COURT OF APPEALS
DECISION
DATED AND FILED

January 4, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2941 **Cir. Ct. No. 2009CV9161**

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

JEANINE L. JACKSON, CHEYENNE S. MCKINNEY-JACKSON AND JUDITH JACKSON,

PLAINTIFFS-APPELLANTS,

V.

TOYOTA MOTOR CREDIT CORPORATION AND TOYOTA FINANCIAL SERVICES,

DEFENDANTS-RESPONDENTS,

SELECT RECOVERY, BASS AND MOGLOWSKY, S.C., PENNY GENTGES, JOSHUA BRADY, MELISSA PINGEL, ARTHUR MOGLOWSKY, STEVE MOGLOWSKY, MAURICE MACDONALD, DAVE MCCALL AND DAVID MCCALL,

DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County: THOMAS R. COOPER, Judge. *Affirmed*.

Before Curley, P.J., Fine and Brennan, JJ.

¶1 BRENNAN, J. Jeanine L. Jackson, Cheyenne S. McKinney-Jackson, and Judith Jackson, *pro se*, appeal from an order of the circuit court denying their motion for leave to file a second amended complaint and granting Toyota Motor Credit Corporation and Toyota Financial Services' (collectively "Toyota") motion to dismiss. Because we conclude that the circuit court properly exercised its discretion when it denied the Jacksons' motion for leave to file a second amended complaint and that the circuit court properly concluded that the Jacksons' assertion that Toyota "hired" Select Recovery did not set forth a claim on which relief could be granted, we affirm.

BACKGROUND

¶2 The Jacksons' first amended complaint[1] alleges that Jeanine L. Jackson entered into a retail installment contract with Toyota for the purchase of a 2004 Toyota Solara.[2] On or around April 2007, Jeanine defaulted on the loan. In April 2009, Toyota received a replevin judgment against Jeanine, permitting it to

[1] Because this case comes to us following the circuit court's order granting Toyota's motion to dismiss, we assume the facts in the first amended complaint are true for purposes of appeal. *See* ***Walberg v. St. Francis Home, Inc.***, 2005 WI 64, ¶6, 281 Wis. 2d 99, 697 N.W.2d 36.

[2] In the Jacksons' first amended complaint, they allege that Jeanine purchased the Solara from Toyota in September 2009 and then later defaulted on the loan in April 2007. Because Jeanine could not have defaulted on the loan prior to entering into it, we assume that this is merely a scrivener's error and that Jeanine in fact purchased the Solara at some point prior to the default.

repossess the Solara.[3] *See* ***Toyota Motor Credit Corp. v. Jackson***, No. 2009SC807 (Milwaukee County Circuit Court Apr. 28, 2009).

¶3 In May 2009, employees of Select Recovery, "hired" by Toyota, went to the Jacksons' home to repossess the Solara. A verbal and physical altercation ensued between the Select Recovery employees and the Jacksons. The police were called and the Solara was repossessed.

¶4 In June 2009, the Jacksons, proceeding *pro se*, filed a complaint, asserting claims of negligence, negligent infliction of emotional distress, intentional infliction of emotional distress, and breach of peace against Toyota.[4] In July 2009, the Jacksons filed their first amended complaint, asserting the same claims and adding a claim for conversion against Toyota.

¶5 Toyota subsequently filed a motion to dismiss pursuant to WIS. STAT. § 802.06(2)(a)6. (2007-08)[5] for failure to state a claim on which relief can be granted. More specifically, Toyota claimed as follows:

> The facts alleged in the Amended Complaint do not support any theory of liability against Toyota…. The Amended Complaint does not allege that any employee of Toyota … was present at the time of the altercation detailed

[3] The Jacksons do not mention the replevin judgment in their original complaint or first amended complaint. However, they do take note of the judgment in their brief-in-chief before this court. We take judicial notice of the CCAP records in the replevin action. *See* ***Toyota Motor Credit Corp. v. Jackson***, No. 2009SC807 (Milwaukee County Circuit Court Apr. 28, 2009); *see also* WIS. STAT. § 902.01 (CCAP is an acronym for Wisconsin's Consolidated Court Automation Programs. The online website reflects information entered by court staff.).

[4] The complaint also asserted numerous claims against Select Recovery, its employees, and several additional parties. However, those claims are not at issue on appeal.

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

> in the Amended Complaint. Rather, the Amended Complaint alleges that employees of another company that was hired to take possession of the vehicle securing Plaintiff Jeanine Jackson's obligation to Toyota … engaged in the conflict described in the Amended Complaint.

