COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1245

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STAINLESS STEEL FABRICATING, INC.,

PLAINTIFF-APPELLANT,

V.

ROY AITCHISON,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Columbia County: LEWIS W. CHARLES, Judge. *Affirmed in part; reversed in part and cause remanded with directions..*

Before Eich, Vergeront and Roggensack, JJ.

EICH, J. Stainless Steel Fabricating, Inc., a manufacturer of cheese-processing equipment, appeals from an order dismissing its complaint for declaratory judgment. Stainless Steel sued Roy Aitchison, a former employee, seeking a declaration of its and Aitchison's rights and obligations with respect to

Aitchison's current business activities. The circuit court dismissed the complaint on Aitchison's motion and Stainless Steel appeals, claiming that the court erred when it: (1) ruled that facts alleged in the complaint were insufficient to state a claim upon which judicial declarations could be made; (2) denied Stainless Steel's request to amend the complaint; and (3) taxed costs against it for Aitchison's faxing and copying expenses. We conclude that the complaint was properly dismissed, although we believe the court (a) erroneously exercised its discretion when it refused to permit Stainless Steel to amend, and (b) erred in taxing the challenged costs. We therefore affirm in part and reverse in part.

We begin our discussion of the sufficiency of Stainless Steel's complaint by setting forth its principal allegations:

> [From] October, 1993 through September, 1995, Aitchison worked … for Stainless Steel, [ultimately] as the person responsible for Stainless['s] … Mechanical/Electrical Departments.… During the course of his employment, Stainless Steel necessarily disclosed to him a wide variety of valuable confidential information and [he] had access to all of Stainless Steel's design and manufacturing information …, as well as [customer] information…."
>
> … During 1997[,] Stainless Steel began receiving information that Aitchison had been contacting Stainless['s] … customers and attempting to sell mozzarella processing system equipment that was appearing to be substantially identical to those which [he] had worked on for Stainless Steel while in its employ. [And] in mid-1997 [Aitchison's] attorney … contacted Stainless Steel [asking whether he was subject to] any non-compete agreements ….
>
> … [D]uring this time frame Stainless Steel continued to receive information that Aitchison was not only competing with Stainless Steel with respect to its line of mozzarella ... equipment, but was still attempting to sell such equipment to Stainless Steel's customers. Stainless Steel's designs of such equipment are … confidential proprietary trade secret type information.

> Stainless Steel's concerns in these regards … have been accentuated because [when Jim Fisher, who had handled] virtually all of its marketing [and] sales [was told by Stainless Steel's president] that sales efforts with one of [its] customers … had been going on behind her back, [his] unexpected knee-jerk response was to suddenly declare that he was no longer going to be representing Stainless Steel. Subsequently, Mr. Fisher has been … professing … to be an expert in mozzarella processing equipment …. Such … pieces of equipment are not only in direct competition with Stainless Steel's line…, including some of its confidential future equipment, but also *may* be referencing machines that are substantially identical to its present line of equipment and/or its anticipated future line of equipment.… (Emphasis in the original.)

The complaint concludes by alleging that, because of all this, Stainless Steel's management had "been growing increasingly concerned *vis a vis* these competitive developments," and that "its present *uncertainties* concerning the precise nature an extent of [its] rights and obligations with respect to Aitchison and his newly competitive business" (emphasis in the original). And it asks the court to "declar[e] all of the respective rights, statuses and other legal relations involving Stainless Steel and Aitchison which relate to the design, manufacture and sale of mozzarella processing system equipment …."

As indicated, the circuit court granted Aitchison's motion to dismiss the complaint for failure to state a claim. The purpose of such a motion is to test the legal sufficiency of the complaint. ***Town of Eagle v. Christensen***, 191 Wis.2d 301, 311-12, 529 N.W.2d 245, 249 (Ct. App. 1995). On appeal, we review the circuit court's decision *de novo,* accepting the facts alleged in the complaint, and all inferences reasonably arising from such facts, as true. ***Id.*** And, since pleadings are to be liberally construed, a complaint will be dismissed only if it is "'quite clear' that under no conditions can the plaintiff prevail." ***Joyce v. County of Dunn***, 192 Wis.2d 699, 704, 531 N.W.2d 628, 630 (Ct. App. 1995) (citation omitted).

Another consideration bearing upon our review of the dismissal is that, according to the supreme court, in order for a circuit court to "entertain an action for declaratory judgment," the following four facts or conditions must be shown to exist:

> (1) A controversy in which a claim of right is asserted against one who has an interest in contesting it.
>
> (2) The controversy must be between persons whose interests are adverse.
>
> (3) The party seeking declaratory relief must have a legal interest in the controversy - that is to say, a legally protectable interest.
>
> (4) The issue involved in the controversy must be ripe for judicial determination.

Miller Brands-Milwaukee, Inc. v. Case, 162 Wis.2d 684, 694, 470 N.W.2d 290, 294 (1991*) (citing* ***Loy v. Bunderson***, 107 Wis.2d 400, 410, 320 N.W.2d 175 (1982)).

