COURT OF APPEALS
DECISION
DATED AND FILED

April 30, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2616 **Cir. Ct. Nos. 01 SC 5939, 01 SC 5941**

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

SHAWN RADTKE,

PLAINTIFF-RESPONDENT,

V.

MATHEW E. LEVIN,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Milwaukee County: KITTY K. BRENNAN, Judge. *Affirmed.*

¶1 SCHUDSON, J.[1] In these consolidated small claims cases, Mathew E. Levin appeals from the judgments, following a bench trial, in favor of Shawn M. Radtke. Levin argues: (1) the trial court erred in denying his motion to change venue to Dodge County; (2) the trial court incorrectly dismissed his

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a), (3) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise indicated.

counterclaims; and (3) the trial court erroneously exercised discretion in reaching its credibility decisions because it "did not examine all the relevant facts," "apply a proper standard of law to both parties," or "use a demonstrative rational process to reach a conclusion that a reasonable judge could reach." This court affirms.

I. Background

¶2 In her small claims complaints, Radtke alleged: (1) in June 1999, she had loaned Levin $1500 "because he needed it for a down payment on a 1995 GMC Sierra Pick-up Truck he was purchasing," and he had "refused to repay the money"; and (2) in July 1999 to the time of her complaint, Levin "made authorized (he agre[e]d to pay) and unauthorized charges on [her] Mastercard Credit card," and he "refuses to pay for these charges." Following the trial, the court concluded that Radtke had proven that Levin owed her $1500 as repayment for the truck loan. The court also concluded, however, that Radtke had not met her burden to prove her credit card allegations, with the exception of $1071 Levin admitted he owed her. Accordingly, the court awarded Radtke $2571 plus costs.

II. Venue

¶3 Levin first argues that the trial court erred in denying his motion to change venue to Dodge County. Radtke responds that the court correctly concluded that proper venue was in Milwaukee County and, regardless of whether venue was in Dodge County or Milwaukee County, the judgments remain valid under WIS. STAT. § 801.50(1), which provides that "[a] defect in venue shall not affect the validity of any order or judgment." Levin replies that under ***Kett v. Community Credit Plan, Inc.***, 228 Wis. 2d 1, 596 N.W.2d 786 (1999), § 801.50(1) is inapplicable to the case involving the credit card charges, and that

the corresponding judgment is invalid.[2] Levin is incorrect; WIS. STAT. § 801.50(1) applies and controls.

¶4 Levin failed to present the trial court with the specific venue challenge he now pursues on appeal. His trial court motion for each case stated, in part: "The proper venue as outlined in 801.50(2)a,b,c would be Dodge County as all three subsections apply to these claims made by Radtke." WISCONSIN STAT. § 801.50(2) states:

> Except as otherwise provided by statute, venue in civil actions or special proceedings shall be as follows:
>
> (a) In the county where the claim arose;
>
> (b) In the county where the real or tangible personal property, or some part thereof, which is the subject of the claim, is situated;
>
> (c) In the county where a defendant resides or does substantial business; or
>
> (d) If the provisions under par. (a) to (c) do not apply, then venue shall be in any county designated by the plaintiff.

Thus, absent a specific exception, these subsections are subsumed by WIS. STAT. § 801.50(1).

¶5 On appeal, regarding the case involving the credit card charges, Levin moves away from his argument under WIS. STAT. § 801.50 and, instead, contends that, under WIS. STAT. § 421.401, he and Radtke were involved in a "consumer credit transaction" in Dodge County and, therefore, under ***Kett***, § 801.50(1) is inapplicable.

[2] Levin also maintains that venue for the case involving the alleged loan for the down payment on the truck is governed by WIS. STAT. § 801.50(2), regardless of whether the subject of the claim is the truck or the loan.

¶6 Levin is incorrect. In ***Kett***, the supreme court carefully considered the distinction the legislature had drawn between "consumer transactions" and "consumer credit transactions" for purposes of determining the consequences of improper venue. ***Kett***, 228 Wis. 2d at 14-17. The supreme court explained:

> [T]he legislature's different treatment of venue for consumer [trans]actions and consumer credit transactions shows a deliberate legislative intent to give meaning to the words "lack of jurisdiction" in Wis. Stat. § 421.401(2)(b). If a transaction giving rise to an action is a consumer transaction, the remedy for defective venue is transfer of the action to the proper place of trial. *See* Wis. Stat. §§ 421.301(13) and 421.401(2)(a). If, on the other hand, a transaction giving rise to an action is a consumer credit transaction, the remedy for defective venue is dismissal of the action for lack of jurisdiction. *See* Wis. Stat. §§ 421.301(10) and 421.401(2)(b).

