COURT OF APPEALS
DECISION
DATED AND FILED

March 8, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-1273 **Cir. Ct. No. 568-422**

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

IN RE THE ESTATE OF JOE SOLOCHEK, DECEASED:

JOSEPH R. KABACINSKI,

APPELLANT,

V.

ESTATE OF JOE SOLOCHEK,

RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: THOMAS R. COOPER, Judge. *Reversed and cause remanded.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 WEDEMEYER, P.J. Joseph R. Kabacinski appeals from an order dismissing his claim against the Estate of Joe Solochek. Kabacinski claims the

trial court erred when it: (1) ruled that the Estate's objection to Kabacinski's first claim satisfied WIS. STAT. § 859.33 (1999-2000)[1] and applied to any subsequent amended or new claim; and (2) directed a verdict on the basis that there was no evidence to sustain his claims. Because the trial court did not err with respect to the first issue, we affirm that decision; however, we conclude that the trial court erred in directing a verdict. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

BACKGROUND

¶2 In February or March of 1995, Kabacinski approached Solochek regarding a building Solochek owned, located at 1404-06 West Mitchell Street in the City of Milwaukee. The building was vacant at the time and contained a tavern on the first floor, with a single residential apartment directly above on the second floor. Kabacinski asserted that Solochek agreed to lease the premises to Kabacinski, who would live in the apartment unit and operate the tavern. Kabacinski paid Solochek a $925 security deposit. However, no lease was executed and no periodic rental payments were made. Kabacinski moved into the apartment and claims he made approximately $12,000 in repairs to the premises. Kabacinski applied for a liquor license, but his application was denied due to a license moratorium in existence at the time.

¶3 Sometime thereafter, Kabacinski traveled to Green Bay to solicit assistance from a family member, who could have helped him appeal/reverse the

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

decision of the city to deny the liquor license. When the two returned,[2] the locks on the tavern and apartment had been changed, and Kabacinski could not access the premises or remove any of his personal belongings. Kabacinski made several written requests to Solochek for the return of his property. He received no response.

¶4 Some time later, Solochek sold the property. On June 16, 1997, Solochek died. The Estate was being processed through informal administration and David Solochek (Solochek's son) was appointed the personal administrator of the Estate. Notice was published requiring all creditor claims to be filed on or before December 19, 1997.

¶5 On March 2, 1999, Kabacinski filed a *pro se* claim against the Estate for conversion in the amount of $185,000. Kabacinski stated that he was filing the claim, which was late, because he had just discovered that Solochek had died. The Estate filed an objection to the claim on February 23, 2000. The probate court ruled that the claim was untimely and therefore barred.

¶6 Kabacinski appealed that decision to this court and we reversed, ruling that because the claim sounded in tort, the claim was not untimely and should be allowed to proceed. In January 2001, just before filing the appeal, Kabacinski filed a second claim against the Estate with the assistance of counsel. The second claim alleged conversion, trespass, and unjust enrichment; sought punitive damages; and asserted the value of the loss was $275,000.

[2] Although the exact date is not known, it was represented that this occurred sometime in August 1995.

¶7 Kabacinski requested a jury trial on the conversion claim and moved for judgment on the second claim, based on the fact that the Estate never filed an objection to it. The Estate argued that the second claim was simply an amended claim based on the same transaction and, accordingly, it was not required to object to it. The Estate contended that it, in fact, could not object to it because the case was on appeal at the time. A hearing in probate court occurred to resolve this issue. The trial court ruled that it was: "satisfied pursuant to 859.33 the objection that they filed originally applies to whatever claims have been filed whether they are amended or new claims. So the issue has been joined."

¶8 As a result, the first and second claims were tried together to a jury. After the conclusion of Kabacinski's case, the Estate moved for a directed verdict. The trial court granted the motion, reasoning that there was no evidence as to how Solochek viewed his relationship with Kabacinski. As a result, the trial court held there was insufficient evidence to establish that a tenancy existed. It dismissed all of Kabacinski's claims. Kabacinski now appeals.

