COURT OF APPEALS
DECISION
DATED AND FILED

October 10, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP645 **Cir. Ct. No. 2006SC1859**

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

NELSON & SONS PAINTING,

PLAINTIFF-RESPONDENT,

V.

RUBEN CARDENAS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: DONALD J. HASSIN, JR., Judge. *Affirmed*.

¶1 NETTESHEIM, J.[1] Ruben Cardenas appeals from an order which dismissed his counterclaim against Nelson & Sons Painting (Nelson) in this small claims action. We affirm.

¶2 The relevant facts of this case are undisputed. Nelson submitted a written proposal to Cardenas for painting services and materials to be provided at a new residence owned by Cardenas. Cardenas agreed to the proposal, and both parties signed the agreement. After the work was completed, Cardenas paid a portion of Nelson's bill, but refused to pay the balance, claiming that some of the work was not satisfactory. The balance due Nelson under the parties' contract was $1350. Nelson then provided extra materials and work in an effort to meet Cardenas' objections, but Cardenas still objected to the quality of the work.

¶3 Nelson responded with this small claims action. Its complaint sought damages in the amount of $1850, $500 beyond the amount due and owing under the parties' written contract. This added amount was based on the additional service and materials Nelson had provided in an effort to accommodate Cardenas' objections to the quality of the work. Cardenas counterclaimed, alleging that Nelson had "failed to comply with Wisconsin Administrative Code Consumer Protection at ATCP 110 requirements relative to the subject transaction alleged in the Complaint." *See* WIS. ADMIN. CODE § ATCP 110 (Oct. 2004).[2] Based upon this allegation, Cardenas requested "damages, statutory enhancement

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version.

[2] All references to the Wisconsin Administrative Code are to the October 2004 version.

damages, and attorney's fees as provided by law." In addition, Cardenas alleged that Nelson had breached the contract.

¶4 At the small claims trial, both parties were represented by counsel. During his testimony, Nelson's owner, Michael Nelson, testified that Nelson no longer was seeking damages beyond the scope of the parties' contract, unlike the position it took in earlier proceedings before a court commissioner. At the close of the evidence, the trial court dismissed Nelson's complaint, ruling that the painting work was not performed in a workmanlike manner.

¶5 In addition, the trial court also dismissed Cardenas' counterclaim on two grounds. First, the court ruled that the counterclaim was defective because it failed to allege any facts in support of the claimed administrative code violation. Second, the court ruled that the evidence also did not reveal any WIS. ADMIN. CODE § ATCP 110 violation. In making these rulings, the trial court did not expressly address Cardenas' counterclaim allegation that Nelson had also breached the parties' contract. Cardenas appeals.

¶6 We first address the sufficiency of Cardenas' counterclaim. On its face, the trial court's ruling that the counterclaim was defective appears to be correct. The counterclaim merely alleged that Nelson had failed to comply with WIS. ADMIN. CODE § ATCP 110 and that Nelson had breached the contract. The counterclaim was devoid of any factual allegations to support those conclusory allegations.

¶7 The law is clear and well established when measuring the sufficiency of a pleading. Our supreme court has held that pleadings are to be liberally construed to do substantial justice between the parties, and a complaint should be dismissed as legally insufficient only if it appears to a certainty that no

relief can be granted under any set of facts that the plaintiff can prove. ***Strid v. Converse***, 111 Wis. 2d 418, 422, 331 N.W.2d 350 (1983). Nor is a party required to put labels on the allegations in order to state a valid claim. ***Id***. However, in the same breath, the supreme court also held that "[*i*]*t is the sufficiency of the facts alleged that control the determination of whether a claim for relief is properly* [*pled*]." ***Id***. at 422-23 (emphasis added). It is on this front that Cardenas' counterclaim clearly falters. The counterclaim merely alleges that Nelson violated administrative code provisions and that it breached the contract. Not a single fact in support of these allegations is alleged.

¶8 Cardenas, however, contends that these rules do not apply in a small claims setting. In support, he points to WIS. STAT. § 799.06(1) which provides that in a small claims case, "All pleadings except the initial complaint may be oral." However, the statute goes on to state, "Any circuit court may by rule require written pleadings and any judge or circuit court commissioner may require written pleadings in a particular case." Cardenas allows that Waukesha county has a local rule which requires that an answer in a small claims case be in writing. The rule says "When contesting a matter, defendant shall file a written Answer in the office of the Clerk of Circuit court, with copy to the plaintiff, either before the return date, at the time of the return date, or within fifteen (15) days of appearing at the return date." WAUKESHA COUNTY CIR. CT. CIR. CT. DIV. R. 9.2. Cardenas argues that this rule, by its very terms, is limited to an answer, not to a counterclaim.

¶9 We hold that Cardenas' argument represents too narrow an interpretation of the local rule. When engaging in statutory interpretation, context is important to meaning. ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. Thus, we interpret statutory

language "in the context in which it is used; not in isolation but as part of a whole." ***Id***. We see no reason why these rules for statutory interpretation should not apply to the interpretation of a local rule.