In dismissing Stainless Steel's complaint, the circuit court described the document as "at best ... fairly vague, dealing with nothing more than conjecture and speculation and innuendo." The court likened the pleading to be the "equivalent of a [civil-law] John Doe proceeding," and stated that, in its view, Stainless Steel was doing no more than "merely asking for court approval, or court-sanctioned investigation and discovery." Then, citing ***Miller Brands***, the court stated that it was dismissing the action for Stainless Steel's failure to allege the existence of a justiciable controversy.

Miller Brands was a case in which a beer wholesaler sought a declaratory ruling that the "tied-house" law, § 125.33(1)(a), STATS., which prohibits brewers or beer wholesalers from giving "things of value" to, or for the benefit of, any tavern owner, does not apply to its practice of "trade spending," a promotional effort in which its representatives offer to buy beers for tavern

customers. The wholesaler's complaint outlined the nature and purpose of its "trade spending" practices, and those allegations were incorporated *verbatim* into the affidavit in support of its motion for summary judgment. ***Id***. 162 Wis.2d at 689-90, 470 N.W.2d at 292. The trial court granted the motion and issued the requested declaration. We reversed, concluding that the wholsaler's program violated the statute. The supreme court reversed, holding that the complaint should have been dismissed because of the lack of a justiciable issue—specifically, that "the issue … was not ripe for declaratory judgment." ***Id***. at 688, 470 N.W.2d at 292. The court began by setting forth the four elements of "justiciability" we have quoted above, and concluded that the fourth, "ripeness," was not satisfied because all the wholesaler had done was to "suppl[y] the court with a definition of trade spending, and ask[] the circuit court to rule that if it stays within this definition, it will not be in violation of sec. 125.33(1)(a), Stats." ***Id.*** at 697, 470 N.W.2d at 295. "Such a ruling," said the court, "would amount to an advisory opinion." ***Id***. It went on to state:

> The "facts" which Miller Brands has supplied the court are insufficient for a declaratory judgment…. The actual facts of the case, as they relate to Miller Brands, are uncertain. What Miller Brands has done is create a definition of trade spending and ask the court, "Is it legal to do this?" We agree [that] the facts of this case are too shifting and nebulous for the invocation of the remedy of declaratory judgment.

Id. (internal quotations omitted).

Stainless Steel claims that ***Miller Brands*** is distinguishable and non-controlling because, first, the court there was dealing with a motion for summary judgment—which it says is a "non-pleading issue"—rather than a motion to dismiss for failure to state a claim, as here. The circuit court thought the distinction was unavailing, as do we. As we have noted above, a motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint; and

the law is, as the ***Miller Brands*** court stated, that an action for declaratory judgment will not lie unless a "justiciable controversy" is shown to exist—that is, unless each of the listed criteria is met. It is true that ***Miller Brands*** involved a motion for summary judgment; but, as the supreme court took pains to note, the only affidavit filed by the parties did no more than repeat the allegations of the wholesaler's complaint.[1] In that context, Stainless Steel's position is not persuasive. The first step in any summary-judgment inquiry is, of course, determining whether the complaint states a claim upon which relief may be granted; and in making that determination courts use the same test applicable to a motion to dismiss for failure to state a claim. ***Leitzke v. Magazine Marketplace, Inc.***, 168 Wis.2d 668, 671, 484 N.W.2d 364, 365-66 (Ct. App. 1992). Indeed, an affidavit which simply repeats the allegations of the complaint is of no effect in summary-judgment proceedings. *See* ***Southern Wis. Cattle Credit Co. v. Lemkau***, 140 Wis.2d 830, 839, 412 N.W.2d 159, 162 (Ct. App. 1987) (factual issues in summary-judgment proceedings must be established by affidavit or other proof, "and a party cannot rely on pleadings to perform that function"). We do not believe ***Miller Brands*** is *per se* distinguishable because it involved a motion for summary judgment, rather than a motion to dismiss.

Stainless Steel also argues that, unlike the situation in ***Miller Brands***, this case is ripe for adjudication because it is "seeking judicial declarations *vis a vis* events that had already occurred … when the Complaint was drafted.…" Again, we disagree. As may be seen, Stainless Steel's complaint alleges no more than: (1) it had "received information" that Aitchison, a man who had left its employ two years earlier, had been contacting Stainless Steel

[1] After reciting the six-sentence affidavit—which we have quoted above—the court stated: "These 'facts,' which also are identically reproduced in Miller Brands' amended complaint, were the sole 'facts' provided to the circuit court." ***Id***. at 690, 470 N.W.2d at 293.

customers attempting to sell machinery "appearing to be substantially identical" to that manufactured by Stainless Steel; (2) Stainless Steel considers the designs of its own equipment to be "trade secrets"; (3) a marketing consultant used by Stainless Steel for several years responded that he would no longer be doing so after the company's president told him that someone had been calling on Stainless Steel's customers "behind her back"; and (4) this consultant has lately been "professing to be an expert" in cheese-processing equipment," and, in doing so, he "*may* be referencing machines that are substantially identical to [Stainless Steel's] present line of equipment and/or its anticipated future line of equipment."[2] Then, stating that all this raises undefined "uncertainties" with respect to "the precise nature and extent" of its rights with respect to Aitchison, Stainless Steel's complaint asks the court to declare "all of the respective rights, statuses and other legal relations" between it and Aitchison which might "relate to the design, manufacture and sale of mozzarella processing system equipment …."

