COURT OF APPEALS
DECISION
DATED AND FILED

October 13, 2010

A. John Voelker
Acting 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. 2009AP2716 **Cir. Ct. No. 2009CV192**

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

DONALD BRAUNSCHWEIG, D/B/A B&B WOOD FLOOR REFINISHING AND DARLENE BRAUNSCHWEIG, D/B/A B&B WOOD FLOOR REFINISHING,

PLAINTIFFS,

V.

BANCO SERVICES, INC.,

DEFENDANT,

ERIK HANSON AND STACY HANSON,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

V.

MADDEN LAW FIRM,

THIRD-PARTY DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from orders of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Erik and Stacy Hanson appeal from orders granting their motion for summary judgment in part but denying them damages and attorney fees against the Madden Law Firm (MLF). MLF cross appeals the order determining that it violated the federal Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692e(11), 1692g(a) (2006).[1] We affirm the orders and do not address the cross-appeal.

¶2 Donald and Darlene Braunschweig performed work on the wood flooring of the Hansons' home. The Hansons refused to pay for the work. The Braunschweigs retained MLF to collect the debt and eventually this lawsuit was filed. The Hansons filed a third-party complaint against MLF alleging that it had violated 15 U.S.C. §§ 1692e(11), 1692g(a), by not including required disclosures in the Notice of Intent to File Claim for Lien served on the Hansons on August 10, 2008. Both MLF and the Hansons moved for summary judgment. The circuit court determined that MLF's Notice of Intent to File Claim for Lien violated the federal disclosure requirements. The circuit court declined to exercise its discretion to award statutory damages. In a separate order the circuit court determined that the Hansons were not entitled to recover their attorney fees and costs under 15 U.S.C. § 1692k because they were not awarded any actual or statutory damages. The Hansons' motion for reconsideration was denied.

[1] All references to the U.S.C. are to the 2006 version unless otherwise noted.

¶3 When called upon to review a circuit court's grant of summary judgment, we follow the same methodology as the circuit court under WIS. STAT. § 802.08(2) (2007-08).[2] ***Apple Valley Gardens Ass'n, Inc. v. MacHutta***, 2007 WI App 270, ¶10, 306 Wis. 2d 780, 743 N.W.2d 483, *aff'd*, 2009 WI 28, 316 Wis. 2d 85, 763 N.W.2d 126.

> Where, as here, the parties file cross-motions for summary judgment and neither argues that factual disputes bar the other's motion, the facts are deemed stipulated, leaving us to determine issues of law. Any stipulation, however, remains subject to the rule that summary judgment may be granted only if no material issue of fact is presented by the parties' respective evidentiary facts.

Id. (citation omitted).

¶4 The dispositive issue here is the circuit court's no damages determination. The Hansons argue that the determination is based on the acceptance of MLF's "bona fide error" defense. *See* 15 U.S.C. § 1692k(c) ("A debt collector may not be held liable … if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."). The Hansons contend that an issue of material facts exists as to the "bona fide error" defense and that MLF failed to offer any

[2] All references to the Wisconsin statutes are to the 2007-08 version unless otherwise noted.

evidence that its failure to comply with the disclosure requirements was unintentional and resulted from a bona fide error.[3]

¶5 Although the circuit court observed that MLF acted in good faith, it found that the provisions of the act requiring certain disclosures were violated. It determined that MLF was liable to the Hansons. It did not specifically absolve MLF of liability under 15 U.S.C. § 1692k(c).[4] The result is based on the determination that the Hansons are not entitled to damages.

¶6 The Hansons conceded that they could not prove any actual damages.[5] That left only to be determined whether the circuit court would allow additional damages not to exceed $1000. *See* 15 U.S.C. § 1692k(a)(1)-(2)(A) (a debt collector violating the act is liable for "any actual damage" and in a case by an individual for "such additional damages as the court may allow, but not exceeding $1,000"). We review the circuit court's decision to not award statutory damages for an erroneous exercise of discretion. *See* ***Lester E. Cox Medical Center v. Huntsman***, 408 F.3d 989, 993 (8th Cir. 2005). A discretionary determination will be sustained if "the [circuit] court examined the relevant facts,

[3] A footnote in the Hansons' brief in support of their motion for summary judgment suggested that "these facts" made summary judgment in favor of MLF inappropriate and that additional discovery should be had as to MLF's conduct and motivations. The footnote failed to identify any material facts in dispute.

