COURT OF APPEALS
DECISION
DATED AND FILED

January 24, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP1753 **Cir. Ct. No. 2005SC2077**

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

NIELSON COMMUNICATIONS, INC.,

PLAINTIFF-RESPONDENT,

V.

SATCOM, LLC,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County: BARBARA HART KEY, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

¶1 BROWN, J.[1] This is an exceedingly long-lived, and no doubt expensive, small claims case. This is the second appeal; in the first, we concluded

[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.

that the small claims court had deprived Satcom of the opportunity to make its case by rendering a decision when Nielson had not yet provided Satcom with potentially critical information. We remanded and ordered that the discovery be provided and that the court examine it. If the discovered information was relevant to Satcom's defense or counterclaim, we directed that the court hold a new trial. The discovery was provided, but without hearing any argument on the relevance of the discovery or providing any record of its reasoning, the small claims court declared that the original judgment would be reinstated.

¶2 We must therefore reverse and remand yet again. We recognize that small claims procedures are informal and are intended to foster the speedy and inexpensive resolution of disputes. *See* ***Portage County v. Steinpreis***, 104 Wis. 2d 466, 479-80, 312 N.W.2d 731 (1981). They cannot be so casual, though, that they deprive a party of a meaningful opportunity to prove its case, as has so far happened here. *See* WIS. STAT. § 799.209(1) (allowing small claims parties to present evidence and argument "to the extent reasonably required for full and true disclosure of the facts").

¶3 We would like to aid in speeding this case along by simply deciding it; however, in view of the lack of factual findings, it is impossible for us to do so. The case is further complicated by the fact that both parties have dropped the ball at various stages of the proceedings, Satcom by failing to present to the lower court arguments that it now raises, and Nielson by submitting a brief long on bluster and vituperation and short on cogent legal argument. We will provide precise directions for remand to avoid, we hope, seeing this case for a third time.

¶4 The underlying facts are set out at some length in our previous opinion in this case, ***Nielson Communications, Inc. v. Satcom, LLC***,

No. 2005AP2174, unpublished slip op. ¶¶2-11 (WI App Feb. 1, 2006), and we will not rehash them here. The facts essential to this second appeal are as follows.

¶5 Nielson brought a replevin suit against Satcom, alleging that Satcom was in possession of communications and computer equipment belonging to Nielson. Satcom answered that it did have the equipment and that it was installed on a communications tower that it owned. The equipment had previously been owned by a company called Subnet, which had leased space for the equipment on the tower to deliver wireless internet service to its customers. Subnet sold the equipment—still attached to Satcom's tower—to Nielson, along with the database of customers that the equipment had served. Satcom claimed that Nielson had contacted Satcom and stated that it was Subnet's successor and that Nielson had at first paid rent for continuing to lease the tower space. However, after the first quarter, the rent payments ceased. Satcom argued that Nielson had assumed Subnet's lease, and therefore Satcom counterclaimed for the remaining rent due. Satcom also claimed a landlord's lien on the equipment, which would allow Satcom to sell it off and apply the proceeds to the unpaid rent.

¶6 Satcom served Nielson with a request for the production of documents dated June 8, 2005, requesting any writings between Nielson and Subnet. Nielson had thirty days to respond per Satcom's request and WIS. STAT. § 804.09(2), but before this period expired, the court, the Honorable Bruce K. Schmidt presiding, held an informal trial. At the trial, Satcom's representative argued that Nielson had assumed Subnet's lease with Satcom, and told the court that Nielson had not responded to Satcom's discovery requests relevant to this claim. *See* ***Nielson***, No. 205AP2174, ¶10. Without the calling or questioning of witnesses or any findings of historical fact being made, the court nevertheless

granted judgment to Nielson and dismissed Satcom's counterclaims. Satcom appealed.