¶10 Cardenas correctly observes that the rule refers to an "answer." But the rule also applies when a defendant is "contesting a matter." Here, Cardenas' counterclaim contends that Nelson should not recover because Nelson had violated the administrative code and because it had also breached the contract. It strains logic to say that these allegations do not represent "contesting the matter." It also strains logic to think that when adopting this rule the Waukesha county circuit judges saw the need for a written answer, but not a need for a written counterclaim. Answers and counterclaims, while serving different functions, are commonly joined in a single pleading and are oftentimes inextricably linked to each other as a defense to the plaintiff's complaint. That is the situation here. We uphold the trial court's ruling that Cardenas' counterclaim as to the WIS. ADMIN. CODE § ATCP 110 violation was not supported by sufficient factual allegations. We similarly hold as to the breach of contract allegation.

¶11 While our holding that Cardenas' counterclaim was insufficient is dispositive, we also choose to address the administrative code issue on the merits. As noted, unlike its stance before the court commissioner, Nelson confined its damage claim to those covered by the parties' contract. During Cardenas' testimony, he was asked about the additional expenses he had incurred as a result of Nelson's alleged defective performance. The trial court interjected, inquiring whether these claims were covered by the pleadings. Cardenas responded that they were covered by his counterclaim. This exchange took the court and the parties into a discussion about the WIS. ADMIN. CODE § ATCP 110 claim generally and § ATCP 110.05 specifically. The latter requires that certain home

improvement contracts, and any changes to such contracts, be in writing. In addition, § ATCP 110.05(2)(c) states that such contracts must recite the "total price or other consideration to be paid by the buyer."

¶12 Cardenas noted that Nelson's claim in the earlier proceedings before the court commissioner sought to recover damages beyond the scope of the parties' written agreement. Based upon that history, Cardenas contended that his testimony about his added expenses was relevant. The trial court disagreed, noting that Michael Nelson's testimony in the trial de novo had limited Nelson's claim to the amount called for under the parties' written contract.

¶13 We agree with the trial court's ultimate ruling that the evidence in this case, including Cardenas' proffered evidence regarding his additional damages, did not support a claim under WIS. ADMIN. CODE § ATCP 110.05(2)(c).[3] However, we take a slightly different tack on the question.

¶14 True, Nelson's complaint sought damages beyond the scope of the parties' written agreement, and Nelson pursued that theory at the proceedings before the court commissioner. However, this portion of Nelson's claim was the result of its efforts to accommodate Cardenas' objections to the quality of the painting work. It was not part of the parties' original contract or part of any changes or amendments made to that contract *before* Nelson commenced its work. The obvious purpose of WIS. ADMIN. CODE § ATCP 110.05(2)(c) is to assure that the parties are on the same page as to the "total price or other consideration to be paid by the buyer." ***Id.*** The parties' contract here was in accord with this

[3] We construe Cardenas' testimony as an offer of proof on the evidentiary question.

provision, and the parties made no changes to that arrangement before Nelson commenced the work. Obviously, the parties did not have a crystal ball foreseeing the later dispute and that Nelson would provide extra work and materials in an effort to resolve the matter.

¶15 Cardenas' allegation of a WIS. ADMIN. CODE § ATCP 110 violation rests on these "after-the-fact" negotiations between the parties to resolve their dispute. Cardenas apparently believes that § ATCP 110.05(2) requires that such matters also be reduced to writing. But he cites no law for that proposition, and we know of none. We would do disservice to the public policy behind § ATCP 110 if we were to hold that legitimate "after-the-fact" efforts by the parties to resolve legitimate disputes expose a contractor to liability for the substantial remedies afforded by WIS. STAT. § 100.20(5) for a violation of § ATCP 110.[4]

¶16 It is not uncommon for a contractor to provide "extras" to an owner as the agreed upon work progresses or after it is finished. While this is not an "extras" case in the strict sense of that term, it remains that Nelson provided extra work and materials to Cardenas in an effort to accommodate Cardenas' complaints and to resolve the parties' dispute. We acknowledge that WIS. ADMIN. CODE § ATCP 110 is a "consumer-friendly" provision,[5] but it also must know some sensible limits. To extend this provision to the type of case here moves beyond the spirit, intent and purpose of the enactment.

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[4] These remedies include twice the amount of the pecuniary loss, costs, and reasonable attorney fees. WIS. STAT. § 100.20(5).

[5] "[P]ublic policy dictates that consumer protection statutes and administrative rules must be read in pari materia to achieve the goal of providing protection and remedies to consumers." ***Rayner v. Reeves Custom Builders, Inc.***, 2004 WI App 231, ¶14, 277 Wis. 2d 535, 691 N.W.2d 705 (quoted source omitted).

By the Court.—Order affirmed.

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