

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 25, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2005AP3165

Cir. Ct. No. 2005SC9348

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE BANK OF CROSS PLAINS,

PLAINTIFF-RESPONDENT,

v.

DOUGLAS J. GARAVALIA,

DEFENDANT-APPELLANT,

JESSICA GARAVALIA,

DEFENDANT.

APPEAL from a judgment of the circuit court for Dane County:
JOHN C. ALBERT, Judge. *Affirmed.*

¶1 VERGERONT, J.¹ Douglas Garavalia appeals the judgment of replevin entered against him and against Jessica Garavalia in favor of the State Bank of Cross Plains. He contends that the circuit court erred in denying his motion for attorney fees under WIS. STAT. § 425.308 of the Wisconsin Consumer Act (WCA) because, he asserts, he was the prevailing party on his motion to dismiss the original complaint. He also asserts that he is entitled to damages under WIS. STAT. § 427.105(1) and that the circuit court erred in entering a default judgment on the complaint against Jessica. For the reasons we explain below, we affirm.

BACKGROUND

¶2 On August 30, 2005, the State Bank of Cross Plains (the Bank) filed a replevin complaint against Douglas and Jessica seeking repossession of a 1999 Jeep Classic. The complaint alleged that Douglas had defaulted on the terms of a consumer credit transaction, that Jessica had an interest in the collateral under the Wisconsin Marital Property Act, that neither had cured the default after receiving notice of the right to cure, that as a result of the default the Bank had accelerated the balance due, and that Douglas had the right to redeem the defaults by paying certain specified amounts within fifteen days from the receipt of the complaint. The complaint alleged, in paragraph 10, the amount due on the note, referring to an attached accounting statement. In paragraph 11, the complaint alleged that if Douglas failed to redeem the collateral, "plaintiff estimates there will be deficiency in an amount not yet determined and intends to seek a deficiency

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

judgment in a separate lawsuit after sale of the collateral.” An affidavit of non-service filed with the complaint averred that a process server had made four unsuccessful attempts to personally serve Jessica at a specified address.

¶3 On September 22, 2005, Douglas filed a motion to dismiss for failure to join Jessica as a necessary party and for failure to comply with WIS. STAT. § 425.109(1)(f), which requires that a complaint by a creditor include “the estimated amount of U.S. dollars … of any deficiency claim which may be available to the creditor following the disposition of any collateral recovered.” Subsequently, proof of service on Jessica by publication was filed in the court and the court, at a hearing on October 14, 2005, took up the issue of a default judgment against Jessica. Douglas appeared by counsel at that hearing and objected to a default judgment against Jessica. That issue was deferred until October 21, 2005.

¶4 Also on October 14, 2005, the Bank filed an amended complaint restating everything in the original complaint and adding that, although the Bank is not seeking a deficiency against Douglas at this time, if a deficiency action is initiated, Douglas “could be liable for the full amount of the obligation in Paragraph 10 in the original complaint, as well as service or other fees that could be added by the court pursuant to Consumer Code.” The amended complaint further added that “[t]he estimate is based upon the fact that the Plaintiff has not seen or had a chance to evaluate the condition of the collateral, does not know if it will be recovered, or if there will be any potential statutory fees or costs assessed against the defendant(s).” Douglas responded to the motion with a letter motion requesting attorney fees, costs, and statutory damages.

¶5 At the hearing scheduled on October 21, 2005, Douglas appeared by counsel; Jessica did not appear by counsel or in person. With respect to a default judgment against Jessica, Douglas's counsel stated that Douglas and Jessica were divorced, he represented only Douglas, but Douglas had standing to move to dismiss the complaint against Jessica as well as himself because the deficient complaint also affected him. The court was not persuaded that Douglas's counsel could object to a default judgment against someone he did not represent and granted a default judgment against Jessica on the replevin complaint, making clear that the Bank could not pursue her on a deficiency.²

¶6 With respect to the motion to dismiss, Douglas's counsel stated that the amended complaint satisfied the pleading requirement in WIS. STAT. § 425.109(1)(f). Douglas's position was that he had therefore prevailed on his motion to dismiss and was entitled to attorney fees and statutory damages. The court denied the motion to dismiss and concluded that Douglas was not the prevailing party and therefore was not entitled to attorney fees or damages based on his motion.

¶7 After Douglas filed an answer to the amended complaint, the Bank moved for judgment of replevin on the pleadings. The circuit court granted that motion, and at the same time reaffirmed its earlier ruling that Douglas was not the prevailing party on his motion to dismiss under the relevant case law.

² Douglas's counsel informed the court that in the divorce action Douglas had been awarded sole right, title, and interest title of the Jeep and Jessica had no interest in it.

DISCUSSION

¶8 Douglas first contends that the circuit court erred in not awarding him attorney fees as the prevailing party on his motion to dismiss. His argument begins with WIS. STAT. § 425.109(1)(f), which provides that a creditor's complaint seeking to enforce rights arising from a consumer credit transaction "shall include" certain information, including "the estimated amount of any potential deficiency claim of U.S. dollars ... which may be available to the creditor following the disposition of any collateral...." According to Douglas, the original complaint did not comply with § 425.109(1)(f) because paragraph 11 alleged only that "plaintiff estimates there will be deficiency in an amount not yet determined...." Because the amended complaint was filed in response to his motion and cured the defect,³ Douglas contends that he is the prevailing party within the meaning of WIS. STAT. § 425.308(1), which provides:

Reasonable attorney fees. (1) If 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.