DISCUSSION

A. Objection.

¶9 Kabacinski claims that the trial court erred in ruling that the Estate's first objection carried over to his second claim. The Estate responds that the trial court's decision was correct. The trial court ruled that the original objection made by the Estate to Kabacinski's claim satisfies the calls of WIS. STAT. § 859.33, because Kabacinski's second claim was based on the same transaction or occurrence. We hold that the trial court's decision was not erroneous.

¶10 WISCONSIN STAT. § 859.33 sets forth a procedure for an estate to contest claims made against the estate. It provides:

> **(1)** HOW CONTEST INITIATED. The following persons may contest a claim or assert an offset or counterclaim in court: the personal representative …. They may do so only by mailing a copy of the objection, offset or counterclaim to the claimant or personally serving the same upon the claimant and filing the same with the court. The objection … may be served at any time prior to entry of judgment on the claim, but if a copy of the claim has been mailed to or served upon the personal representative or the attorney for the estate, the objection, offset or counterclaim shall be served upon or mailed to the claimant and filed with the court within 60 days after the copy of the claim was mailed to or served upon the personal representative or the attorney for the estate.

¶11 Here, it is undisputed that the Estate objected to Kabacinski's original, *pro se* conversion claim. It is also undisputed that the Estate did not object to the second claim Kabacinski filed with retained counsel, which alleged conversion, trespass, unjust enrichment and punitive damages. Neither party disputes that both claims are based on the same transaction or occurrence. Both agree that the second claim merely adds additional legal theories.

¶12 Kabacinski, however, insists that the second claim is a new claim and that the Estate was required to object to it. Because it did not object, Kabacinski contends the trial court should have entered default judgment in its favor on the second claim. The Estate responds that the second claim is simply an amendment of the first claim and therefore its original objection suffices to notify Kabacinski that the Estate is contesting his claim.

¶13 After hearing arguments and reviewing the pertinent materials, the trial court engaged in the following analysis:

All right. The decision by the Court of Appeals, which quite frankly, has been very illustrative to the Court -- ….

….

All right. But the interesting issue, it comes down to the last sentence in the decision. "Furthermore, amendments to claims in probate proceedings are to be liberally permitted and should have been allowed to correct the pleadings omissions." Liberally permitted claims. That's a double-edged sword. There is the liberality to allow the amendments of the claims as filed, and also the liberality applies to the estate to respond to those claims. It cuts both ways.

[Kabacinski], you're asking that they be absolutely technically forbidden to respond because you say by definition it is a second claim, and therefore they have sixty days to comply.

Well, technically … [the trial court] declined to act on that, so there was nothing they had to respond to because it was declined by the court.

I think this Court of Appeals' decision does deal with that issue and it tells [the trial court] that no, you shouldn't have declined to act; that you should have liberally allowed that claim to be amended, added or whatever.

So I guess it is not necessary for me to find that it is an amended claim or a second claim. The Court of Appeals says that I should liberally allow that to be filed.

And then we flip to the estate side that that same liberality -- what is good for the goose is good for the gander. The same liberality applies to the estate. They have filed an objection to the claim filed by your client. It is arguably from the same transaction, occurrence or event. It involves the same subject matter. It involves different legal theories. They have already objected to that.

So I am satisfied pursuant to 859.33 the objection that they filed originally applies to whatever claims have been filed whether they are amended or new claims. So the issue has been joined. They object to the claims. There is a triable issue ….

¶14 The trial court's decision is reasonable. Whether it is an amended claim or a second claim, it is based on the same transaction—the tenancy in Solochek's building. The objection filed by the Estate clearly establishes that it is contesting Kabacinski's claim of tenancy, and thereby objecting to any damages Kabacinski claims arose from the tenancy. The purpose of the statute is to provide notice to the claimant that his or her claim is being contested by the estate and to set up the posture for resolving the dispute. The purpose was accomplished throughout the record in this case, starting with the first objection, and then the opposition by the Estate to Kabacinski's motions, its defense at trial, and appeal. To conclude otherwise would result in an unreasonable interpretation under the facts and circumstances presented in this case.

