COURT OF APPEALS
DECISION
DATED AND FILED

April 11, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1408 **Cir. Ct. No. 2017SC271**

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

SECURITY FINANCE,

PLAINTIFF-RESPONDENT,

V.

BRIAN KIRSCH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Washington County: TODD K. MARTENS, Judge. *Affirmed*.

¶1 REILLY, P.J.[1] Brian Kirsch appeals from an order dismissing counterclaims and amended counterclaims pursuant to the Wisconsin

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Consumer Act (WCA). Security Finance Corporation of Wisconsin (Security Finance) filed an action seeking a money judgment against Kirsch in small claims court under a consumer loan agreement. The circuit court concluded that Kirsch's counterclaims failed to state a claim on which relief can be granted. We agree and affirm the decision of the circuit court.

FACTS

¶2 Security Finance filed this action for a money judgment seeking $1252.82 under a consumer loan agreement between itself and Kirsch. Kirsch answered and counterclaimed under the WCA. Security Finance filed a motion to dismiss the counterclaims and a motion for voluntary dismissal of its complaint pursuant to WIS. STAT. § 805.04(2). The court granted Security Finance's voluntary dismissal; however, Kirsch moved to reopen the judgment based upon his counterclaims. The court vacated the order dismissing the action and set a briefing schedule.

¶3 Kirsch failed to submit a brief as requested, but he did file an amended answer and counterclaims. Security Finance again moved to dismiss the amended counterclaims. The circuit court granted Security Finance's motion for voluntary dismissal and dismissed Kirsch's counterclaims without prejudice. Kirsch appeals.

DISCUSSION

¶4 "The WCA was designed to protect consumers from unfair, deceptive, and unconscionable merchant practices and may go 'further to protect consumer interests than any other such legislation in the country.'" ***Credit Acceptance Corp. v. Kong***, 2012 WI App 98, ¶8, 344 Wis. 2d 259, 822 N.W.2d

506 (quoting ***Kett v. Community Credit Plan, Inc.***, 228 Wis. 2d 1, 18 n.15, 596 N.W.2d 786 (1999) (quoted source omitted)); *see also* WIS. STAT. § 421.102(2)(b). We construe the WCA "liberally … to promote [the statutes'] underlying purposes and policies." Sec. 421.102(1).

¶5 Resolution of the issues before us require statutory interpretation and application, which is a question of law we review de novo. ***Brunton v. Nuvell Credit Corp.***, 2010 WI 50, ¶10, 325 Wis. 2d 135, 785 N.W.2d 302. When we interpret a statute, our primary objective is to ascertain and give effect to the intent of the legislature, and to determine the intent of the legislature, we look to the language of the statute itself. ***Kirk v. Credit Acceptance Corp.***, 2013 WI App 32, ¶50, 346 Wis. 2d 635, 829 N.W.2d 522. Our review of a motion dismissing a complaint presents a question of law for our independent review. ***Data Key Partners v. Permira Advisers LLC***, 2014 WI 86, ¶17, 356 Wis. 2d 665, 849 N.W.2d 693. We accept factual allegations in the complaint as true, but legal conclusions are not so accepted and are insufficient to withstand a motion to dismiss. ***Id.***, ¶18.

¶6 Kirsch asserted the following counterclaims under the WCA: (1) Security Finance did not comply with WIS. STAT. § 425.109; (2) Security Finance filed this action without serving Kirsch with a notice of right to cure default under WIS. STAT. §§ 425.104 and 425.105; (3) Security Finance violated WIS. STAT. § 425.107; and (4) Security Finance engaged in debt collection

practices prohibited by WIS. STAT. § 427.104(1)(g), (1)(j).[2] We address each of Kirsch's arguments below.

WISCONSIN STAT. § 425.109

¶7 Kirsch argues that Security Finance's complaint failed to meet the pleading requirements of WIS. STAT. § 425.109 as it did not include a breakdown of the amounts owed as required under the statute. Section 425.109(1)(d)2. provides:

> If the consumer credit transaction is other than one pursuant to an open-end credit plan, the actual or estimated amount of U.S. dollars or of a named foreign currency alleged to be due to the merchant on a date certain after the customer's default, and a breakdown of all charges, interest, and payments, including any amount received from the sale of any collateral, occurring after this date certain. This paragraph does not require a specific itemization, but the breakdown shall identify separately the amount due on a date certain, the total of all charges occurring after this date certain, the total of all interest occurring after this date certain, and the total of all payments occurring after this date certain.

Security Finance argues that its complaint complied with § 425.109 as it provided the amount due as of a "date certain," meaning the date of the complaint, and it attached the loan agreement to the complaint.

