

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 13, 2010

David R. Schanker
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. 2009AP345

Cir. Ct. No. 2007SC1083

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

TREVOR RICHARDSON,

PLAINTIFF-APPELLANT,

V.

ROBERT W. HENDERSON,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Ozaukee County:
JOSEPH D. McCORMACK, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.¹ Trevor Richardson appeals from a small claims order dismissing his action against Robert W. Henderson for allegedly failing to

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

return marital property. Richardson's wife, who rented an apartment from Henderson, fled the country during divorce proceedings and prior to the division of marital property. While the divorce was pending, Richardson filed a small claims action against Henderson requesting the return of a \$200 security deposit, \$1000 paid at the termination of the lease, and other property left in the apartment which he believed to be marital property. The small claims court dismissed Richardson's action on grounds that his claim involved the enforcement of a temporary order issued by the family court which it did not have jurisdiction to enforce. Although Richardson claims that he was pursuing the return of marital property outside of the divorce action, the resolution of Richardson's claim required a determination of the status of the alleged marital property at issue, the property division, and potentially the interpretation and application of a family court order, which the small claims court properly deferred to the family court. We therefore affirm the dismissal order.

BACKGROUND

¶2 On February 9, 2007, Richardson's then-spouse, Mariana Farah-Saldivar, entered into a residential lease with Henderson to expire on February 29, 2008. Farah-Saldivar then filed for divorce in Milwaukee county on February 16, 2007. On February 25, 2007, Farah-Saldivar spent approximately \$492 for a new washer and dryer for the apartment. A temporary order dated March 20, 2007, provided that "[e]ach party shall have the use of the items of personal property in his/her current possession" and "each party shall be responsible for his/her own living expenses." The order additionally provided that both parties "are restrained from ... giving away, transferring ... or otherwise disposing of any item of personal property, furniture ... until a final division of these items is made by the

trial court unless the parties agree in writing, or a court modifies this order prior to the final hearing.”

¶3 Prior to the parties’ final divorce hearing and judgment on January 2, 2008, Farah-Saldivar left the country. At the time of her early August 2007 departure, Farah-Saldivar left Henderson a note in which she apologized for leaving without notice and providing him with a check for \$1000 “to help with the lease,” and the contents of the apartment and, specifically, the washer and dryer.

¶4 On October 11, 2007, prior to the parties’ judgment of divorce, Richardson commenced this small claims action against Henderson in Ozaukee county, requesting that “all marital property [be] returned and a refund of the security deposit and other money [Farah-Saldivar] gave the landlord including the \$1000 check she wrote him and monetary award for depreciation of property.” Henderson requested dismissal of the action for failure to state a claim and because Richardson was not a party to the lease. Richardson argued that he was entitled to bring the action under WIS. STAT. ch. 766 and also that Farah-Saldivar had violated the family court’s temporary order in the divorce action. Henderson subsequently filed a motion for summary judgment, which was denied by the small claims court, as was his motion for reconsideration. The matter proceeded to a hearing on January 12, 2009.

¶5 After hearing arguments from both parties, the small claims court dismissed the action, concluding:

[T]his is a matter involving family court [T]he disputes between [Richardson and Farah-Saldivar] concerning the property and who had a right to give it was disposed of by the family court. And to the extent that there was a violation of any family court order, that was in effect melded into the judgment, and I have nothing here before me that would allow me to upset that.

Richardson then filed a motion for reconsideration clarifying that (1) the small claims action was premised on WIS. STAT. ch. 766, (2) it was brought against Henderson and not Farah-Saldivar, and (3) he was not requesting the small claims court to enforce the family court's temporary order.

¶6 The default divorce judgment, entered in Milwaukee county on January 2, 2008, failed to expressly address the property in question. Richardson now appeals the Ozaukee county trial court's dismissal of his small claims action. Also before us is a WIS. STAT. RULE 809.25(3) motion for sanctions filed by Henderson on September 23, 2009.

