COURT OF APPEALS
DECISION
DATED AND FILED

May 27, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2276

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

WILLIAM D. MORIN,

PLAINTIFF-APPELLANT,

V.

WATERTOWN LEASING CO., INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

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

DYKMAN, P.J. William D. Morin appeals from a judgment dismissing his claim for relief under the Wisconsin Consumer Act, as well as his claims for breach of contract, conversion and forgery. Morin contends that his wrongful repossession claim is covered under the Wisconsin Consumer Act. We

disagree. He also argues that the trial court erred in concluding that there were no genuine issues of material fact regarding his breach of contract and conversion claims. We agree. Finally, Morin argues that the trial court erred in dismissing his forgery claim when neither party moved for the claim's dismissal. We disagree. Accordingly, we affirm in part, reverse in part and remand for trial on those issues not appropriate for summary judgment.

BACKGROUND

On January 9, 1997, Watertown Leasing Company leased a 1997 Ford Ranger truck to Custom Cabinets, Closets and Countertops, a Watertown business owned by William D. Morin. Morin allegedly told Terry Koplin, a salesperson at Watertown Leasing, that he needed the truck for business and personal purposes.

The terms and conditions of the forty-eight month lease were set out in a standard form, which listed Custom Cabinets, Closets and Countertops as the lessee and Watertown Leasing as the lessor. The lease could be terminated early if: (1) the lessee provided the lessor with fifteen days' advance notice and returned the vehicle to lessor on or before the early termination date; or (2) the lessee was in default by failing to make payment or by materially breaching the terms and conditions of the lease.[1] The lease also prohibited the use of the truck outside of the state for more than thirty consecutive days without the lessor's prior written consent. Morin signed the lease contract as "William D. Morin, owner."

[1] Morin would be in default regarding payment by failing to pay an amount *exceeding* one full payment for more than ten days after its due date, which is the ninth day of every month. A delinquency charge of $10 was assessed for any late monthly payment, but the contract does not identify a specific time period within which an assessed delinquency charge must be paid.

A few months into the lease, Morin accepted a job in Massachusetts. He contacted Watertown Leasing for its consent to remove the leased truck from Wisconsin, which Watertown Leasing declined to give. On May 24, 1997, after Morin determined that he was not going to be able to sell the truck in time, he parked the truck in Watertown Leasing's lot and left for Massachusetts. On June 19, 1997, Watertown Leasing sold the truck to a car dealership in Madison. The truck was sold together with a fiberglass cap, a bedliner, and trailer hitch, which Morin had purchased and installed during the lease.

Morin filed a complaint for remedies provided under the Wisconsin Consumer Act for wrongful repossession, as well as claims for breach of contract and conversion. During discovery, Morin received a copy of his lease agreement and noticed that the signature on one of the form's lines was not his signature. Morin then amended his complaint to allege a cause of action for forgery.

Watertown Leasing denied all the claims Morin asserted against it and argued that because Morin voluntarily surrendered the truck on May 24, 1997, and was in default regarding payment in June, its repossession and subsequent sale of the truck was proper. It also filed a counterclaim for the deficiency between the amount still due on the lease at the time of the alleged default and the amount for which the truck was eventually sold.

Morin moved for summary judgment on whether the Wisconsin Consumer Act applied to the lease transaction.[2] Watertown Leasing also moved for summary judgment in its favor but did not limit its motion to specific claims. The trial court concluded that because the parties filed cross-motions for summary

[2] The parties do not contest whether summary judgment is available for this purpose.

judgment, all material facts were stipulated, and all claims were therefore appropriate for review. The court eventually entered a summary judgment dismissing all claims. Morin appeals.[3]