¶8 We agree that Security Finance's complaint failed to satisfied the pleading requirements in WIS. STAT. § 425.109. In ***Household Fin. Corp. v. Kohl***, 173 Wis. 2d 798, 799, 496 N.W.2d 708 (Ct. App. 1993), this court concluded that the creditor's complaint failed to comply with § 425.109(1)(d) where it set forth

[2] Kirsch sought an award of statutory, compensatory, and punitive damages as well as reasonable attorney fees for the alleged violations.

only the total amount owed, the interest accrued as of that date, and the interest rate for continued accrual after that date.[3] The court explained that "[i]t would be contrary to the philosophy of the WCA to conclude that [the creditor's] complaint is sufficient because it meets the requirements of notice pleadings under the Wisconsin Rules of Civil Procedure. The philosophy of the WCA is to give as much notice to consumers as is consistent with 'a realistic credit economy.'" ***Kohl***, 173 Wis. 2d at 801. According to the court, "[c]onsumers are not to be forced to conduct expensive and time-consuming discovery to learn how the creditor computed the amount due. Section 425.109(1)(d) requires that the complaint contain the figures necessary for the debtor to compute how the creditor arrived at the amount claimed to be due." ***Kohl***, 173 Wis. 2d at 801

¶9 Security Finance's complaint does not provide Kirsch with the figures necessary for him to compute how it arrived at the $1252.82 amount owed. The statute specifically requires "a breakdown of all charges, interest, and payments" that must "identify separately the amount due on a date certain, the total of all charges occurring after this date certain, the total of all interest occurring after this date certain, and the total of all payments occurring after this date certain." Under Security Finance's reading of the statute, the "date certain" could be the date of the filing of the complaint, which would lead to an absurd reading of the statute as it would require a creditor to breakdown charges, interest, and payments *in the complaint* for the period *after the complaint* had been filed,

[3] We note that WIS. STAT. § 425.109 has been amended since ***Household Fin. Corp. v. Kohl***, 173 Wis. 2d 798, 496 N.W.2d 708 (Ct. App. 1993), was decided. *See* 2015 Wis. Act 155. The former § 425.109(1)(d) (1991-92) provided that the complaint must include: "The actual or estimated amount of U.S. dollars or of a named foreign currency that the creditor alleges he or she is entitled to recover and the figures necessary for computation of the amount, including any amount received from the sale of any collateral."

which would be impossible. We conclude that a more reasonable reading of the statute is that it requires a "breakdown of all charges, interest, and payments" accruing after the debtor's default[4] in order to compute how the creditor arrived at the figure it claims is owed in the complaint. Attaching the loan agreement to the complaint is insufficient to satisfy WIS. STAT. § 425.109(1)(d) as it does not provide the debtor with information pertaining to, for example, when payments were allegedly missed and if late fees were assessed.

¶10 We agree with Security Finance, however, that despite its failure to comply with WIS. STAT. § 425.109(1)(d), the consequence is that the complaint should either be dismissed without prejudice or the creditor should be permitted to file an amended complaint. *See* § 425.109(3); ***Mercado v. GE Money Bank***, 2009 WI App 73, ¶14, 318 Wis. 2d 216, 768 N.W.2d 53 ("Had [the debtors] timely filed a motion to reopen based on an alleged pleading deficiency, assuming a deficiency did in fact exist … GE would have been able to cure the deficiency by amending its complaint or refiling."); ***Rsidue, L.L.C. v. Michaud***, 2006 WI App 164, ¶19, 295 Wis. 2d 585, 721 N.W.2d 718 ("[A]lthough a failure to comply with the pleading requirements under § 425.109(1) might hinder a creditor's ability to obtain a judgment against a consumer, *see* § 425.109(3), the creditor could typically cure such a pleading deficiency by amending the complaint or re-filing the action."). Here, Security Finance moved to voluntarily dismiss its own complaint, which was proper.

¶11 Kirsch argues that noncompliance with the pleading requirements of WIS. STAT. § 425.109 is a violation of the WCA, that Security Finance's "actions

[4] *See* WIS. STAT. § 425.103(2) for the definition of when a default occurs.

are deliberate and done with an intentional disregard of defendant's statutory rights," and that he is entitled to damages. Section 425.109(4) provides that "a complaint that fails to comply with this section does not constitute a violation of [the WCA], and shall not give rise to recovery of attorney fees under [WIS. STAT. §] 425.308, unless the customer establishes by a preponderance of the evidence that the failure to comply was willful or intentional." The circuit court properly dismissed this counterclaim as the statute specifically provides that failure to comply with the pleading requirements does not constitute a violation *and* will not give rise to recovery of attorney fees *unless* the debtor establishes willful or intentional noncompliance.[5] Kirsch's counterclaim alleging that Security Finance's actions were deliberate and done with intentional disregard of his rights is not even pled generally.[6] Kirsch makes a legal conclusion we are not required to accept and one which is unsupported by any allegations sufficient to withstand a motion to dismiss.