DISCUSSION

¶7 Richardson raises three issues: (1) whether the trial court erred in dismissing his small claims action when the alleged marital property in dispute was abandoned within its jurisdiction, (2) whether the trial court erred in dismissing his action without deciding if the property sought in the action was marital, and (3) whether the trial court can dismiss the small claims action without ruling if conversion of marital property occurred or whether Henderson was unjustly enriched. Therefore, at issue is whether the trial court properly exercised its discretion when it dismissed Richardson's action.

¶8 Our review of a trial court's decision to dismiss a case with prejudice is limited to whether the trial court erroneously exercised its discretion. *Haselow v. Gauthier*, 212 Wis. 2d 580, 590-91, 569 N.W.2d 97 (Ct. App. 1997). We will uphold a discretionary decision of the trial court "if the [trial] court has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Id.* at 591 (citation omitted). Whether a court has jurisdiction is a

question of law, which is reviewable de novo. *See Dragoo v. Dragoo*, 99 Wis. 2d 42, 43, 298 N.W.2d 231 (Ct. App. 1980).

¶9 The small claims court essentially determined that the transfer of alleged marital property occurred during the pendency of a divorce proceeding and was potentially in violation of a temporary order entered under WIS. STAT. ch. 767, and therefore Richardson’s remedy lies in ch. 767. *See Socha v. Socha*, 204 Wis. 2d 474, 480-81, 555 N.W.2d 152 (Ct. App. 1996) (during divorce proceedings, the remedy for a violation of a temporary order lies in ch. 767). We agree. Richardson’s complaint in the small claims action requests the return of marital property. However, it was clear from the subsequent filings and proceedings that the parties disputed the status of the cash and property left by Farah-Saldivar, and the family court’s subsequent judgment of divorce did not address the disposition of the items at issue. Although Richardson argued in his motion for reconsideration that he was not relying on the family court’s temporary order in attempting to recover the alleged marital property, his response to Henderson’s motion for summary judgment belies that statement.

¶10 In both his brief in opposition to summary judgment and in oral statements to the court, Richardson indicated that his grounds for recovery included Farah-Saldivar’s violation of the family court’s temporary order, which was in effect at the time of her departure from Henderson’s rental property. When asked the basis for his claim against Henderson, Richardson replied, “[T]here was an injunction order in effect that prevented my ex-wife from giving, gifting property to the defendant.” The small claims court explained: “[I]f you have an injunction ... [t]he only place you can enforce an injunction like that is where you got an injunction.”

¶11 Because the resolution of Richardson’s small claims action turned on the status of the alleged marital property, including the property division and, potentially, the interpretation, application and enforcement of the family court’s temporary order, we agree that the small claims court properly deferred to the family court to resolve the marital property dispute. Pursuant to WIS. STAT. §§ 767.001(1)(h) and 767.01, trial courts have subject matter jurisdiction over all actions affecting the family, including property division, and have authority to do all things necessary and proper in those actions to carry out their orders and judgments into execution. The family court has the statutory authority to determine whether the property is marital property and the division of same. Here, Richardson acknowledged that the status of the disputed property as between his wife and him was not yet resolved by the family court either at the time the small claims action was commenced or at the final judgment of divorce.

¶12 It is well-established that, from earliest times, Wisconsin has allowed third-party joinder to impose an equitable remedy. *Zabel v. Zabel*, 210 Wis. 2d 336, 342, 565 N.W.2d 240 (Ct. App. 1997) (husband’s mother joined as third party in divorce action where wife alleged that real property titled in mother’s name was marital property and subject to division as part of divorce) (citing *Damon v. Damon*, 28 Wis. 510 (1871)). Before the trial court, and on appeal, Richardson provides no authority to support his contention that a third-party claim based on the transfer of alleged marital property, including a claimed violation of the family court’s temporary order, can be commenced in one county while a divorce action encompassing the division of the marital property is pending in another trial court.