STANDARD OF REVIEW

There is a standard methodology that a trial court is to apply when faced with a motion for summary judgment. *See* ***Voss v. City of Middleton***, 162 Wis.2d 737, 747, 470 N.W.2d 625, 628 (1991). First, the court examines the pleadings to determine whether a claim for relief has been stated and a material issue of fact exists. *See* ***id.*** at 747, 470 N.W.2d at 628-29. If the court concludes that a claim for relief has been stated, then it must examine the moving party's affidavits or other proof to determine if they establish a prima facie case for summary judgment. *See* ***id.*** at 747-48, 470 N.W.2d at 629. To make a prima facie case for summary judgment, a defendant must show a defense that would defeat the non-moving party's claim. *See* ***id.*** at 748, 470 N.W.2d at 629. If a prima facie case is established, the court reviews the opposing party's affidavits to determine if there are any genuine issues of material fact that would require a trial. *See* ***id.*** Under § 802.08(2), STATS., summary judgment is appropriate when the trial court is satisfied that the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, demonstrate that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. We review summary judgment de novo, applying the same methodology as the trial court. *See* ***Voss***, 162 Wis.2d at 747, 470 N.W.2d at 628.

[3] Watertown Leasing has not filed a cross-appeal. We will therefore not review the court's decision to dismiss its deficiency claim.

DISCUSSION

1. *Wisconsin Consumer Act*

Morin contends that the trial court erred in concluding that he was not entitled to relief under the Wisconsin Consumer Act, chs. 421-427 STATS. Specifically, he argues that the court erred when it found that he did not qualify as a "customer" under § 421.301(17), STATS. However, whether Morin is a "customer" under the Act is only relevant if he entered into a "consumer lease" for the truck.

There are two types of "consumer leases." The first is the generic "consumer lease" defined in § 421.301(11), STATS., as "a lease of goods which a merchant makes to a customer for a term exceeding 4 months." The second type is the "motor vehicle consumer lease," which § 421.301(25m) defines as a "consumer lease" under § 429.104(9), STATS.

Section 429.104(9), STATS., a part of the Wisconsin Motor Vehicle Consumer Lease Act, reads as follows:

> "Consumer lease" or "lease" means a lease entered into in this state that transfers the right of possession and use by a natural person of a motor vehicle primarily for a personal, family, household or agricultural purpose, for a period of time exceeding 4 months, if the total lease obligation, excluding any option to purchase or otherwise become owner of the motor vehicle at the expiration of the consumer lease, does not exceed $25,000. The term does not include a credit sale, as defined under 12 CFR 226.2 (a) (16).

This case involves a lease for a motor vehicle and therefore we use § 429.104(9), STATS. The question then becomes whether the lease agreement in this case qualifies as a "consumer lease" under § 429.104(9). While Morin stated

in his amended complaint that he "leased the truck not only for business purposes but also … for personal, family, and household purposes," § 429.104(9) requires that he intended to lease the truck *primarily* for personal, family and household purposes. Morin therefore has failed to plead a claim for relief. The trial court correctly granted Watertown Leasing's motion for summary judgment on Morin's Consumer Act claim.

2. *Summary Judgment*

Morin also argues that the trial court erred in concluding that because both parties moved for summary judgment, there were no material issues of triable fact requiring a jury trial. He contends that while a trial court may presume that there are no triable issues of material fact if the parties file cross-motions for summary judgment on the same issue, it may not make such a presumption when the parties file cross-motions for summary judgment on different issues. We agree that not all cross-motions for summary judgment are stipulations as to the facts. *See* ***Stone v. Seeber***, 155 Wis.2d 275, 278, 455 N.W.2d 627, 629 (Ct. App. 1990). But because we review motions for summary judgment de novo, we need not pursue the matter further.

A. *Breach of Contract*

A second issue was whether Watertown Leasing breached the lease contract when it repossessed the truck and sold it to a used car dealership. Morin argues that the trial court improperly considered this issue because neither party raised it in their motions for summary judgment. We disagree. Watertown Leasing's motion broadly states that it was moving for "summary judgment in [its] favor on the grounds that the record in the action demonstrates no genuine issue of material fact, and that [it] was entitled to judgment as a matter of law." Although

Watertown Leasing's motion does not specifically state the claims on which it was moving for summary judgment, it is not required to do so. *See* § 802.08, STATS.

Looking at the pleadings, we conclude that Morin has stated a valid breach of contract claim, because if Morin did not voluntarily surrender the truck on May 24, 1997, and was not in default on June 19, 1997, Watertown Leasing had no authority to repossess and sell the truck.