¶7 We reversed, noting that the requested discovery was potentially relevant and important to Satcom's claims, and holding that it was therefore error for the small claims court to litigate the matter to completion when that discovery was still pending. ***Nielson***, No. 2005AP2174, ¶¶14-15. We remanded and ordered that Nielson respond to Satcom's discovery requests. ***Id.***, ¶16. We resisted simply ordering a new trial, however, because we recognized that the discovery might turn up nothing of relevance and that a new trial in that instance would inappropriately give Satcom a "second kick at the cat." ***Id.***

¶8 On remand, Nielson provided Satcom with the contract between Nielson and Subnet. The small claims court, now with the Honorable Barbara Hart Key presiding, held a hearing at which it heard arguments from both sides, mostly regarding the existence of any other discoverable material. At the end of this hearing, the court reinstated the original judgment, stating there was nothing in the discovery response that would "change the underlying results of the case," and that no other discovery was necessary. The court's written order stated that discovery had turned up no new information "which supports a change or amendment to the Writ of Replevin previously granted."

¶9 The small claims court did not explain its view of the contract, but since it did not conduct a new trial, we assume that it meant by the above-quoted language that the contract was irrelevant to Satcom's case.

¶10 If this was the court's conclusion, we must disagree. The contract is directly relevant to Satcom's defense because it suggests that Subnet assigned its tower lease to Nielson. If in fact Nielson was an assignee of the tower lease, then

it was on the hook for rent payments to Satcom. Also, because the tower lease between Satcom and Subnet contained a landlord's lien provision, if Nielson was an assignee of that lease, then Satcom had the right to hold on to (and sell) the equipment to recover for Nielson's delinquent rent.

¶11 The reasons we say the contract suggests that Subnet assigned its lease to Nielson are: it is titled "Agreement Assigning and Transferring Certain Assets of [Subnet] to [Nielson]"; it states that Nielson was paying Subnet for "the assignment[] of the tower rights"; it states that Subnet's representative was authorized to enter into an agreement for "assignment of tower rights"; and it states that the contract contains the entire agreement "in regard to the sale and assignment of the assets, leases and customer database." This is significant because in an assignment, as distinguished from a sublease, the assignee becomes personally liable to the landlord for rent according to the lease.[2] *See* 49 AM. JUR. 2D *Landlord and Tenant* § 967 (2006); *see also* ***Cross v. Upson***, 17 Wis. 638, [*618], 641, [*621] (1864).

¶12 Nielson argues that rather than an assignment, it had a sublease with Subnet. Nielson points out that besides the "assignment" language, the contract also states that Nielson "agrees to sublease [Subnet's] tower rights … for a period of which [Nielson] deems necessary." Certainly, this provides support for

[2] Nielson argues that the absence of the word "assume" in the contract precludes a finding that Nielson assumed the obligation to pay rent from Subnet. This is incorrect. An assignment obligates the assignee to pay rent to the original lessor. *See* ***Cross v. Upson***, 17 Wis. 638, [*618], 641, [*621] (1864) ("If he [or she] went in as assignee, he [or she] was bound to pay according to the lease, just as [the assignor] was, so long as he [or she] remained."); *see also* 49 AM. JUR. 2D *Landlord and Tenant* § 967 (2006). Other obligations in a lease may require specific assumption. *See* 49 AM. JUR. 2D § 960. Nielson owes rent if it is an assignee of Subnet; the presence or absence of the word "assume" is irrelevant.

Nielson's argument, but Nielson simply fails to acknowledge or discuss the contract language that favors Satcom's claim. It likewise fails to respond to Satcom's several arguments that the "assignment" interpretation is more reasonable than the "sublease" one, except to assert that the arguments are not supported by the record. Nielson incorrectly says that there is no factual support for Satcom's claims; each is based in the language of the contract and reasonable inferences drawn from it. They are unproven, to be sure, there being almost no record in this case, and whether they can be proven will depend upon the facts found on remand.

¶13 Because of that lack of record, we cannot decide which arrangement, sublease or assignment, was intended by the parties. The contract is ambiguous. It is true that the interpretation of a contract is a question of law that we can address independently on appeal. ***Druschel v. Cloeren***, 2006 WI App 190, ¶21, ___ Wis. 2d ___, 723 N.W.2d 430, *review denied*, 2006 WI 126, ___ Wis. 2d ___, 724 N.W.2d 205. However, where, as here, a contract is ambiguous and requires a resort to extrinsic evidence to resolve its meaning, the question is one of fact. ***Jones v. Jenkins***, 88 Wis. 2d 712, 722, 277 N.W.2d 815 (1979).