¶13 Moreover, while Richardson contends that his claims for unjust enrichment and conversion are “outside” the divorce proceeding, he also alleges

mismanagement, waste or transfer of marital property without adequate consideration. WISCONSIN STAT. § 767.63 specifically provides the divorce court with authority to address such claims involving alleged marital property which are to be considered in the property division.² *See also Socha*, 204 Wis. 2d at 480-81 (had wife discovered alleged violations of temporary order governing marital property during divorce proceeding, her remedy would lie in WIS. STAT. § ch. 767). Here, although Richardson chose not to pursue this claim against his wife, the claim is still premised on his contention that the property at issue was marital property. *Cf. Knafelc v. Dain Bosworth, Inc.*, 224 Wis. 2d 346, 355, 591 N.W.2d 611 (Ct. App. 1999) (“If a claim arises from a marital relationship and encompasses a breach of duty of good faith regarding matters of marital property, the claim must be resolved in divorce court.”). Having been presented with no case law or statutory authority to the contrary, we conclude that the small claims court properly deferred the resolution of this dispute over marital property to the family court that presided over the parties’ divorce and property division.

² WISCONSIN STAT. § 767.63 provides:

Disposed assets may be subject to division. In an action affecting the family, except an action to affirm marriage under [WIS. STAT. §] 767.001(1)(a), any asset with a fair market value of \$500 or more that would be considered part of the estate of either or both of the parties if owned by either or both of them at the time of the action and that was transferred for inadequate consideration, wasted, given away, or otherwise unaccounted for by one of the parties within one year prior to the filing of the petition or the length of the marriage, whichever is shorter, is rebuttably presumed to be property subject to division under [WIS. STAT. §] 767.61 and is subject to the disclosure requirement of [WIS. STAT. §] 767.127....

See also Gardner v. Gardner, 175 Wis. 2d 420, 431, 499 N.W.2d 266 (Ct. App. 1993) (once a divorce action is filed, matters involving marital property of the spouses are addressed when determining the property in the marital estate and dividing the marital estate).

¶14 As a final matter, we address Henderson’s WIS. STAT. RULE 809.25(3) motion for sanctions.³ Henderson contends that Richardson has used or continued this appeal in bad faith solely for the purpose of harassing Henderson or causing him malicious harm. We cannot agree. Richardson informed the small claims court that both his divorce attorney and the family court told him to seek the return of the property at issue through small claims court. The notes accompanying the family court’s denial of Richardson’s postjudgment motion to reopen the divorce judgment to address the property at issue in this case support Richardson’s representation. The notes indicate that the family court advised Richardson that the property dispute was between himself and the landlord, and the landlord was not a party to the divorce action. Therefore, at the time of filing, Richardson had been instructed to pursue his claim against Henderson outside of the divorce proceeding. Richardson did so, and we find nothing in the record to suggest that his pursuit of this matter has been done in bad faith.⁴

CONCLUSION

³ Certain aspects of the issues presented by Richardson have been addressed by the Milwaukee county trial court in the context of his divorce action during the pendency of this appeal. Included with Henderson’s motion for sanctions is a document issued by the Milwaukee county family court in Richardson’s divorce action. In the document entitled “Findings and Order” and dated July 29, 2009, the court finds: “On or about August 4, 2007, [Farah-Saldivar] vacated the premises in Mequon and fled to Mexico, leaving for the landlord, Robert Henderson, a washer and dryer which she had purchased at a cost of \$491.98, an envelope containing \$1000 in cash and her security deposit.” The court additionally found that (1) the temporary order was in effect at the time of transfer; (2) “the washer and dryer, cash and security deposit were marital property”; and (3) “[t]he existence of this property was overlooked at the time of the judgment of divorce due to mistake, inadvertence or excusable neglect.” The court ordered that Richardson’s “motion to reopen the Judgment of Divorce is granted, and the washer and dryer, \$1000 in cash and the security deposit are awarded to [Richardson].”

⁴ We note that Richardson’s appeal of the small claims dismissal order was filed prior to the family court’s order reopening the judgment of divorce and awarding him certain of the property in question.

¶15 We conclude that the small claims court did not err in its determination that it was without jurisdiction to enforce the family court order or otherwise rule on the disposition of property during the pendency of the divorce. We therefore affirm the order dismissing Richardson's small claims action. We deny Henderson's WIS. STAT. RULE 809.25(3) motion for sanctions.

By the Court.—Order affirmed.

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

