

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 1, 2006

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. 2005AP2174

Cir. Ct. No. 2005SC2077

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

NIELSON COMMUNICATIONS, INC.,

PLAINTIFF-RESPONDENT,

V.

SATCOM, LLC,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Winnebago County: BRUCE SCHMIDT, Judge. *Reversed and cause remanded with directions.*

¶1 NETTESHEIM, J.¹ Satcom, LLC (Satcom) appeals from a small claims judgment awarding Nielson Communications, Inc. (Nielson) a writ of replevin to certain personal property in Satcom’s possession. The judgment also dismissed Satcom’s counterclaim. We reverse the judgment and remand.² We hold that the trial court erred by conducting the trial while Satcom’s discovery requests were still pending. We remand to allow the discovery process to complete. If the discovery reveals information relevant to the issues between the parties, we direct a new trial in the appropriate venue. If not, we authorize the trial court to reinstate the judgment.

BACKGROUND

¶2 The facts and procedural background of this case are undisputed. On May 23, 2005, Nielson commenced this small claims replevin action contending that Satcom was unlawfully withholding certain of Nielson’s “tower equipment” property. The summons recited a return date on June 14, 2005.

¶3 On June 10, 2005, Satcom’s representative, John Aegerter, filed an answer and counterclaim alleging the following. The property in question was previously owned by Subnet Technologies, LLC (Subnet) and had been placed on Satcom’s communications tower site pursuant to an agreement between Satcom and Subnet (Satcom/Subnet agreement). This agreement called for rental payments from Subnet to Satcom. In addition, the agreement prohibited any

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

² While Satcom’s notice of appeal indicates that it is appealing from the judgment and ensuing orders, the appellate issues addressed are limited to those raised by the judgment.

transfer of the property without Satcom's consent and that any such transfer without Satcom's consent would be void. Sometime later, Nielson contacted Satcom and advised that Nielson was now a "successor" to Subnet. Thereafter, Nielson paid Satcom the rent called for in the Satcom/Subnet agreement for the first three months of 2005.

¶4 As relief, Satcom sought the balance of the rental payments called for in the Satcom/Subnet agreement and for a landlord's lien against the personal property as provided in the Satcom/Subnet agreement. In addition to its answer and counterclaim, Satcom filed a motion for change of venue to Waukesha County pursuant to the agreement, which stated that any litigation arising out of the parties' contract would be litigated in Waukesha County.

¶5 In a request for the production of documents dated June 8, 2005, Satcom requested that Nielson produce "[a]ll documents, agreements, memoranda, or any writings" between Nielson and Subnet.³ In addition, Satcom submitted interrogatories to Nielson asking, among other things, that Nielson: (1) list all of Nielson's principals; and (2) identify whether any principals or employees of Subnet were employed by Nielson, any subsidiary of Nielson, or any business in which such persons had an interest. Both the request for production of documents and the interrogatories requested that Nielson respond within thirty days pursuant to WIS. STAT. §§ 804.09(2) and 804.08(1)(b), respectively.

¶6 The proceedings before the court commissioner on the return date of June 14, 2005, are not documented in the appellate record. However, Satcom's

³ The request also sought such documents between Nielson and Satcom.

brief-in-chief represents that the court commissioner declined to hear the matter and, instead, transferred the case to the circuit court. Nielson's respondent's brief does not dispute this history. Moreover, the court commissioner's action appears appropriate pursuant to WIS. STAT. § 799.206(3), which provides that when a replevin action is contested before a court commissioner, the matter shall be scheduled for a hearing "as soon as possible before a judge."

¶7 On June 15, Aegerter, Satcom's representative, faxed a copy of the Satcom/Subnet agreement to Nielson's attorney in response to the attorney's request. Nielson replied to Satcom's counterclaim the following day.

¶8 The matter was heard by the circuit court on June 20, 2005. Aegerter appeared on behalf of Satcom while Nielson was represented by its attorney.⁴ The proceeding was informal, consisting of dialogue between the trial court, Aegerter, Nielson's counsel, and Steven Nielson, a representative of Nielson. No sworn testimony was presented.⁵

¶9 Satcom's argument was that Nielson was a "successor" to Subnet and had assumed Subnet's obligations under the Satcom/Subnet agreement. Nielson's response was that it had merely agreed to purchase Subnet's assets and had not contracted to assume Subnet's obligations under the Satcom/Subnet

⁴ WISCONSIN STAT. § 799.06(2) authorizes a full-time employee of a party to appear on behalf of a party if the employee is so authorized.

⁵ WISCONSIN STAT. § 799.209(1) provides that a small claims proceeding shall be conducted "informally, allowing each party to present arguments and proofs and to examine witnesses to the extent reasonably required for full and true disclosure of the facts." Among his appellate issues, Satcom complains that the "witnesses" were not sworn. However, Satcom never objected to the procedure used by the trial court. We deem this issue waived.

agreement. During the course of the proceeding, the following exchange took place between the trial court and Aegerter:

Mr. Aegerter: There's one thing else. In December [Nielson] had said that he had purchased Subnet. And when a business is purchased, you not only buy the assets, you buy the liabilities and that I believe is a point of law. Am I correct?