Id. at 14. Thus, the court concluded that "when venue is defective in an action arising from a consumer credit transaction, any judgment except a judgment of dismissal is invalid when entered because the circuit court lacks jurisdiction other than to dismiss the action." ***Id.*** at 17.

¶7 WISCONSIN STAT. § 421.301(10), in part, defines "[c]onsumer credit transaction" as "a consumer transaction between a merchant and a customer in which real or personal property, services or money is acquired on credit." Section 421.301(13) defines "[c]onsumer transaction" as "a transaction in which one or more of the parties is a customer for purposes of that transaction." Section 421.301(44) defines "[t]ransaction" as "an agreement between 2 or more persons, whether or not the agreement is a contract enforceable by action, and includes the making of and the performance pursuant to that agreement." Section 421.301(17) defines "[c]ustomer," in part, as "a [natural] person … who seeks or acquires real or personal property, services, money or credit for personal, family or household purposes." Section 421.301(25), in part, defines "[m]erchant" as "a person who

regularly advertises, distributes, offers, supplies or deals in real or personal property, services, money or credit in a manner which directly or indirectly results in or is intended or designed to result in, lead to or induce a consumer transaction."

¶8 Nothing in this record suggests that either Levin or Radtke was a "merchant." They had been living together and, as the court commented, their property dispute was akin to that encountered in divorce proceedings. Thus, their transactions were not "consumer credit transactions" and, therefore, under ***Kett***, WIS. STAT. § 421.401(2)(b) would not apply.

¶9 Additionally, § 421.401(2)(a) would not apply. As stated in WIS. STAT. § 421.102(2),

> The underlying purposes and policies of chs. 421 to 427 [the Wisconsin consumer act] are:
>
> (a) To simplify, clarify and modernize the law governing consumer transactions;
>
> (b) To protect customers against unfair, deceptive, false, misleading and unconscionable practices by merchants;
>
> (c) To permit and encourage the development of fair and economically sound consumer practices in consumer transactions; and
>
> (d) To coordinate the regulation of consumer credit transactions with the policies of the federal consumer credit protection act.

Clearly, the Wisconsin consumer act was not designed to apply to claims such as those involved in the cases underlying this appeal. Thus, regardless of the propriety of the trial court's venue ruling, WIS. STAT. § 801.50(1) governs; the judgments are valid. *See* WIS. STAT. §§ 799.11(1)(e), 801.50(1).

III. Levin's Counterclaims

¶10 Levin next argues that the trial court incorrectly dismissed his counterclaims. This court disagrees.

¶11 Regarding the case involving the alleged loan for the down payment on the truck, Levin counterclaimed: "I have had to take off from work for several days to prepare for this claim and to file a response and to be able to appear in court for this unjustified claim by Radtke." In the case involving the credit card charges, he counterclaimed: "As a matter of legal fact Shawn Radtke has been harassing Mathew Levin. In the course of dealing with Radtke's unlawful behavior Levin has incurred substantial monetary loss."

¶12 With respect to Levin's counterclaim regarding Radtke's alleged harassment, the court concluded: "I'll dismiss the counterclaim of the defendant. In that case there's … been no proof offered at this trial about it." With respect to Levin's counterclaim that he "had to take off from work for several days to prepare … and to be able to appear in court for this unjustified claim," the court concluded:

> That was the case of the loan in which I ruled for the plaintiff. It was not an unjustified claim. There has been no offer of proof for damages for taking off work, but as a practical matter I wouldn't award it anyway because I found for the plaintiff on that.

Levin responded to the court: "I understand that one, but at no point was I asked about my counterclaim. How was I to know the counterclaim was to be heard at this point?" The court replied: "Maybe you should have gone to law school before you started. I told you this is your last chance to say anything, if you wanted to say anything."

¶13 On appeal, Levin complains:

> It is clear from all testimony, and all the instruction given by the judge that the entire hearing was directed towards answering the allegations that Radtke made of Levin. In fact, the Court is ending the proceedings without ever ruling on the counterclaims.
>
> As Levin realized that the Judge was ending the proceedings he then asked about the counterclaims.… The Judge then dismissed both counterclaims without any testimony being heard.
>
> When Levin questioned the Court about the status of the counterclaims, the judge was unaware that there were two properly filed counterclaims and was working under the assumption that there was only one. Levin then informed the court that there were two counterclaims. Even with the Judge knowing that there was at least one counterclaim, the Judge was ending the proceedings without ruling on them. This is a violation of Wis. Stat. 799.209(1), (3), and (4).[3] Levin was not allowed to present arguments or proof for full disclosure of the facts. The Court did not question Levin or endeavor to ensure that all of Levin's claims were fairly presented to the court. The Court established the order of the trial and the procedure of the presentation of evidence and arguments in a manner that was inconsistent with the ends of justice and the prompt resolution of the dispute on [its] merits according to the substantive law.