[5] *See also* ***Rsidue, L.L.C. v. Michaud***, 2006 WI App 164, ¶19, 295 Wis. 2d 585, 721 N.W.2d 718 ("Quite simply, WIS. STAT. § 425.109(1) does not create any 'claims' or 'defenses' for consumers; the statute imposes pleading requirements on creditors. Thus, the statute deals with matters of procedure, not substantive legal principles. 'Claims and defenses' are substantive legal theories, which, if the necessary facts are established, allow a consumer to avoid liability on a consumer credit obligation or to recover offsetting damages from the creditor.'"). When ***Rsidue*** was decided, § 425.109(4) did not exist. *See* 2015 Wis. Act 155, § 10.

[6] Kirsch claims that under WIS. STAT. § 802.03(2) and ***Data Key Partners v. Permira Advisors LLC***, 2014 WI 86, 356 Wis. 2d 665, 849 N.W.2d 693, nothing more is required than a general allegation of intent. It is true that allegations of intent do not require the particularity requirements of fraud or mistake (who, what, where, when, and how), but some grounds sufficient to allege a plausible right to relief are required. *See* ***Bell Atl. Corp. v. Twombly***, 550 U.S. 544, 555-56 (2007).

WISCONSIN STAT. §§ 425.10 and 425.105

¶12 Kirsch next argues that Security Finance never served a notice of right to cure default on him as required under WIS. STAT. §§ 425.104[7] and 425.105. Section 425.105(1) provides:

> A merchant may not accelerate the maturity of a consumer credit transaction, commence any action …, or demand or take possession of collateral or goods subject to a consumer lease …, unless the merchant believes the customer to be in default …, and then only upon the expiration of 15 days after a notice is given pursuant to [§] 425.104 if the customer has the right to cure under this section.[8]

Kirsch acknowledges that no Wisconsin court has held that filing a suit without providing a required notice of right to cure default allows the debtor to sue for damages. Security Finance argues that neither §§ 425.104 nor 425.105 provide that a failure to provide a notice of cure is a "violation" of the WCA, citing to several statutes that specifically reference "a violation," whereas § 425.105 does not.

¶13 We agree with the court's persuasive authority in ***Beal v. Wyndham Vacation Resorts, Inc.***, 956 F. Supp. 2d 962, 969 (W.D. Wis. 2013), which explained that "the requirement that a creditor provide a notice of right to cure default is a procedural hurdle creditors must clear in order to pursue their remedies." The court in ***Beal*** concluded that "the appropriate remedy for a creditor's failure to comply with these procedural requirements is dismissal of the

[7] WISCONSIN STAT. § 425.104(1) provides that "[a] merchant who believes that a customer is in default may give the customer written notice of the alleged default and, if applicable, of the customer's right to cure any such default ([WIS. STAT. §] 425.105)."

[8] Security Finance does not allege that Kirsch did not have a right to cure.

creditor's action."[9] ***Id.*** Similar to WIS. STAT. § 425.109, WIS. STAT. § 425.105(1) imposes procedural requirements on creditors that hinder the creditor's ability to file a suit and obtain a judgment against a debtor. Thus, § 425.105(1) provides a shield, but not a sword.

¶14 As this court explained in ***Rosendale State Bank v. Schultz***, 123 Wis. 2d 195, 199, 365 N.W.2d 911 (Ct. App. 1985), "the purpose of requiring the notice of right to cure is to give the customer an opportunity, before the merchant accelerates the obligation, to restore his or her loan to a current status and thus preserve the customer-merchant relationship." By requiring dismissal of the creditor's action as a remedy for the failure to provide the debtor a notice of right to cure, the debtor is put back in the position that he or she was prior to the lawsuit: the renewed opportunity to receive the notice of right to cure and restore his or her loan to a current status before a lawsuit is filed. This remedy complies with the requirement under WIS. STAT. § 425.301 that "[t]he remedies provided by this subchapter shall be liberally administered to the end that the customer as the aggrieved party shall be put in at least as good a position as if the creditor had fully complied with [WIS. STAT.] chs. 421 to 427." Dismissal of the complaint was the proper remedy for a failure to comply with WIS. STAT. § 425.105. *See* ***Indianhead Motors v. Brooks***, 2006 WI App 266, ¶14, 297 Wis. 2d 821, 726 N.W.2d 352.