¶15 Accordingly, we affirm the trial court's decision on this issue.

B. Directed Verdict.

¶16 Kabacinski also argues that the trial court erred when it directed a verdict in favor of the Estate. The Estate argues that the deadman's statute operates to bar Kabacinski from offering any testimony to support his claim of tenancy and, therefore, the trial court's directed verdict and dismissal of the case was appropriate. We disagree.

¶17 Our standard of review is whether, viewing the evidence most favorably to the party against whom the verdict is sought to be directed, there is any evidence to sustain a cause of action. *See* WIS. STAT. § 805.14(1) (2001-02). A verdict should be directed only when the evidence gives rise to no dispute as to the material issues, or when the evidence is so clear and convincing as to reasonably permit unbiased and impartial minds to come to but one conclusion. ***Tanner v. Shoupe***, 228 Wis. 2d 357, 375-76, 596 N.W.2d 805 (Ct. App. 1999).

¶18 The trial court found that there was no evidence establishing Kabacinski's position that a tenancy existed. The trial court ruled that the deadman's statute prevented any of the witnesses from testifying as to how Solochek viewed the relationship with Kabacinski. We conclude that the trial court erred in directing a verdict. In reviewing the transcripts and applying the review standard referenced above, we cannot hold that a jury could reach but one conclusion or that there was no evidence to sustain the claim.

¶19 There was credible evidence from which a jury could infer a tenancy at will existed.[3] There was testimony that Kabacinski entered the premises with the permission of the owner. There was evidence that the owner was Solochek. There was evidence that a $925 security deposit was paid, that Kabacinski applied for a liquor license, that he made repairs to the property, that he moved his personal belongings into the second floor apartment, and that he had a set of keys

[3] The Estate argues that the deadman's statute prohibited the court from finding that any tenancy existed. We disagree for two reasons. First, there was sufficient evidence without application of the deadman's statute to permit the jury to resolve the dispute. Second, the deadman's statute did not bar testimony in this case because the Estate opened the door during its cross-examination of Kabacinski.

The deadman's statute, WIS. STAT. § 885.16 (2001-02), provides:

> No party … shall be examined as a witness in respect to any transaction or communication by the party … personally with a deceased or insane person in any civil action … unless such opposite party shall first … introduce testimony … concerning such transaction or communication, and then only in respect to such transaction or communication of which testimony is so given or in respect to matters to which such testimony relates.

It was during the Estate's cross-examination of Kabacinski that counsel asked questions about transactions with Solochek. Accordingly, based on the plain language of the statute, "unless such opposite party shall first … introduce testimony," the Estate waived the application of the deadman's statute by opening the door.

to the property. After the city denied his application for a liquor license, Solochek took Kabacinski to meet with Solochek's attorney to see if the attorney could help reverse that decision. There was evidence that the locks were changed while Kabacinski was out of town and that on September 15, 1995, Solochek put an ad in the newspaper telling Kabacinski to contact him within ten days or his items would be sold. All of this evidence was admitted without any objection under the deadman's statute. Based on the foregoing, and viewing this evidence in a light most favorable to Kabacinski, we conclude a reasonable jury could have made the necessary inferences to find that a tenancy existed.

¶20 The Estate contends that there was no testimony that Solochek changed the locks. But, the flip side of that is there was no evidence that Solochek did not change the locks or that someone other than Solochek changed the locks. There was testimony in the record from which a reasonable jury could infer that Solochek changed the locks, including the fact that he owned the building, that he had a relationship with Kabacinski, and that he ran an ad telling Kabacinski to pick up his belongings.

¶21 Clearly, a lot of the evidence in this case was based on the testimony of Kabacinski and his brother. The jury could have determined that Kabacinski's version of events was unbelievable, or it could have found that Kabacinski was telling the truth. The trial court, however, usurped the authority of the jury to resolve the factual dispute by directing a verdict. That decision is hereby reversed and this case is remanded for further proceedings. Kabacinski is entitled to have a

jury determine whether he was wronged and, if so, whether he has proven that he is entitled to the damages he seeks.

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.