The pleadings present a material issue of triable fact as to whether Morin surrendered the truck when he left it at Watertown Leasing's parking lot on May 24, 1997. Morin asserts in his complaint that while he left the truck on the lot for safekeeping in his absence, he never voluntarily surrendered the truck or his rights under the lease arrangements. He alleges that he informed Watertown Leasing's officers and attorney on several occasions while the truck was at Grinwald Ford that he fully intended to keep the lease current and keep the truck pursuant to the lease terms. Watertown Leasing denies both of these factual statements in its answer.

The pleadings also present a material issue of triable fact as to whether Morin was in default on the date that Watertown Leasing took possession of the truck and sold it to a dealership in Madison. The lease provides that Morin would be in default if he failed to pay an amount *exceeding* one full payment for more than ten days after its due date. Morin asserts in his complaint that the lease payments were due every month, and that he had made these payments through the month of May. While Morin admits that he failed to make the June payment on the payment date required under the lease (June 9), he asserts that he was not in default under the terms of the lease until after June 19, 1997, which was the date

Watertown Leasing sold the truck. Morin therefore alleges that Watertown Leasing breached the lease. Watertown Leasing denies these assertions.

We next examine Watertown Leasing's affidavits or other proof to determine if it has established a prima facie case for summary judgment. Watertown Leasing attached the affidavits of two of its officers, Terry Koplin and Terry Grinwald. Both Koplin and Grinwald stated in their affidavits that at no time prior to the commencement of this action did Morin ever inform them that he did not intend to surrender his truck when he parked it on Watertown Leasing's lot. Neither, however, offers anything further.

Watertown Leasing also attached a copy of Morin's deposition to its motion for summary judgment. But because it did not properly append the deposition to an affidavit, we may not consider it. *See* ***Wagner v. Dissing***, 141 Wis.2d 931, 945, 416 N.W.2d 655, 660 (1987) ("[i]f depositions or other record items are to be used on summary judgment motions, they must be accompanied by an affidavit containing appropriate page references."). Our inquiry is limited to the Koplin and Grinwald affidavits, and all they show is that Morin did not tell *them* that he did not intend to surrender his truck. The affidavit in no way negates Morin's assertion in his complaint that he told Watertown Leasing's officers and attorney that he intended to keep the lease current. Koplin and Grinwald do not assert that they are the only officers of Watertown Leasing, and they say nothing as to what Morin said to their attorney.

As for its assertion that Morin was in default at the time of the sale, Grinwald's affidavit contains the following statements:

> 4. Lessee terminated the lease agreement prior to the end of the lease term by voluntarily surrendering possession of the vehicles to the Defendants on or about

> May 24, 1997, and by failing to pay the monthly payment that was due June 9, 1997.
>
> ….
>
> 7. On June 18, 1997, an agent of Kayser Ford in Madison, Wisconsin, met with me to discuss the potential sale of the vehicle to Kayser Ford. I indicated that Watertown Leasing Co., Inc., could not transfer the vehicle until June 19, 1997. Kayser Ford and Watertown Leasing Co., Inc., agreed on the terms of the potential sale and entered into a tentative purchase contract on June 18, 1997, with an understanding that the contract was conditioned on Watertown Leasing Co., Inc. receiving no communication from the Plaintiff by June 19, 1997. See Motor Vehicle Purchase Contract, dated June 18, 1997, and attached to the Plaintiff's Notice of Motion and Motion for Summary Judgment.
>
> 8. Due to the early termination of the lease and the lack of communication from the Plaintiff and pursuant to paragraph 20 of the lease, Watertown Leasing Co., Inc. then sold the vehicle in a commercially reasonable manner to Kayser Ford in Madison, Wisconsin, on June 19, 1997, for a total sales price of $16,600.00. See Receipt of Sale, dated June 19, 1997, and attached as Exhibit "D."

These statements, which are primarily conclusory, are also insufficient to establish a prima facie case for summary judgment. *See* ***Hopper v. City of Madison***, 79 Wis.2d 120, 130, 256 N.W.2d 139, 143 (1977) (legal conclusions in summary judgment affidavits will be disregarded). Even if the truck was sold sometime during June 19, we conclude that the lease gave Morin until June 20 to make his payment. Moreover, Morin's lease provides that he would be in default by failing to pay an amount *exceeding* one full payment, and there is no evidence that such an amount was owing at the time of the sale.

