

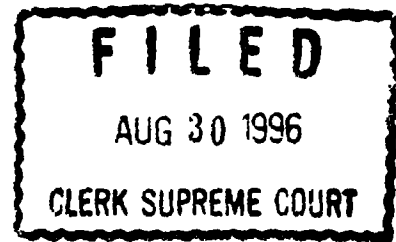
IN THE COURT OF APPEALS OF IOWA

No. 6-454 / 95-1170

HAROLD DOWNS and NORMA DOWNS,
Appellees,

vs.

KATHLEEN KUTZNER,
Appellant.



Appeal from the Iowa District Court for Tama County, David M. Remley,
Judge.

Kathleen Kutzner appeals the district court's ruling on her counterclaim
alleging wrongful conversion against plaintiffs. **AFFIRMED.**

Randal J. Giannetto of Mowry, Irvine, Giannetto & Moon, Marshalltown, for
appellant.

Douglas W. Beals of Harrison, Brennecke, Moore, Smaha & McKibben,
Marshalltown, for appellees.

Considered by Sackett, C.J., and Cady and Streit, JJ.

PER CURIAM

This is an appeal by a defendant claiming the district court should not have denied her counterclaim for wrongful conversion. We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

On October 1, 1992, Harold and Norma Downs entered into a one-year lease agreement with Kathleen Kutzner, which provided Kutzner would pay rent of \$250 per month plus the utilities for the rental property. Kutzner operated a restaurant on the property, but had problems maintaining the business. She stopped operations on October 6, 1993. At that time she owed \$2,250 in rent and \$3,239 for utilities.

Kutzner did not remove all of her personal property from the building at the time the lease ended. In November or December 1993, the Downs changed the locks. They removed much of Kutzner's property and put it in storage before they sold the building. Some of Kutzner's property was still in the building when a fire broke out in August 1994, and this property was damaged.

The Downs filed an action against Kutzner, seeking to recover for the unpaid rent and utilities. Kutzner counterclaimed under a theory of wrongful conversion, claiming plaintiffs had intentionally misappropriated her property. The district court entered judgment against Kutzner for \$5,378. The court determined plaintiffs were gratuitous bailees, but determined they were not responsible for the damage to defendant's goods because they had not been negligent. Plaintiffs were ordered to

turn over to Kutzner the items they admitted were in their possession. The court denied the remainder of Kutzner's counterclaim.

Kutzner appealed. She claims the district court erred in determining plaintiffs were not negligent, as gratuitous bailees, in the keeping of her personal property. She states plaintiffs were negligent because they sold the premises without making sure all of her personal property had been removed. A gratuitous bailee of personal property is not an insurer of the safety of the property while the in the possession the bailee. *Fazio v. Brotman*, 371 N.W.2d 842, 848 (Iowa App. 1985). A gratuitous bailee is liable only if he or she fails to exercise due care in keeping the property. *Id.*

We find there is substantial evidence in the record to support the district court's conclusion that plaintiffs were not negligent. Plaintiffs testified they asked defendant several times to retrieve her property. We conclude plaintiffs did not keep defendant's property in a manner inconsistent with her rights. Plaintiffs placed most of defendant's property in storage and agreed to return to her those items which they could identify as belonging to her. The court found defendant was not credible in her claim that she owned additional property in the building which plaintiffs had not recognized as belonging to her.

We affirm the decision of the district court. Costs of this appeal are assessed to Kutzner.

AFFIRMED.