

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 20, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-3020

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

BRANDON APPAREL GROUP, INC.,

PLAINTIFF-APPELLANT,

v.

**PEARSON PROPERTIES, LTD, CLYDE PEARSON AND
HELENANN PEARSON,**

**DEFENDANTS-THIRD-
PARTY PLAINTIFFS-RESPONDENTS,**

v.

ERIC LEFKOFSKY,

THIRD-PARTY DEFENDANT.

APPEAL from a judgment of the circuit court for Columbia County:
LEWIS W. CHARLES, Judge. *Reversed and cause remanded.*

Before Dykman, P.J., Eich and Deininger, JJ.

PER CURIAM. Brandon Apparel Group, Inc., appeals from a summary judgment dismissing its claims against Pearson Properties, Ltd., Clyde Pearson and Helenann Pearson (the Pearsons). The dispositive issue is whether the Pearsons' submissions on summary judgment established a *prima facie* case for dismissal of the action. We conclude that they did not, and therefore reverse.

Brandon purchased the Pearsons' apparel manufacturing business in August 1994. Included in the purchase were over one hundred items of apparel manufacturing equipment that the Pearsons warranted to be in good condition. Under the purchase agreement, Brandon's claim for any defective equipment expired after two years. The agreement also provided that Brandon had to provide notice of any claim within thirty days of discovering the defect, although an untimely claim would suffice unless it "adversely affects to a material degree seller's ability to defend itself against a claim."

It is undisputed that Brandon's owners concluded shortly after the sale that much of the equipment was in defective condition. However, Brandon did not provide notice of its claims against the Pearsons until May 1996, and commenced this action shortly thereafter.

In their motion for summary judgment, the Pearsons asserted that the untimely notice of claim violated the purchase agreement because it adversely affected their ability to defend against Brandon's allegations. In support they offered Clyde Pearson's affidavit stating that apparel manufacturing equipment deteriorates quickly without proper maintenance, and photographs showing deteriorated equipment in storage. They also offered deposition testimony from Brandon's equipment appraiser, who stated that he could not determine the condition of equipment in 1994 by examining it in 1996. Additionally, the

Pearsons submitted evidence that some of the allegedly defective equipment had been sold, moved or disposed of, although the parties disputed how much of it was no longer available for inspection. Brandon submitted no evidence on this issue. The trial court found prejudice and dismissed the claim for lack of timely notice, resulting in this appeal.

We decide summary judgment cases in the same manner as the trial court and without deference to its decision. *In re Cherokee Park Plat*, 113 Wis.2d 112, 115-16, 334 N.W.2d 580, 582-83 (Ct. App. 1983). Where, as here, the pleadings join the issue, a moving defendant must present a *prima facie* case for summary judgment that would defeat the plaintiff. *Grams v. Boss*, 97 Wis.2d 332, 338, 294 N.W.2d 473, 476-77 (1980). Summary judgment should not be granted unless the moving party makes its case with such clarity as to leave no room for controversy. *Id.* If the proof submitted on summary judgment is subject to conflicting interpretations or reasonable people might differ as to its significance, summary judgment is improper. *Id.* at 339, 294 N.W.2d at 477.

The Pearsons' proof falls short of a *prima facie* case that the untimely notice prejudiced them. Their proof established that as a general rule a twenty-one-month delay in notice will prejudice the ability to defend against a defective mechanical equipment claim. There is little if any proof regarding the particular equipment in this case, however, and none that extends to every piece of equipment in the claim. As Brandon notes, the Pearsons have yet to examine that equipment, and without such examination can hardly prove prejudicial delay in every instance. Brandon's claim therefore remains factually disputed.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