We think these allegations—giving them the most liberal construction we can muster, and taking into consideration all reasonable inferences from the alleged facts—are insufficient to even suggest the existence of a justiciable controversy under ***Miller Brands*** and similar cases. The "facts" Stainless Steel supplied to the court are no different in principle than those supplied by the ***Miller Brands*** wholesaler in support of its request that the court declare its rights, obligations and status under the tied-house law. To paraphrase the ***Miller Brands*** court: "All Stainless Steel has done is to say that it heard from someone that a former employee is attempting to sell equipment that appears to be substantially identical to equipment Stainless itself markets, or may market in the future, and to ask the court: 'Is it legal for him to do this?'" The ***Miller Brands***

[2] Although Stainless Steel's complaint contains an oblique reference to "non-compete" contracts with Aitchison, it nowhere alleges the existence or breach of any such contract. Nor does it assert the violation or breach of any trade secret, or any other "right" against Aitchison.

court's response is ours as well: "[T]he facts [alleged] are too shifting and nebulous for the invocation of the remedy of declaratory judgment." ***Id***. at 697, 470 N.W.2d at 295, quoting from ***Waukesha Memorial Hospital v. Baird***, 45 Wis.2d 629, 643-44, 173 N.W.2d 700, 707 (1970).

We therefore affirm the circuit court's order insofar as it dismissed Stainless Steel's complaint for failure to state a claim upon which relief may be granted.

Stainless Steel's next argument—that the trial court abused its discretion in denying its request for permission to file and serve an amended complaint—has merit. At the conclusion of the hearing at which the court ruled the complaint should be dismissed for failure to allege a justiciable controversy, Stainless Steel's counsel asked the court: "Are you prepared to grant me, say fourteen days, to see if I desire to try to amend away the lack of justiciability?" to which the court responded: "I think it's so vague, Mr. Kinney, that I would go with a new action rather than giving an opportunity to amend this complaint."

Whether to allow an amendment to pleadings is within the trial court's discretion. ***Goff v. Seldera***, 202 Wis.2d 600, 616, 550 N.W.2d 144, 151 (Ct. App. 1996). Generally, we will sustain a discretionary act of the trial court if that court examined the relevant facts, applied a proper standard of law, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982). In considering discretionary determinations, however, we have also recognized the long-standing rule that "[d]iscretion is more than an unexplained choice between alternatives," and that "when the decisionmaker acts without giving the parties or the reviewing court any inkling of the reasons underlying the decision," the basic inquiry—whether discretion was in fact exercised—is frustrated. ***Argonaut Ins. Co. v. LIRC***, 132 Wis.2d 385, 391, 392 N.W.2d 837, 839 (Ct. App. 1987). And

while we may independently review the record to determine whether reasons exist to support the trial court's exercise of discretion, ***Stan's Lumber, Inc. v. Fleming***, 196 Wis.2d 554, 573, 538 N.W.2d 849, 857 (Ct. App. 1995), we do not do so in all cases.

Another consideration bearing on our inquiry, at least peripherally, is that a party has the right to amend its pleading "once as a matter of course at any time within 6 months after the summons and complaint are filed." Section 802.09(1), STATS. "Otherwise, a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given at any stage of the action when justice so requires." ***Id.*** At the time of Stainless Steel's request to amend, at least three days remained before the six-month time limit would expire.

Because Stainless Steel's request was made within the statutory six-month "amendment-of-course" period, we see no issue of prejudicial delay; and the court did not suggest that calendering or other administration-of-justice considerations were present which would militate against granting two weeks in which to amend the complaint. On this record, then—and in the absence of any explanation—we are unable to discern a sustainable reason for the court's decision to deny the request to amend. We therefore reverse on this issue and remand with directions to the court to issue an order granting Stainless Steel's motion for permission to amend its complaint within fourteen days.

Finally, Stainless Steel argues that the court erred in taxing costs for Aitchison's faxing and copying expenses. These items are not included in the costs statute, § 814.04, STATS., and it is the rule in Wisconsin that items not specifically delineated in the statute are not recoverable. ***Kleinke v. Farmers***

Coop. Supply & Shipping, 202 Wis.2d 138, 147, 549 N.W.2d 714, 717 (1996). We thus reverse the court's award of costs for these two items of expense.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.