¶9 A resolution of this issue, as well as the other issues Douglas raises on this appeal, requires that we construe provisions of the Wisconsin Consumer Act in light of the existing case law. This presents a question of law, which we

³ Douglas states in a footnote that it is arguable that the amended complaint was not in "good faith," but he recognizes that he agreed in the circuit court that the amended complaint did meet the requirements of WIS. STAT. § 425.109(1)(f) and he is not contending otherwise on appeal.

review de novo. *Garcia v. Mazda Motors of Am. Inc.*, 2004 WI 93, ¶7, 273 Wis. 2d 612, 682 N.W.2d 365.

¶10 For purposes of this appeal we will assume that the original complaint did not comply with WIS. STAT. § 425.109(1)(f), that the amended complaint did, and that the amendment was prompted by Douglas's motion.

¶11 A consumer prevails within the meaning of WIS. STAT. § 425.308(1) "if he or she achieves some significant benefit in litigation involving a creditor's violation of the WCA." *Cnty. Credit Plan, Inc. v. Johnson*, 221 Wis. 2d 766, 773-74, 586 N.W.2d 77 (Ct. App. 1998), *aff'd* 228 Wis. 2d 30, 596 N.W.2d 799 (1999). A minor violation does not make a consumer a prevailing party. *Footville State Bank v. Harvell*, 146 Wis. 2d 524, 539-40, 432 N.W.2d 122 (Ct. App. 1988).

¶12 We conclude the difference between the original and amended complaint was not a significant benefit to Douglas.⁴ We recognize that the requirements in WIS. STAT. § 425.109(1) for a creditor's complaint express a legislative judgment that the specified information is helpful to a consumer in deciding what action to take in response to the complaint. However, it does not follow that every amendment to bring a complaint into compliance with § 425.109(1) is therefore a significant benefit to the consumer. Here the amended complaint provided, at best, a little additional information about the Bank's

⁴ Because of this conclusion, it is not necessary for us to decide whether the Bank is correct in arguing that noncompliance with WIS. STAT. § 425.109(1) is not a violation of the WCA for purposes of WIS. STAT. § 425.308. Nor is it necessary for us to decide whether an amendment to a complaint filed as a matter of right (that is, within six months of the original complaint, WIS. STAT. § 802.09(1)) to bring a complaint into compliance with § 425.109(1) can ever confer a significant benefit for purposes of § 425.308.

estimate of the deficiency. The amended complaint did not provide Douglas with a benefit anywhere near the significance of the benefit achieved in the cases on which he relies. In *Community Credit Plan*, 221 Wis. 2d at 776-77, *aff'd* 228 Wis. 2d at 35-36, the consumers obtained a dismissal of the default judgments against them, and in *Footville State Bank*, 146 Wis. 2d at 540, the consumer succeeded in substantially reducing his preverdict liability. We are persuaded that any benefit to Douglas from the amendment was truly minor.

¶13 Douglas also argues that he is entitled to damages for a violation of WIS. STAT. § 427.104(1)(j), which provides:

Prohibited practices. (1) In attempting to collect an alleged debt arising from a consumer credit transaction or other consumer transaction, including a transaction primarily for an agricultural purpose, where there is an agreement to defer payment, a debt collector may not:

(j) Claim, or attempt or threaten to enforce a right with knowledge or reason to know that the right does not exist;

Persons injured by any violation of WIS. STAT. ch. 427 may recover actual damages and the penalty provided in WIS. STAT. § 425.304. WIS. STAT. § 427.105(1). Douglas explains that he could not file a counterclaim asserting a claim for damages under § 427.104(1)(j) because of the court's ruling denying his motion to dismiss and concluding he was not a prevailing party on his motion to dismiss. As we understand his argument for damages under § 427.104(1)(j), it is dependent upon the circuit court having erred in those rulings. We have already concluded that Douglas was not a prevailing party under WIS. STAT. § 425.308, and we see no basis for error in the court's denial of Douglas's motion to dismiss. The Bank had the right to amend the complaint without the court's permission within six months of the filing of the original complaint, WIS. STAT. § 802.09(1), and Douglas's counsel told the court that the amended complaint complied with

WIS. STAT. § 425.109(1)(f). We therefore do not further discuss damages under §§ 427.104 and 427.105.

¶14 Finally, Douglas contends that the circuit court erred in entering a default judgment against Jessica. He asserts that he has standing to object to the entry of a default judgment against Jessica under *Zehetner v. Chrysler Financial Co.*, 2004 WI App. 80, 272 Wis. 2d 628, 679 N.W.2d 919. We agree with the Bank that *Zehetner* does not support Douglas's position. In *Zehetner*, we concluded that a person who had co-signed a purchase agreement and other documents but not the retail installment contract was a "customer" under WIS. STAT. § 427.105(1) and a "person" under § 427.105(1) and therefore could pursue her claim for a violation of WIS. STAT. § 427.104. *Zehetner*, 272 Wis. 2d 628, ¶¶2-5, 9, 21. *Zehetner* does not in any way suggest that one party may make arguments for another party who has not appeared.

¶15 We conclude the circuit court properly denied Douglas's motion to dismiss and denied his request for attorney fees and damages. We therefore affirm the judgment against him. We also conclude he has no standing to object to the default judgment entered against Jessica. We therefore affirm the default judgment against her.

By the Court.—Judgment affirmed.

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

