COURT OF APPEALS
DECISION
DATED AND RELEASED

March 28, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 92-2066

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

LAKE CITY RENTAL AND LEASING, INC.,
STEPHEN HARNESS,
AND CRAIG BLEVINS,

Plaintiffs-Appellants,

v.

MADISON RENTAL AND LEASING, INC.,

Defendant,

DOLLAR RENT A CAR-WISCONSIN, INC.,
A WISCONSIN CORPORATION,
DOLLAR SYSTEMS, INC.,
A DELAWARE CORPORATION,
DOLLAR RENT A CAR SYSTEMS, INC.,
A CALIFORNIA CORPORATION,

Defendants-Respondents,

MINNESOTA RENTAL AND LEASING,
A MINNESOTA CORPORATION,
RICHARD L. PEARSON,

ORVILLE E. FISHER,
PATRICK O'DANIELS,

Defendants,

E. WOODY FRANCIS,
AND H.J. CARUSO, PRESIDENT,
DOLLAR RENT A CAR SYSTEMS, INC.,

Defendants-Respondents.

APPEAL from judgments of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Affirmed*.

Before Gartzke, P.J., Dykman and Sundby, JJ.

SUNDBY, J. As of February 15, 1982, Madison Rental and Leasing, Inc. operated an automobile rental business at the Dane County airport under a franchise from Dollar Systems, Inc. On that date, Madison Rental sold the franchise to Lake City Rental and Leasing, Inc., a Wisconsin corporation whose sole shareholders were Stephen Harness and Craig Blevins, a/k/a Craig Greenwald. Madison Rental's franchise required that Dollar consent to the transfer of the franchise to Lake City. Dollar gave that consent February 1, 1982, subject to a License Agreement between Dollar and Lake City of the same date. On October 5, 1982, Madison Rental served Lake City with a notice of default, subject to cure. On November 3, 1982, Lake City voluntarily ceased operations and thereafter Madison Rental operated the franchise.

On December 9, 1982, Lake City, Greenwald/Blevins and Harness (collectively Lake City) began this action against Madison Rental, the Dollar entities (Dollar Rent A Car--Wisconsin, Inc., Dollar Systems, Inc., and Dollar Rent A Car Systems, Inc.), Minnesota Rental and Leasing, Inc. (Madison Rental was owned by Minnesota Rental), and individual officers and directors of Dollar and Minnesota Rental. Lake City claims that Madison Rental sold it an unregistered franchise, contrary to § 553.21(1), STATS., 1981-82, and wrongfully terminated its dealership, contrary to § 135.04, STATS., 1981-82.

Lake City and the individual plaintiffs seek review of (1) the summary judgment dismissing Lake City's Franchise Investment Law claim against Madison Rental; (2) the summary judgment dismissing Lake City's Fair Dealership Law claims against Minnesota Rental and its officers and directors; and (3) the judgment on the pleadings granting Dollar's counterclaims rescinding all contracts between Dollar and Lake City and dismissing Lake City's dealership claim against Dollar. We affirm.

DECISION

We first consider Lake City's Franchise Investment Law claim. Section 553.21(1), STATS., 1981-82, provided: "No person may sell or offer in this state any franchise unless the offer of the franchise has been registered under this chapter or exempted under s. 553.22, 553.23 or 553.25." Section 553.21 is part of the Wisconsin Franchise Investment Law, enacted in 1971 to require persons offering or selling franchises to make disclosures to prospective franchisees. *See* Laws of 1971, ch. 241.

The hallmark of Wisconsin's Franchise Investment Law is the disclosure of information to assist franchisees in accurately evaluating business ventures in which they are considering the investment of substantial financial and personal resources. ***Godfrey v. Schroeckenthaler***, 177 Wis.2d 1, 5-6, 501 N.W.2d 812, 813 (Ct. App. 1993). However, the legislature has determined that certain offers to sell franchises are exempt from registration with the Commissioner of Securities because the sale is from the franchisee and not from the franchisor. One such exemption was made by § 553.23, STATS., 1981-82, which provided in part:

> The offer or sale of a franchise by a franchisee *for the franchisee's own account* ... is exempted from s. 553.21 *if the sale is not effected by or through a franchisor*. The sale is not effected by or through a franchisor merely because a franchisor has a right to approve or disapprove a different franchisee.[1]

[1] Section 553.23, STATS., was amended by 1987 Wis. Act 381, § 28, to provide that a sale

(Emphasis added.)