B. *Conversion*

A third issue decided on summary judgment was whether Watertown Leasing converted Morin's fiberglass cap, bedliner and a trailer hitch, when it repossessed and later sold the truck.[4] The elements of tortious conversion include: (1) intentionally controlling/taking property belonging to another; (2) controlling/taking property without the owner's consent; and (3) those acts resulting in serious interference with the rights of the owner to possess the property. *See* ***Brunner v. Heritage Companies***, No. 97-3383, slip op. at 6 (Wis. Ct. App. March 17, 1999, ordered published April 21, 1999). Conversion, however, does not require wrongful intent or knowledge that what is being taken rightfully belongs to another. *See* ***id.*** (citing ***Eden Stone Co. v. Oakfield Stone Co.***, 166 Wis.2d 105, 124, 479 N.W.2d 557, 565 (Ct. App. 1991)).

Morin alleges in his complaint that he purchased and installed a cap, bedliner and trailer hitch on the truck, and that Watertown Leasing converted these items when it sold them with the truck. We conclude that this sets out a valid claim for relief. However, because abandonment is a recognized defense to conversion,[5] and there is a dispute in the pleadings as to whether Morin voluntarily surrendered or abandoned these items when he left the truck parked in Watertown Leasing's lot, we conclude that there is a material issue of triable fact regarding

[4] Morin again argues that because neither party moved for summary judgment it was improper for the trial court to decide the conversion claim. Watertown Leasing did not specifically limit its motion to certain claims. This necessarily includes the conversion claim. Consequently, we will review whether Watertown Leasing was entitled to summary judgment on the conversion claim.

[5] *See* 18 AM JUR 2d § 91 (1985); *see also* ***Rodgers v. Crum***, 215 P.2d 190 (Kan. 1950); ***Knight v. M.H. Siegfried Real Estate, Inc.,*** 647 S.W.2d 811 (Mo. App. 1982); ***Jones v. Jacobson***, 273 P.2d 979 (Wash. 1954).

Morin's conversion claim. Summary judgment is inappropriate when there is a triable issue of material fact.

C. *Forgery*

Finally, Morin contends that the trial court erred in dismissing his forgery claim.[6] The dispute centers around Morin's signatures on the lease agreement. Morin concedes in his complaint that while he signed the bottom signature line, the signature an inch or two above this signature was a forgery, made after he agreed the terms of the lease. The alleged forgery was on the blank signature line that followed this language:

> This Lease contains the entire agreement between you and us relating to the Lease of the Vehicle. Any change to the terms of this Lease must be in writing and signed by you and us. No oral changes are binding. We may delay or refrain from enforcing any of your rights under this Lease without losing them.

After reviewing the pleadings, we conclude that there are no triable issues of material fact presented in Morin's forgery claim. While Morin contends that the first signature on the form is a forgery, and Watertown Leasing contends that it is not, the dispute is not material. "Material facts are those that are of consequence to the merits of the litigation." ***Michael R.B. v. State***, 175 Wis.2d 713, 724, 499 N.W.2d 641, 646 (1993).

Whether Morin signed the signature line after the integration clause is immaterial to this litigation because he signed at the bottom of the page,

[6] Similar to his previous claims, Morin argues that neither party moved the court to decide this issue on summary judgment. However, as we explained above, because Watertown Leasing moved for summary judgment, this necessarily included the forgery claim.

indicating that he agreed to all the terms and conditions contained in the agreement. We therefore conclude that the trial court did not err in dismissing Morin's forgery claim.

CONCLUSION

We are satisfied that Morin's claims are not covered under either the Wisconsin Consumer Act or the Wisconsin Motor Vehicle Consumer Lease Act, but we conclude that there are triable issues of material fact regarding Morin's breach of contract and conversion claims. Finally, we conclude that Morin's forgery claim was appropriately dismissed. We therefore affirm in part; reverse in part, and remand for proceedings not inconsistent with this opinion.

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

Not recommended for publication in the official reports.