COURT OF APPEALS
DECISION
DATED AND FILED

May 23, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2331-FT

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

NORTH CENTRAL FORKLIFT, INC.,

PLAINTIFF-RESPONDENT,

V.

T.J. BROWNSON AND NIP' N TUCK CONSTRUCTION,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Reversed and cause remanded with directions.*

¶1 HOOVER, P.J.[1] This is an appeal of a small claims judgment awarding North Central Forklift, Inc., $3,626.23.[2] The suit arose out of a breach

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a).

[2] This is an expedited appeal under WIS. STAT. RULE 809.17.

of an installment "rental/purchase" agreement. T.J. Brownson & Nip N' Tuck Construction (Brownson) came to trial prepared to defend against a consumer credit transaction replevin action. At trial, North Central twice moved to amend its complaint. It first sought to allege a commercial replevin, so as to avoid Wisconsin Consumer Act (WCA) defenses Brownson raised, *see* WIS. STAT. Ch. 425,[3] but finally moved to seek money damages for breach of the "rental" agreement. Because the trial court erroneously exercised its discretion by granting North Central's motions to amend its complaint at the trial, the judgment is reversed and the matter is remanded for further proceedings.

¶2 Brownson purchased a skidsteer[4] from North Central under an installment purchase agreement. Over two years later, North Central commenced a small claims replevin action, alleging that the parties had entered into a consumer credit transaction. Brownson's answer claimed that North Central's pleadings did not comply with WIS. STAT. § 425.109. Brownson also counterclaimed, alleging violations of the WCA. Brownson requested a jury trial at the small claims return date, but because he failed to timely file a jury fee, the matter was tried to the court.[5]

¶3 At the time of the small claims trial, Brownson attempted to pursue his WIS. STAT. ch. 425 defense. In response, North Central moved to amend the

[3] All references to the Wisconsin Statutes are to the 1997-98 version.

[4] A four-wheeled machine commonly known as a "Bobcat."

[5] Brownson contends that he has a right to a first hearing before a court commissioner and then to a trial de novo before the trial court. This court agrees with North Central that Brownson's demand for a jury trial indicated his desire to have the matter tried before the court. In any event, the issue was not shown to be raised before the trial court. This court declines to consider this issue. As a general rule, appellate courts will not decide issues that have not first been raised in the trial court. *See* ***Terpstra v. Soiltest, Inc.***, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974).

complaint to allege a general replevin action to take the claim out of the WCA. North Central contended that, its pleadings notwithstanding, this was not a consumer credit transaction, but one involving commercial entities. Brownson objected to the proposed amendment, noting that the complaint identified the installment "sale" as a consumer transaction and the answer did not dispute the allegation. He indicated that this was the first time he had heard that the claim was no longer under the WCA.[6] Brownson further informed the court that under the WCA, the parties can elect to have the WCA apply and that his answer constituted such an election.[7]

¶4 The trial court did not expressly consider this argument and found that the installment agreement was a commercial transaction not subject to the WCA. The trial court noted that in small claims actions:

> [H]istorically this Court has allowed parties great leeway in making adjustments to their complaints and responses, even at time of trial, as long as there's not prejudice to the other party. It seems to me that we want to resolve this dispute today. And I think the nature of the transaction was essentially not a consumer one. It was a commercial transaction between two concerns. They're involved in business and, therefore, [it] does not really fall within the Consumer Act provisions. And although you planned this defense at the 11th hour, I don't think it necessarily

[6] Shortly thereafter, and after the trial court reached a tentative conclusion that the case involved a commercial, not a consumer, transaction, Brownson stated:

> But, Your Honor, they pled it as a Consumer Act. If they want it to be something other than that, then they should go back and amend the pleadings and we can argue that. I'm here today ready to argue under the Consumer Act because he pled it was under the Consumer Act. It seems to me by pleading this under the Consumer Act he's elected to have—or the plaintiff has elected to have it covered under the Consumer Act.

[7] *See* WIS. STAT. §§ 421.301(10); 421.301(13); and 421.301(17) (a person other than one to whom the WCA applies may agree to be governed by the Act).

> prejudices the defendant, that the court can—will allow the allegation that this was a Consumer Act violation to be struck from the Complaint and amended to read a commercial transaction.

¶5 At this point, Brownson informed the court that the amendment from a WCA to a commercial replevin took the matter out of small claims jurisdiction because the value of the machine exceeded $5,000.[8] North Central, believing the machine's value would remove the case from small claims, ascertained from its office manager, a prospective witness, that the account balance was $4,674.84. North Central then responded to Brownson's assertion by re-characterizing the parties' arrangement as a "rental contract where there's been [a] breach on rent and there's been wrongful withholding by the defendant on return of the item."

¶6 The court then confirmed with North Central that it wanted the item returned but that its value exceeded $5,000, and asked North Central if it was moving to dismiss the action. At this point, Brownson reiterated his position that if the claim was no longer under the WCA, it was therefore no longer properly before the small claims court. Brownson opined that the claim would have to be re-pled. North Central consulted the small claims statutes, conceded that "replevin may not be appropriate," and asked the court to permit it to proceed on the rent theory. Brownson again objected, stating that North Central filed a replevin action, not one seeking money damages, and observed that "[t]hey're trying to twist and distort this thing well beyond what it was filed as." North Central responded that it was seeking damages and that this was "simply a case of unpaid

[8] The parties do not dispute that if the case involved a consumer credit transaction, the replevin action was properly filed in small claims but that a commercial action would be filed as a regular civil action.

rent ….” The trial court then stated that it would allow the proceedings to continue concerning the rent deficiency only.