Lake City argues that there is a disputed issue of material fact as to whether Lake City's purchase of the franchise was "effected by or through" Dollar. Lake City points to evidence that several Dollar employees took part in effecting the sale from Madison Rental. One Dollar employee helped Harness work out fleet revenue projections. Another came from Chicago to inform Harness that Minnesota Rental intended to discharge him as manager, and to offer Harness the opportunity to buy the Madison franchise. Harness testified that Dollar employees gave him information that helped him decide to buy the franchise. He testified that officers of Minnesota Rental told him that it would base its decision to sell the franchise on recommendations from Dollar. Finally, and according to Lake City, "most important," Lake City entered into a License Agreement with Dollar which it claims is a contract for the disposition of a franchise within the meaning of § 553.03(11)(a), STATS., 1981-82, which provided: "`Sale' or `sell' includes every contract or agreement of sale of, contract to sell, or disposition of, a franchise or interest in a franchise for value."

We rejected similar arguments in ***Godfrey*** where we concluded that a Dairy Queen franchisee who sold the franchise to Godfrey made a sale "for the franchisee's own account," within the meaning of § 553.23, STATS. We have not found a decision interpreting this phrase in a franchise investment law. However, in ***Godfrey***, we found similar language in § 551.02(3), STATS., 1969, of the Wisconsin Uniform Securities Law which defined a securities "broker-dealer" to mean "any person engaged in the business of effecting transactions in securities for the account of others or *for his own account*." 177 Wis.2d at 10, 501 N.W.2d at 815. We compared ch. 553, STATS., 1971, with ch. 551, STATS., 1969, and concluded that the former was patterned after the latter. ***Id***. We concluded that a pattern of legislative intent was established to exempt from registration sales or offers to sell securities and franchises where the seller did not act as the agent of the issuer or franchisor but acted in its "own name." 177 Wis.2d at 11, 501 N.W.2d at 816 (citing 30A WORDS AND PHRASES 392, *Own Account* (1972 & Supp. 1992) (cross referencing "own account" with "own name")).

(..continued)
is not effected by or through a franchisor merely because the franchisor imposes or has the right to impose a fee or charge to reimburse the franchisor for reasonable and actual expenses incurred in connection with the sale. This amendment does not affect the result in this case.

This case presents substantially the same situation we faced in ***Godfrey***: A franchisee sells the franchise subject to approval and with the assistance of the franchisor. Godfrey argued, as does Lake City, that he had substantial contractual relationships with the franchisor which established that he had purchased a franchise from Dairy Queen. We concluded, however, that Godfrey's proof did not establish that the franchisee from whom he purchased his franchise was a "franchisor." ***Id***. at 12, 501 N.W.2d at 816. A "franchisor" is "a person who grants a franchise." Section 553.03(6), STATS., 1981-82. Madison Rental did not grant Lake City a franchise; it merely sold the franchise which it had. Dollar did not grant Lake City a franchise; it merely approved the sale from Madison Rental to Lake City, subject to a License Agreement.

The exemption under § 553.23, STATS., 1981-82, of an offer or sale by a franchisee "for the franchisee's own account" is intended to give some value to the franchise so that it could be marketed for the franchisee's own account. Lake City's interpretation would render a franchise virtually worthless because, in every case, a prospective purchaser would have to go back to the franchisor and get a new franchise. The existing franchisee would have nothing to sell except, perhaps, the building and site, furniture, equipment and good will. We conclude that the sale in this case was made by Madison Rental to Lake City "for [its] own account," and was exempt from registration under § 553.21(1), STATS., 1981-82.

We next consider Dollar's counterclaim. Lake City claims that Dollar violated the Fair Dealership Law by terminating Lake City's dealership without the ninety day's notice required by § 135.04, STATS., 1981-82. Dollar concedes that its License Agreement created a dealership under § 135.02(2), STATS., 1981-82,[2] and that it did not give Lake City the notice required by

[2] Section 135.02(2), STATS., 1981-82, provided:

> "Dealership" means a contract or agreement, either expressed or implied, whether oral or written, between 2 or more persons, by which a person is granted the right to sell or distribute goods or services, or use a trade name, trademark, service mark, logotype, advertising or other commercial symbol, in which there is a community of interest in the business of offering, selling or distributing goods or services at wholesale, retail, by lease, agreement or otherwise.