[9] We acknowledge the persuasive authority in ***Johnson v. LVNV Funding***, No. 13-C-1191, slip op. (E.D. Wis. Feb. 18, 2016), which refused to follow ***Beal v. Wyndham Vacation Resorts, Inc.***, 956 F. Supp. 2d 962, 969 (W.D. Wis. 2013). We agree with the reasoning in ***Beal***.

WISCONSIN STAT. § 425.107

¶15 Kirsch also argues that Security Finance engaged in unconscionable practices in violation of WIS. STAT. § 425.107. Section 425.107(1) provides:

> With respect to a consumer credit transaction, if the court as a matter of law finds that any aspect of the transaction, any conduct directed against the customer by a party to the transaction, or any result of the transaction is unconscionable, the court shall, in addition to the remedy and penalty [under WIS. STAT. § 425.303], either refuse to enforce the transaction against the customer, or so limit the application of any unconscionable aspect or conduct to avoid any unconscionable result.

The statute further provides that in determining "the issue of unconscionability," the court may consider, for example, whether "the practice unfairly takes advantage of the lack of knowledge, ability, experience or capacity of customers" and whether "the practice may enable merchants to take advantage of the inability of customers reasonably to protect their interests by reason of physical or mental infirmities, illiteracy or inability to understand the language of the agreement, ignorance or lack of education or similar factors." Sec. 425.107(3)(a), (d).

¶16 According to Kirsch, Security Finance's conduct in filing this suit, and not necessarily the loan agreement itself, was unconscionable based on its failure to comply with WIS. STAT. §§ 425.109 and 425.105 as those statutes are in place to "help[] protect customers from 'unscrupulous practices'" and "avoid 'expensive and time-consuming discovery' to determine information that should be in the complaint." Security Finance does not argue the merits of Kirsch's claim; instead, it argues that unconscionability is a defense to an action and not an affirmative claim for relief. Since Security Finance's action was voluntarily dismissed, no unconscionability action could be raised.

¶17 Security Finance cites to two unpublished district court cases in support of its position. In ***Riel v. Navient Sols. Inc.***, No. 16-CV-1191-JPS, 2017 U.S. Dist. LEXIS 6193, at *8 (E.D. Wis. Jan. 17, 2017), the court concluded that the unambiguous language of WIS. STAT. § 425.107 "confers no independent right of action." The court in ***Vanhuss v. Rausch, Sturm, Israel, Enerson & Hornik***, No. 16-CV-372-SLC, 2017 U.S. Dist. LEXIS 57335, at *29-30 (W.D. Wis. Apr. 14, 2017), concurred with the holding in ***Riel*** that unconscionability must be asserted as a defense to a creditor's lawsuit.

¶18 Our review of the statute leads us to the same conclusion. As the court in ***Riel*** explained, subchapter one of WIS. STAT. ch 425 is subject to WIS. STAT. § 425.102, which provides that "[t]his subchapter applies to actions or other proceedings *brought by a creditor* to enforce rights arising from consumer credit transactions and to extortionate extensions of credit under [WIS. STAT. §] 425.108." By the statute's plain language, this scope provision does not permit Kirsch to enforce a claim for unconscionability against a creditor via a separate lawsuit.

¶19 Kirsch argues, however, that the court in ***Riel*** held that using WIS. STAT. § 425.107 "as Kirsch does here would be perfectly appropriate" as he raised it as a defense to Security Finance's lawsuit. We agree that Kirsch's claim under § 425.107 was properly asserted as a defense to Security Finance's action, but Kirsch now seeks to maintain his counterclaim after the suit was voluntarily dismissed, which in effect means he is pursuing a claim of unconscionability as an independent cause of action. This is improper, and we agree with the circuit court's dismissal of Kirsch's counterclaim under § 425.107.

WISCONSIN STAT. § 427.104

¶20 Finally, Kirsch alleges in his counterclaims that Security Finance violated WIS. STAT. § 427.104(1)(g) and (1)(j).[10] These sections provide that in attempting to collect a debt, a debt collector may not "[c]ommunicate with the customer or a person related to the customer with such frequency or at such unusual hours or in such a manner as can reasonably be expected to threaten or harass the customer" and may not "[c]laim, or attempt or threaten to enforce a right with knowledge or reason to know that the right does not exist." Kirsch argues that by failing to comply with the pleading and notice of a right to cure requirements, Security Finance filed an "illegal complaint" and, thus, engaged in prohibited practices under the WCA.

