THE ISSUES PRESENTED

- I. DID THE TRIAL COURT CORRECTLY APPLY THE SECURITY DEPOSIT CREDIT OF \$3,750.00 TO THE MAXIMUM DAMAGES OF \$5,000.00 ALLOWED BY SECTION 799.01, WIS. STATS.**

Yes. The trial court properly deducted the security deposit of \$3,750.00 from the \$5,000.00 award of damages. R.16:1-3. App.22-24. R. 34:97, lines 12-25, :98, lines 1-14. App.38-39.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Respondent does not request oral argument. The briefs and written record adequately present the issues.

Publication is not requested by the respondent. None of the criteria in Section 809.23(1)(a) Wis. Stats., apply to this case.

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

This case arises out of a commercial lease. Respondent leased an auto service facility from Appellant in Barron, Wisconsin. The appellant brought suit against Respondent for default of the lease and for monetary damages in the amount of \$39,058.96. The trial court granted judgment to the appellant in the amount of \$1,250.00.

The sole issue on appeal is the court's application of the security deposit in the amount of \$3,750.00 to the \$5,000.00 award of damages.

II. PROCEDURAL STATUS

The appellant filed a small claims action for monetary damages in the amount of \$39,058.96. The suit was brought against the lessee, Wolverine Lube and Wash, LLC, and against the LLC's member, Frank Lechner. R.1:1, App.1. At the close of the appellant's case, the trial court granted Respondent's motion to dismiss Frank Lechner individually from the case because he was not a proper party to the action. R.34:51, lines 1-25, :52, lines 1-25, :53, lines 1-25, :54, lines 1-5. App.28-31. The appellant did not appeal the ruling to dismiss Frank Lechner.

At the close of the evidence, the trial court granted Respondent's request for a finding that this matter was one for monetary damages and was not an eviction. R. 34:91, lines 14-25, :92, lines 1-3. App.32-33. The appellant has not appealed the trial court's ruling on this issue.

The trial court also found that Section 799.01, Wis. Stats., applied to the case and limited the damages to \$5,000.00, the maximum amount allowed in small claims actions at the time. The trial court found that the \$5,000.00 in damages had been proven by a preponderance of the evidence. R.34:92, lines 4-20. App.33. The appellant has not appealed the trial court's ruling on this issue.

The trial court also ruled that the \$3,750.00 security deposit be deducted from the \$5,000.00 award resulting in a judgment of \$1,250.00. The trial court made this ruling at the request of the appellant. R.34:97, lines 14-25, 98, lines 1-2. App.38-39. The appellant appeals the trial court's ruling on this issue.

STATEMENT OF FACTS

The evidence of the security deposit and its application can be found in several places in the record. It is first referenced in an attachment to the Complaint as a Notice of Default dated 7/8/2010 to the respondent. In the last sentence of the Notice it states in pertinent part:

“The Lessor shall also apply the security deposit in order to cure part of the default... .” R.1:10. App.10.

The trial court considered the Complaint and the inference to be drawn is that the attachment was reviewed and considered as well. The trial court also refers to reviewing “the letter” in its ruling to dismiss Frank Lechner. R.34:53, lines 11-21, :91, lines 14-24. App.30, 32.

The lease itself, Section 16, references the security deposit of \$3,750.00. R.15:5. App.17. The trial court considered the lease and the inference that can be drawn therefrom is that the court considered the security deposit provisions in the lease. R.34:21, lines 1-5, :22, lines 12-23, :53, lines 11-20. App.26-27, 30.

Additional references to the security deposit can be found in two invoices submitted by the appellant in the appellant’s case in chief. Invoice number 15 (Exhibit No.

3 at trial) shows a credit in the amount of \$3,750.00 for the security deposit and can be found on the invoice in the second entry. Invoice number 16 (Exhibit No. 4 at the trial) again shows a \$3,750.00 credit being applied for the security deposit. R.15:12-13. App.20-21.

The court reviewed these invoices and the inference that can be drawn is that the court considered the application of the security deposit. R.34:21, lines 7-13, :53, lines 11-21. App.26, 30.