The Court: Well, he never showed you anything regarding that purchase?

Mr. Aegerter: No. *He hadn't responded to our request for reproduction of documents.*

The Court: *So you don't have any documentation that establishes that what he bought was the assets, plus all of the legal obligations?*

Mr. Aegerter: That's correct.... (Emphasis added.)

¶10 Later, in an exchange with Steven Nielson, a representative of Nielson, the trial court inquired whether Nielson had assumed the obligations of Subnet. Steven Nielson responded, "Absolutely not." Still later, the following exchange took place between the court and Aegerter:

Mr. Aegerter: No. I'm saying that when a company purchases another they buy the assets and the liabilities and all the contracts. Am I right on that? Am I wrong?

The Court: You're wrong. *It depends upon the agreement that was reached between the parties.* There's no blanket rule.

¶11 In its final ruling, the trial court held that Satcom's relief, if any, was against Subnet, not Nielson. The court dismissed Satcom's counterclaim, ruled that Satcom had illegally withheld Nielson's personal property, and granted Nielson's request for a writ of replevin. The court then transferred the matter back to the court commissioner for a determination of damages as a result of Satcom's

wrongful retention of Nielson's property. Satcom appeals from the ensuing judgment.

DISCUSSION

¶12 On appeal, Satcom challenges the trial court's ruling on a number of fronts.⁶ However, we deem only one issue dispositive—Satcom's contention that the trial court erred by conducting the trial before Nielson had responded to Satcom's discovery demands for the production of documents and interrogatories.

¶13 As noted in our recital of the facts, Satcom's theory in support of its answer and counterclaim was that Nielson had assumed Subnet's obligations to Satcom. Satcom's counterclaim alleged that Nielson had told Satcom that Nielson was a "successor" to Subnet and that Nielson had paid for three months' rent for which Subnet otherwise would have been responsible under the Satcom/Subnet agreement. Seeking support for that theory, Satcom interposed discovery demands to Nielson for the production of documents relating to the dealings between Nielson and Subnet and interrogatories seeking information that might reveal some commonality between the principals of Nielson and Subnet.

¶14 At the trial, the trial court properly observed that the correctness of Satcom's theory depended on the arrangement struck between Nielson and Subnet. When the court questioned Aegerter as to whether Nielson had provided Satcom with "anything regarding that purchase," Aegerter responded, "No," adding that

⁶ Satcom contends that it was entitled to a landlord's lien, that Nielson assumed Subnet's obligations under the Satcom/Subnet agreement, that the venue should have been changed to Waukesha County, and that the proceeding was conducted without the taking of any sworn testimony.

Nielson had not responded to Satcom's prior request for the production of documents. Later during the proceeding, the court correctly pointed out to Aegerter that the vitality of Satcom's theory "depends upon the agreement that was reached between the parties." Satcom's discovery requests went directly to that very question, and Aegerter brought that matter to the attention of the trial court, noting that Nielson had not yet responded to the discovery requests. Nonetheless, the trial court proceeded to litigate the matter to completion without that potentially relevant and important discovery information.

¶15 Nielson argues that Satcom's argument is of no moment because the thirty-day deadline for its responses to Satcom's discovery requests was not yet at hand. But, as the preceding discussion reveals, that argument more supports Satcom than Nielson because it demonstrates that the trial in this case was conducted without potentially relevant information on the crucial issue in the case—namely, what was the agreement or understanding, if any, between Nielson and Subnet as to Subnet's obligations to Satcom. And, as we have noted, Aegerter alerted the trial court to Satcom's pending discovery requests on this crucial point. We conclude that it was error for the trial to proceed with Satcom's discovery requests still unanswered. We therefore reverse the judgment.

¶16 That brings us to the question of the remand. While we could direct a new trial and leave it at that, we conclude that a more limited and conditional remand is appropriate under the unique circumstances of this case. We say this because once the discovery process is complete, the responses may reveal nothing relevant or helpful to Satcom's cause. A new trial under those circumstances would be inappropriate and give Satcom a "second kick at the cat." Therefore, we direct the following on remand. Upon the return of the record, Nielson shall respond to Satcom's discovery requests within fifteen days. Satcom shall then

present the discovered information to the trial court within fifteen days from Nielson's production.⁷ The court shall then determine whether the information is relevant to Satcom's defense and counterclaim. If so, the court shall order a new trial. In addition, the court shall determine whether the trial should occur in Waukesha County pursuant to the venue provision in the Satcom/Subnet agreement. On the other hand, if the court determines that the information is not relevant to Satcom's defense and counterclaim, the court is authorized to reenter the original judgment. While this remand is admittedly unusual, we deem it to be the most economical use of the valuable time and resources of all concerned.

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

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

⁷ If Satcom does not present the discovered information to the circuit court within the fifteen-day deadline, the court is authorized to reenter the original judgment.