¶7 While Brownson raises several arguments, two of them echo its underlying theme that the trial court erroneously exercised its discretion by permitting the several amendments. North Central contends that the trial court properly exercised its discretion and properly concluded that the amendments were not prejudicial because Brownson was aware that the trial would concern a claimed default under the agreement.

¶8 The parties are correct that the standard of review for an order amending pleadings is the erroneous exercise of discretion. *See* ***Leciejewski v. Sedlak***, 110 Wis. 2d 337, 351, 329 N.W.2d 233 (Ct. App. 1982). In exercising its discretion, the trial court may not permit the amendment to unfairly deprive an adverse party of the opportunity to contest issues raised by the amendment. *See* ***id.*** A number of factors have been considered in determining whether discretion was properly exercised. They include whether (1) the adverse party's evasive actions contributed to the late amendment;[9] (2) the new material alleged was within the objecting party's knowledge; (3) the amendment sought change in the form of relief rather than merely adding facts that were within the adverse party's knowledge; (4) a continuance was permitted to prepare a defense in light of the

[9] In ***John v. John***, 153 Wis. 2d 343, 365, 450 N.W.2d 795 (Ct. App. 1989), the party objecting to the amendment, "by various evasions, including failure to answer interrogatories and evasive answers at his deposition, contributed to the amended complaint's late filing." Here, Brownson filed his answer raising the issue of the complaint's technical sufficiency under the WCA five days before trial. Rather than amend its complaint to satisfy the alleged deficiencies, North Central filed a motion to strike the affirmative defenses and counterclaims. Relying upon statutory authority, Brownson contended that they were timely. It was at this point that North Central, rather than responding to Brownson's argument, moved to amend its claim to allege a commercial replevin. The trial court thus did not have an opportunity to determine whether Brownson's WCA defenses and counterclaims were timely.

amendment; (5) and whether the adverse party was prejudiced. *See* ***John v. John***, 153 Wis. 2d 343, 365, 450 N.W.2d 795 (Ct. App. 1989).

¶9 This court agrees that the trial court did not properly exercise its discretion.[10] Having reached this conclusion, this court nevertheless appreciates the challenges WIS. STAT. ch. 799's purposes and procedures present trial courts. In some instances, the nature and aims of small claims court conflict irreconcilably with principles that underlie and guide the judicial process. This case perhaps presents such an instance.

¶10 Application of the ***John*** factors compels the conclusion that the trial court erred by granting the several amendments. First, because the trial court did not have an opportunity to determine whether Brownson's WCA defenses and counterclaims were timely filed, this court cannot conclude that their filing contributed to the late amendment in a manner analogous to the party's evasive actions in ***John***. Second, Brownson claimed that he did not have knowledge of the amount allegedly due. Third, the second amendment changed the nature of relief, rather than added facts within Brownson's knowledge. Fourth, no continuance was granted, notwithstanding Brownson's objection to proceeding on a theory he had no notice of and therefore had not prepared for.

¶11 Of all the ***John*** factors, however, prejudice is the most significant in this case. The trial court first addressed this element after closing arguments. It said that Brownson was not prejudiced because the court "really didn't hear any significant argument from the defense as to how … this was some huge surprise,

[10] Because the resolution of this issue is dispositive, this court need not address the other issues Brownson raises. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

how certain evidence maybe was not available …." Nevertheless, it is clear from the record that the court was in fact compelled not by the absence of prejudice, but by its desire to give the parties "their day in court" and to bring the dispute to an end that day. This theme appears several times in the record. In keeping therewith, the court also indicated that it could have granted the dismissal motion, but the action would be refiled and the parties would again be in court.

¶12 This court concludes that Brownson demonstrated prejudice and that the trial court erred by not considering it. Several times Brownson argued that he came prepared to defend and pursue counterclaims under the WCA because a consumer replevin action was pled. The court failed to consider his argument that the parties had elected to come under the WCA. He was therefore deprived of his opportunity to defend or to pursue affirmative relief under the WCA. Moreover, as Brownson pointed out when he renewed his objection at the beginning of his closing argument, he was "greatly prejudiced" because he did not come prepared to address money damages, i.e., the balance allegedly due and owing under the agreement, whatever its nature. In other words, Brownson did not have time to prepare a defense to the new claim. In addition, the trial court stated: "And, you know, I think legally the defendant could have succeeded in that motion to dismiss. I could have granted it …." Brownson was prejudiced because he was denied proper legal relief under a meritorious defense. In the end, Brownson came to trial with a meritorious defense (and perhaps counterclaims) to a consumer credit transaction replevin action, but was then faced with a commercial replevin in the wrong court and finally was forced to defend a money damages claim based upon a rental theory.

¶13 Because the trial court erred by granting North Central's motions to amend its complaint at trial, the judgment based upon the final amendment is reversed. The matter is remanded to the trial court for further proceedings.

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

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