The court also considered the security deposit and its application to the \$5,000.00 award. The appellant raised the issue of applying the security deposit to the total amount of damages. The trial court rejected the appellant's request, reasoning as follows:

"The Court: Mr. Graf, are there any other findings you want me to make today?

Mr. Graf: Yes, Your Honor. There is a security deposit that would have to come off of your total that was paid by Mr. Lechner of - -

The Court: How much would that be?

Mr. Graf: \$3,750.00, Your Honor.

The Court: One month's rent?

Mr. Graf: Correct.

The Court: If I credit that back on the \$5,000.00, that leaves \$1,250.00 as the judgment, plus the service fees and filing fees. And so I will modify judgment in that amount accordingly. Madam Clerk, \$1,250.00 is the actual judgment. I will subtract that, as well, from my alternate finding should I be wrong on the law which turns into \$27,000.00 - - no, I'm sorry, \$24,773.17. Any other findings today Mr. Graf?

Mr. Graf: Your Honor, would the - -would the deposit - - the security deposit come off the \$5,000.00 even though I've proven greater than the \$5,000.00?

The Court: Yes, because you're entitled to judgment of \$5,000.00, but I believe that's - - there's the credit and the setoff for the security deposit. That's my finding again. Again, the Third District Court of Appeals will tell me if that's not the right way to do it." R.34:97, lines 14-25, :98, lines 1-14. App.38-39.

ARGUMENT

I. THE TRIAL COURT'S FINDING THAT THE SECURITY DEPOSIT OF \$3750.00 WAS A PROPER CREDIT FROM THE \$5,000.00 IS SUPPORTED BY THE GREAT WEIGHT AND CLEAR PREPONDERANCE OF THE EVIDENCE.

The Court of Appeals must sustain the trial court's finding unless they are against the great weight and clear preponderance of the evidence. Onalaska Electric Heating, Inc., v. Schalle, 94 Wis. 2d 493, 288 N.W.2d 829 (1980); In Re Kaiman's Estate, 13 Wis. 2d 201, 108 N.W.2d 379 (1961); Salveson v. Douglas County, 234 Wis. 2d 413, 610 N.W.2d 184 (Ct. App. 2000). The reviewing court must accept reasonable inferences drawn by the trial court from the credible evidence. First National Bank v. Wernhart, 204 Wis. 2d 361, 555 N.W.2d 819, *Review denied* 207 Wis.2d 288, 516 N.W.2d 276 (Ct. App. 1996). When reviewing the trial court's findings, the appellate court must search the record for evidence to support the decision reached by the trier of fact. Noble v. Noble, 287 Wis.2d 699, 706 N.W.2d 166, 2005 Wis. App. 227, *Review denied* 289 Wis.2d. 11, 712 N.W.2d 36 (2006 Wis. 23) (Ct. App. 2005).

The trial court considered all the evidence in this matter carefully and thoroughly. The court's analysis and reasoning is laid out in the court's disposition of the

matter. R.34:91-99. App.32-40. In light of all the circumstances the court ruled that Section 799.01, Wis. Stats., applied to this case and limited the appellant to a maximum of \$5,000.00 in damages. The court found by a preponderance of the evidence that the appellant had proven \$5,000.00 in damages and judgment was awarded in that amount. R.34:91-92. App.32-33. The appellant did not appeal this ruling.

The trial court then reasoned that if this ruling were reversed on appeal it would be appropriate to make a second set of findings on what was proven to be the total damages so that additional proceedings would not be required. In doing so, the trial court found that without the limiting factor of Section 799.01, Wis. Stats., the total damages would have been \$28,523.17. The trial court did not award a judgment in that amount, but rather made the finding for the reasons stated. R.34:92-97. App.33-38.

The appellant did not appeal the trial court's ruling on the application of Section 799.01, Wis. Stats., to the damage award, limiting it to \$5,000.00. Nor has the appellant appealed the trial court's finding that the damages of \$5,000.00 were proven by a preponderance of the evidence. Because the appeal is limited to the application of the security deposit to the \$5,000.00, no inquiry need

be made into the second contingent set of findings on whether the security deposit should have been deducted from the larger amount.