§ 135.04. However, Dollar argues that no dealership ever existed because it rescinded the contract with Lake City. "The effect of rescission is to restore the parties to the position they would have occupied if no contract had ever been made between them." ***Seidling v. Unichem, Inc.***, 52 Wis.2d 552, 557-58, 191 N.W.2d 205, 208-09 (1971).

Dollar's counterclaims allege two bases for rescission: material misrepresentation and mutual mistake. The alleged misrepresentation was that Dollar was dealing with Craig Greenwald when in fact Greenwald was really Craig Blevins, and Lake City provided personal and financial information with respect to Craig Greenwald which was false. Dollar alleges that Lake City "created" a Craig Greenwald who had an employment history, assets and liabilities, and references. Dollar claims that as a result of Lake City's representations as to "Greenwald," it entered into the License Agreement and other agreements and would not have done so had it known Blevins was the real party with whom they were dealing and had known his true personal and financial information.

It is undisputed that Lake City did not answer Dollar's counterclaims. Section 802.02(4), STATS., provides in part:

> Averments in a pleading to which a responsive pleading is required, other than those as to the fact, nature and extent of injury and damage, *are admitted when not denied in the responsive pleading* ....

(Emphasis added.)

Section 802.02(4), STATS., applies to answers to counterclaims. *See* ***Northland Ins. Co. v. Avis Rent-A-Car***, 62 Wis.2d 643, 647, 215 N.W.2d 439, 441 (1974). Failure to answer a counterclaim is deemed an admission of the facts alleged. ***Jarvis v. Peck***, 19 Wis. 74 [84], 75 [85] (1865).

Lake City asks us to look at the extensive hearings on its motion for a preliminary injunction, where it denied the allegations of Dollar's counterclaims. However, on a motion for judgment on the pleadings, a court may not look beyond the pleadings: In considering a motion for judgment on

the pleadings, "[t]he district court may not look beyond the pleadings, and all uncontested allegations as to which the parties had an opportunity to respond are taken as true." ***United States v. Wood***, 925 F.2d 1580, 1581 (7th Cir. 1991). Wisconsin follows that rule. *See* ***Poeske v. Estreen***, 55 Wis.2d 238, 242, 198 N.W.2d 625, 628 (1972) ("Evidence, stipulations during trial, or matters outside of the pleadings and not incorporated therein were not to be considered ...."). Also, oral testimony cannot satisfy the requirement of § 802.01(1), STATS., which defines pleadings to include "a reply to a counterclaim." It is undisputed that a counterclaim requires a responsive pleading. *See* § 802.02(4), STATS.

Lake City next argues that Dollar's counterclaims do not set forth the elements of fraudulent inducement. There must be a statement of fact which is untrue; the false statement must be made with intent to defraud and for the purpose of inducing the other party to act on it; and the other party must rely on the false statement and be induced thereby to his or her injury or damage. ***Merten v. Nathan***, 108 Wis.2d 205, 209 n.2, 321 N.W.2d 173, 176 (1982). We conclude that Dollar's counterclaims set forth the elements of fraudulent inducement.

Dollar's first counterclaim alleges that Lake City's representation that Dollar was dealing with Craig Greenwald was false, as were the statements as to his background, employment history, assets and liabilities, references, that he was not engaged in any court proceeding, and that he was in good health. The counterclaim further alleges that defendants would not have entered into the agreements with Lake City had these representations not been made. Dollar requested that the court rescind all agreements between it and Lake City and put it back in the position it would have occupied had it not relied on Lake City's representations, so as to avoid "unjust enrichment." The latter allegation is sufficient to allege damages. Thus, all of the elements of fraudulent inducement are alleged. Further, plaintiffs' misrepresentations were substantial; had Dollar known "Greenwald's" true identity and personal and financial background, it would not have contracted with Lake City. *See* ***Seidling***, 52 Wis.2d at 557, 191 N.W.2d at 208 (where breach is substantial, rescission is appropriate).

In view of our conclusion that the trial court correctly granted judgment on Dollar's first counterclaim, we need not consider whether the court correctly granted Dollar judgment on its second counterclaim. Because Dollar

effectively rescinded all agreements with Lake City, Lake City fails to state a claim for violation of the Wisconsin Fair Dealership Law.

By the Court.—Judgments affirmed.

Not recommended for publication in the official reports.