(Record references omitted; footnote added.)

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[3] WISCONSIN STAT. § 799.209 provides, in relevant part:

> At any trial, hearing or other proceeding under this chapter:
>
> (1) The court … shall conduct the proceeding informally, allowing each party to present arguments and proofs and to examine witnesses to the extent reasonably required for full and true disclosure of the facts.
>
> ….
>
> (3) The court … may conduct questioning of the witnesses and shall endeavor to ensure that the claims or defenses of all parties are fairly presented to the court ….
>
> (4) The court … shall establish the order of trial and the procedure to be followed in the presentation of evidence and arguments in an appropriate manner consistent with the ends of justice and the prompt resolution of the dispute on its merits according to the substantive law.

¶14 Having reviewed the record, this court can appreciate Levin's sense that the trial court, concentrating on Radtke's claims, never signaled an opportunity for litigation of the counterclaims. Nevertheless, near the end of the proceedings, the court provided four open-ended invitations to Levin: "Okay. Anything else from you, Mr. Levin?"; "Anything else from you?"; "Anything else, Mr. Levin?"; and "Okay. Last chance for you to say something, Mr. Levin?" Levin responded each time; he did not, however, offer anything in support of his counterclaims. Thus, this court rejects Levin's request to return to the trial court for litigation of his counterclaims.[4]

IV. Credibility

¶15 Finally, Levin argues that "the trial court's decisions on credibility should be reversed in that the court failed to consider all the evidence presented and failed to provide adequate reasoning for it's [sic] judgment." This court disagrees.

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[4] This court recognizes, however, that Levin's characterization of the proceedings is not unfounded. When Levin was responding to the first invitation to present anything more, the trial court interrupted him to ask Radtke a question. The court then issued the second invitation but, as Levin was responding, the court issued its third invitation and then allowed Radtke to interrupt Levin. Then, after Radtke finished her comments, the trial court announced that it was wrapping things up. But the court then allowed Radtke to speak again, after which it issued its fourth invitation to Levin, specifying that he was to keep his comments brief. While Levin was responding, the court again interrupted and said: "The record is now closed. The Court is going to make its finding on both of these two trials." At this point in the proceedings, the trial court had not indicated any awareness of the counterclaims; only Levin's comments, after the record was closed, led the court to address them.

Any one of the trial court's invitations, standing alone, might not have alerted Levin to the need to present evidence in support of his counterclaims. The full series of invitations, however, in combination with the very nature of Levin's counterclaims (essentially protesting Radtke's "harassing" and pursuit of what he considered "unjustified" legal action) allowed the trial court to conclude the proceedings without re-opening them for litigation of the counterclaims.

¶16 A trial court is in the best position to evaluate witness credibility and, accordingly, this court generally defers to the trial court's credibility determinations. *See* WIS. STAT. § 805.17(2) (Regarding a trial to the court, "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.").

¶17 Here, regarding the claim involving the truck loan, the court commented:

> [T]he court has to … determine people's reliability, and believability, and credibility, and frankly I've seen things here against both of you.
>
> On the point of credibility both of you have stretched it if not outright lied on this record. That's not particularly shocking to me because I've seen that in divorce cases. A lot of your behavior in this ongoing fight since 1999 is just like the folks going through a divorce, and I understand that this is painful to you two. You two have separated. You have chosen to go different ways, and yet you—at least one of you if not both of you can't quite give up the contact.
>
> Be that as it may, I am prepared to make a credibility finding first on the loan. I'm going to take the truck loan case separate.… With regard to that case I find Ms. Radtke's testimony the more believable.

The court went on to explain the basis for its credibility conclusion by referring to specific testimony and documentary evidence supporting Radtke's assertions.

¶18 On appeal, Levin points to other evidence that could have led the trial court to a different conclusion. He effectively elaborates his theories and amplifies the arguments he implicitly offered the trial court. He fails, however, to establish that the trial court's credibility call was clearly erroneous; accordingly, this court will uphold the trial court's credibility determination. *See* WIS. STAT. § 805.17(2).

V. Conclusion

¶19 Although the record reveals several areas of serious concern, and although, as a result, this court recognizes the substantial nature of Levin's arguments,[5] the record also establishes that Levin and Radtke had a fair opportunity to present their causes to the trial court. Neither walked out of court able to claim complete victory, but both can walk away without further nursing any wounds. They should understand that their interests now depend, in part, on their mature ability to leave these matters behind.

By the Court.—Judgments affirmed.

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

[5] Accordingly, this court denies Radtke's "Motion for Costs, Penalties, Damages, and Fees."