The inquiry is limited to whether there was any credible evidence in the record for the trial court to make its decision to deduct the security deposit from the \$5,000.00 award. The evidence and inferences therefrom are clear that the security deposit was \$3,750.00, that a deduction of the security deposit was contemplated at all times by the appellant, and that the trial court gave it due consideration and analysis in reaching its decision.

The fact of the security deposit was first raised in an attachment to the Complaint. The Notice of default letter attached to the Complaint clearly stated that the security deposit was to be a deduction. R.1:10. App.10. The trial court made reference to the Complaint and to the letter in its analysis. R.34:53, lines 11-21. App.30. The conclusion that was reached by the trial court was that a security deposit of \$3,750.00 was paid and was to be a deduction or credit on damages.

This conclusion is further supported by the two invoices introduced into evidence by the appellant. The clear inference to be drawn from these invoices is that a security deposit of \$3,750.00 had been paid and that a

credit for the same was clearly contemplated. The trial court made reference to these invoices. R.15:12-13. App.20-21. Thus, when the appellant asked the trial court to make a deduction for the security deposit, the trial court had credible evidence in the record upon which to make a decision. The trial court then went on to apply the security deposit to the alternate finding for the record's sake in case that issue was appealed.

The appellant asked about the application of the security deposit to the greater amount rather than the \$5,000.00. This is the crux of appellant's argument on appeal. The trial court makes clear the distinction and reason for the decision in this exchange:

"The Court: Any other findings today Mr. Graf?

Mr. Graf: Your Honor, would the - -would the deposit - - the security deposit come off the \$5,000.00 even though I've proven greater than the \$5,000.00?

The Court: Yes, because you are entitled to judgment of \$5,000.00, but I believe that's - - there's the credit and the setoff for the security deposit. That's my finding again. Again, the Third District Court of Appeals will tell me if that's not the right way to do it."

R.34:98, lines 5-14. App.39.

The appellant disagrees with the trial court's decision and asks the Court of Appeals to reverse the decision on the security deposit credit. However, the appellant offers no evidence in the record or any case law to support his argument. On that basis alone the appellant's appeal must be denied.

CONCLUSION

The appellant voluntarily chose small claims court in which to bring his money claim against the respondent in the amount of \$39,058.96. The maximum amount of damages allowed in small claims court at the time was \$5,000.00. The trial court found by a preponderance of the evidence that the appellant had proven \$5,000.00 in damages and granted a judgment in that amount.

The appellant asked the trial court to apply the security deposit of \$3,750.00 as a credit. The trial court granted Appellant's request and did so and reduced the judgment to \$1,250.00.

The appellant chose to appeal on the limited issue of the security deposit and application. There is credible evidence in the record supporting the trial court's finding and ruling that the security deposit was a proper credit leaving the judgment at \$1,250.00.

Respondent respectfully requests that the appellant's appeal be denied and the judgment of \$1,250.00 be upheld.

Dated January _____, 2012.

PENDERGAST LAW OFFICE

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c), Wis. Stats., for a brief and appendix produced using the following font: Monospaced font; 10 characters per inch; double spaced; 1.5 inch margin on the left side and 1 inch margins on the remaining three sides. The length of this brief is 11 pages.

Signed: _____

CERTIFICATION OF SERVICE

I certify that, pursuant to Wis. Stat. Sections 809.80 and 809.18 that the Brief of Respondent was mailed by U.S. Mail on January _____, 2012, to the Clerk of Court of Appeals with three copies served on the party as follows:

Eugene Graf
1640A ¼ Street
Turtle Lake, WI 54889

Dated January _____, 2012.

PENDERGAST LAW OFFICE

Rick L. Pendergast

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this Brief, excluding the appendix, if any, which complies with the requirements of Section 809.19(12). I further certify that:

This electronic Brief is identical in content and format to the printed form of the Brief filed as of this date.

A copy of this certificate has been served with the paper copies of this Brief filed with the court and served on all opposing parties.

Dated January _____, 2012.

PENDERGAST LAW OFFICE

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