¶14 We therefore remand for a new trial.[3] Though we said in our first opinion in this case that Satcom should not receive a "second kick at the cat," in view of the fact that essential evidence was missing from the first trial, we do not

[3] Satcom contends that we should be sending this case to Waukesha county, because of a forum selection clause in the lease. However, since we have not determined whether that lease is binding on Nielson, there is no basis for doing so. Further, since that question is the very essence of the matter still to be tried, it would not be reasonable to enforce the forum selection clause if it is finally determined that Nielson is bound by the lease, since the case would, at that point, be in large part decided. *See* ***Beilfuss v. Huffy Corp***., 2004 WI App 118, ¶17, 274 Wis. 2d 500, 685 N.W.2d 373 (forum selection clauses enforced unless doing so would be unreasonable).

think Satcom has yet had its first kick. The real issue in controversy has not yet been tried. The issues the small claims court must address follow.

¶15 As Satcom points out, there is a presumption that Nielson is an assignee by the fact of possession and the payment of rent, which Nielson may rebut by showing that there was some other arrangement. ***Upson***, 17 Wis. at 643, [*623]; 49 AM. JUR. 2D § 966. This will require a resolution of the ambiguity in the contract. In addition to the claim that Subnet explicitly assigned the lease to Nielson, Satcom has also advanced theories that Nielson was a continuation of Subnet and that the transaction between the two was a de facto merger.[4] We will not evaluate these claims, as they are impossible to assess without a better grasp on the facts than we can get from the record. Satcom may try to prove them through the calling of witnesses or the presentation of other evidence to the extent reasonably required.[5] WIS. STAT. § 799.209(1).

¶16 If Satcom is able to show that Nielson was bound by the lease, Nielson is, in turn, entitled to prove its claim that Satcom breached the lease by installing other equipment on its tower that interfered with Nielson's equipment,

[4] Satcom also argues that regardless of the contract between Subnet and Nielson, it had a lien on the tower equipment because Subnet breached the lease before selling the equipment to Nielson. *See* ***Nielson Communications, Inc. v. Satcom, LLC.***, 2005AP2174, unpublished slip op. ¶12 n.6 (WI App Feb. 1, 2006). However, Satcom never advanced this claim in the first small claims court proceeding, and it may not now revive it. While the lien in the lease may be relevant to determining whether Satcom had the right to hold Nielson's property, Satcom must first show that Nielson was bound by the lease.

[5] Satcom is not, however, entitled to the further discovery that it seeks. In our first decision in this case, we ordered Nielsen to respond to Satcom's document requests and interrogatories. ***Id.***, ¶16. The parties disagree as to the series of events that led to Nielson responding only to the document request and not the interrogatories, but for whatever reason, when the small claims court held a hearing on the matter, Satcom failed to pursue the interrogatories, seeking only the documents. We deem the interrogatory requests abandoned.

as it has asserted throughout this case. We note that it is unclear from the record when this alleged breach occurred and whether it came before or after Nielson ceased paying rent.

¶17 We recognize that the order of proof outlined above is likely more complicated than in the usual small claims case. In fact, as our supreme court has stated, even discovery is inappropriate in the vast majority of small claims cases. ***Steinpreis***, 104 Wis. 2d at 482 n.15. But this is not the usual small claims case, involving as it does two contracts (one ambiguous) between three businesses. The procedure we have described is the minimum necessary inquiry for the "prompt resolution of the dispute on its merits according to the substantive law." WIS. STAT. § 799.209(4).

¶18 The last point we must address is Satcom's complaint that Nielson has failed to pay the costs it owes from the last appeal. Nielson argues that the small claims court "elected not to award Satcom … those costs." We cannot tell from the record whether this is so, but we hope that it is not. The $366.10 at issue represents costs for the *appeal*, awarded by the *court of appeals* under WIS. STAT. RULE 809.25, (though both parties refer only to WIS. STAT. § 814.10, which governs costs and fees in circuit courts). These costs, once awarded by the court of appeals, are to be entered as judgments in the circuit court. WIS. STAT. § 806.16. The circuit court has no authority to modify or dismiss an award of costs and fees by the court of appeals. For this appeal, there will be no costs to either party.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

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