[4] The Hansons repeatedly suggest it was improper for the circuit court to grant MLF's motion for summary judgment. In fact, the circuit court specifically denied MLF's motion for summary judgment.

[5] In rendering its decision the circuit court indicated that the Hansons' attorney "has been quick to point out, Well, judge we can't prove any direct damages …." When a party fails to object to a circuit court's characterization of the underlying facts, that party has waived the right to argue the issue on appeal. ***First Interstate Bank v. Heritage Bank & Trust***, 166 Wis. 2d 948, 954, 480 N.W.2d 555 (Ct. App. 1992). Indeed the Hansons only asserted entitlement to the $1000 statutory damages under 15 U.S.C. § 1692k(a)(2)(A).

applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶7 In determining whether to award statutory damages the circuit court is to consider "the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which the noncompliance was intentional." 15 U.S.C. § 1692k(b)(1). The circuit court remarked that MLF's conduct was not outrageous and that MLF had acted in good faith.[6] It observed that no real damages had been incurred. On reconsideration it further explained that there had been just a technical violation of the disclosure requirements, that the violation would not have made any difference in the way collection was pursued, and that no real harm was done. The circuit court did not want to encourage motions to redress a mere technical violation when no actual damages exist.

¶8 "For *de minimis* or technical violations, some courts refuse to award statutory damages." ***Cox Medical Center***, 408 F.3d at 994. Although the circuit court did not couch its decision in the terms used in 15 U.S.C. § 1692k(b)(1), its

[6] On appeal the Hansons contend that summary judgment was premature because discovery had not been completed and they should have had the opportunity to find out if MLF had committed additional violations. The Hansons did not ask for additional time under WIS. STAT. § 802.08(4), which permits the court, in the proper exercise of its discretion, to stay summary judgment proceedings "or ... make such other order as is just" to permit the opposing party to conduct discovery. The Hansons' suggestion that additional discovery was necessary comes too late on appeal and ignores that judgment was entered on their motion for summary judgment. *See* ***Black v. Metro Title, Inc.***, 2006 WI App 52, ¶15, 290 Wis. 2d 213, 712 N.W.2d 395 (failure to invoke § 802.08(4) precludes claim that circuit court denied further discovery). Only by a footnote in their circuit court brief did the Hansons suggest that "these facts" regarding MLF's conduct made summary judgment inappropriate. The Hansons failed to specify to the circuit court and on appeal what factual disputes exist to preclude summary judgment on the issue of damages.

decision demonstrates consideration of the enumerated factors. The circuit court's desire to avoid suits on mere technical violations is also an appropriate consideration in light of recognition that the Fair Debt Collection Practices Act was not intended to create a "cottage industry for the production of attorney's fees." ***Murphy v. Equifax Check Services, Inc.***, 35 F. Supp. 2d 200, 204 (D. Conn. 1999); *see also* ***Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA***, ___ U.S. ___, 130 S. Ct. 1605, 1620-21 (2010) (vesting the court with discretion to award "additional" damages capped at $1000 is a guard against abusive lawsuits for trivial violations); ***Federal Home Loan Mortgage Corp. v. Lamar***, 503 F.3d 504, 513-514 (6th Cir. 2007) (recognizing a developing cottage industry that does not serve the purposes of the Fair Debt Collection Practices Act). The circuit court properly exercised its discretion in denying statutory damages.

¶9 The cross-appeal challenges the circuit court's determination that MLF violated the Fair Debt Collection Practices Act. In particular MLF seeks a declaration that the Notice of Intent to File Claim for Lien utilized under WIS. STAT. § 779.06(2) is a state court pleading and thereby exempt from the verification and disclosure requirements of the Fair Debt Collection Practices Act. *See* 15 U.S.C. § 1692g(d) ("A communication in the form of a formal pleading in a civil action shall not be treated as an initial communication for purposes of subsection (a) of this section."). We need not address the cross-appeal because there is no judgment against MLF. *See* ***Zizzo v. Lakeside Steel & Mfg. Co.***, 2008 WI App 69, ¶22, 312 Wis. 2d 463, 752 N.W.2d 889. We decide appeals on the narrowest grounds possible. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (holding that a Wisconsin appellate court need not decide an issue if the resolution of another issue is dispositive). This court does not give

advisory opinions. ***Brown v. LaChance***, 165 Wis. 2d 52, 69, 477 N.W.2d 296 (Ct. App. 1991).

¶10 No costs to either party.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.