¶21 We conclude that Kirsch has failed to state a claim under WIS. STAT. § 427.104. Wisconsin courts rarely discuss para. (1)(g), but in one such case, ***Associates Financial Services Co. v. Hornik***, 114 Wis. 2d 163, 168, 336 N.W.2d 395 (Ct. App. 1983), the court explained the "focus is whether the collector's communication can reasonably be expected to threaten or harass" and that "the duty of care element is better characterized as [an] objective" question of fact. There, the court concluded that making four to five calls per month to a delinquent debtor was not harassment. ***Id.*** at 169. In this case, Kirsch asserts no factual allegations in his counterclaims that would support a finding of a violation under para. (1)(g). Kirsch attempts to shoehorn the filing of one lawsuit that failed to comply with pleading and notice provisions of the WCA into a statutory

[10] Kirsch's counterclaim also alleges a violation of WIS. STAT. § 425.302, but that section describes the remedy and penalty for violations of the WCA and does not give rise to an independent claim for relief.

provision meant to provide a remedy where a debt collector is actually *contacting* a debtor *repeatedly* and engaging in what a reasonable person would perceive as abusive debt collection activities. The circuit court properly dismissed Kirsch's counterclaim.

¶22 Kirsch also alleges a violation of WIS. STAT. § 427.104(1)(j), citing to ***Kett*** for the proposition that violating the venue provisions of the WCA also constituted violations of WIS. STAT. § 427.104(1)(h) and (j). Our supreme court in ***Kett*** upheld this court's conclusion that Community Credit "had engaged in prohibited debt collection practices as a matter of law" and that "Community Credit had a duty to know that Milwaukee County was not the proper venue and that Community Credit's filing of a replevin action in Milwaukee County was an attempt to enforce a right it had reason to know did not exist." ***Kett***, 228 Wis. 2d at 25. According to the court, it was "not persuaded by Community Credit's position that its only violation is the violation of venue. As a result of the improper venue, Community Credit has violated other provisions of the Act for which penalties may be assessed." ***Id.*** at 26.

¶23 We are not bound by the conclusion in ***Kett*** as it involved a violation of the venue statute under WIS. STAT. § 421.401 and not WIS. STAT. §§ 425.109 or 425.105. Under the venue statute, the creditor in ***Kett*** did not have a "right" to file suit in Milwaukee County. Here, there is no allegation by Kirsch that there was no loan agreement, that he was not in default on that agreement, or that Security Finance filed suit in the improper county. Thus, Security Finance did have a "right" to file its lawsuit and there was no "reason to know that the right does not exist." *See* WIS. STAT. § 427.104(1)(j). We refuse to conclude that Security Finance's mistakes in this case led to it attempting to enforce a right it did not have. *See* ***Kong***, 344 Wis. 2d 259, ¶18 (reversing the circuit court's award of

statutory damages under § 427.104 where creditor repossessed debtor's vehicle without proper notice of default because there was no explanation how creditor violated § 427.104).

Attorney Fees

¶24 Security Finance also claims for the first time on appeal that Kirsch has forfeited his right to attorney fees under WIS. STAT. § 425.308 as a motion for fees was required to be filed within thirty days after entry of the dismissal under WIS. STAT. § 806.06(4). Kirsch argues that he cannot waive his right to seek attorney fees by appealing the dismissal of the case, citing to ***Kirk***, 346 Wis. 2d 635, ¶¶56-57, which upheld the circuit court's discretionary decision to respond to an untimely motion for attorneys fees. We do not reach the issue of whether Kirsch forfeited his right to attorney fees as we conclude that, regardless, he is not entitled to attorney fees under § 425.308.

¶25 WISCONSIN STAT. § 425.308 provides that

> [i]f the customer prevails in an action arising from a consumer transaction, the customer shall recover the aggregate amount of costs and expenses determined by the court to have been reasonably incurred on the customer's behalf in connection with the prosecution or defense of such action, together with a reasonable amount for attorney fees.

This court has previously determined that "a customer 'prevails' for § 425.308 … purposes if he or she achieves some significant benefit in litigation involving the creditor's violation of the WCA." ***Community Credit Plan, Inc. v. Johnson***, 221 Wis. 2d 766, 774, 586 N.W.2d 77 (Ct. App. 1998). The customers in ***Johnson*** obtained a significant benefit from dismissal as judgments had already been entered against them allowing the creditor to repossess their property and garnish

their wages. Here, Security Finance's complaint was dismissed due to procedural pleading and notice issues prior to any judgment being entered. Kirsch did not obtain a similar benefit from the dismissal of the complaint under the facts in this case.

¶26 For the reasons stated, the circuit court is affirmed in all respects.

By the Court.—Order affirmed.

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