After receiving Toyota's motion to dismiss, the Jacksons filed a motion for leave to file a second amended complaint. The Jacksons' proposed second amended complaint was attached to the motion.

¶6 At a hearing in September 2009, the circuit court denied the Jacksons' motion for leave to amend and granted Toyota's motion to dismiss. The circuit court held that: (1) the proposed second amended complaint did not respond to Toyota's motion to dismiss, or add any material facts to the first amended complaint; and (2) the assertion in the first amended complaint—that Toyota "hired" Select Recovery—was conclusory and did not sufficiently assert a relationship between Toyota and Select Recovery such that Toyota could be responsible for the actions of Select Recovery and its employees. The Jacksons appeal.

DISCUSSION

¶7 The Jacksons allege that the circuit court erred when it denied their motion for leave to file a second amended complaint and when it granted Toyota's motion to dismiss. We address each motion in turn.

I. The Jacksons' Motion for Leave to File a Second Amended Complaint

¶8 The Jacksons first argue that the circuit court erroneously exercised its discretion when it denied their motion for leave to file a second amended complaint. The Jacksons contend that because they modeled their second amended complaint after an amended complaint drafted by an attorney in an

unrelated Milwaukee County Circuit Court case, the circuit court in this case was required to grant their motion to amend. We disagree.

¶9 WISCONSIN STAT. § 802.09(1) permits a party to "amend the party's pleading once as a matter of course at any time within 6 months after the summons and complaint are filed." Thereafter, as relevant here, § 802.09(1) states that "a party may amend the pleading only by leave of court … and leave shall be freely given … when justice so requires." The Jacksons amended their complaint "once as a matter of course" in July 2009. Accordingly, we turn to whether "justice … requires" they be permitted a second amendment.

¶10 Whether to grant a motion to amend a complaint lies within the circuit court's discretion, ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶12, 239 Wis. 2d 406, 620 N.W.2d 463, and we must affirm the circuit court's exercise of discretion if the circuit court applied the correct legal standard to the facts of record in a reasonable manner, *see* ***id.*** "The circuit court 'in exercising its discretion must balance the interests of the party benefiting by the amendment and those of the party objecting to the amendment.'" ***Id.*** (citation omitted).

¶11 Here, the circuit court denied the Jacksons' motion for leave to file a second amended complaint because it found that the additional facts alleged by the Jacksons in the proposed second amended complaint were "immaterial" and "ha[d] nothing to do with this lawsuit." Furthermore, the circuit court concluded that the Jacksons were "in the same position [with respect to Toyota's motion to dismiss] either way even if [the amendment was] allowed or not allowed." In so holding, the court properly considered the interests of both parties and properly exercised its discretion.

¶12 Before this court, the Jacksons have not demonstrated that the circuit court was wrong in its assessment that the proposed second amended complaint raised no new facts relevant to their legal claims against Toyota or that the proposed second amended complaint was even necessary. *See* ***Collins v. Eli Lilly Co.***, 116 Wis. 2d 166, 204, 342 N.W.2d 37 (1984) (upholding the circuit court's decision to deny the plaintiff's motion to amend the complaint based on the plaintiff's failure to allege new facts or otherwise demonstrate the amendment was necessary). The Jacksons do not point to a single fact or statement in the proposed second amended complaint that distinguishes it legally from the first amended complaint. To the contrary, the bulk of their brief-in-chief focuses on those facts raised in *both* complaints that they believe state a viable claim against Toyota.

¶13 Our review of the first and proposed second amended complaints shows that the only notable addition was the Jacksons' assertion (on multiple occasions) that Select Recovery was Toyota's "agent." However, the bare assertion that Select Recovery was Toyota's "agent," without explaining the extent of the relationship, does not set forth a claim against Toyota. *See* ***Doe 67C v. Archdiocese of Milwaukee***, 2005 WI 123, ¶36, 284 Wis. 2d 307, 700 N.W.2d 180 ("'bare conclusion [does] not fulfill[] a plaintiff's duty of stating the elements of a claim in general terms'") (citation omitted; alterations in ***Doe 67C***).

¶14 Moreover, we reject as irrelevant the Jacksons' argument that the circuit court erroneously exercised its discretion when it denied their motion to amend because the Jacksons modeled their proposed second amended complaint after an amended complaint drafted by an attorney in an unrelated Milwaukee County Circuit Court case. First, in Milwaukee County Circuit Court Case No. 2009CV4420, the case cited by the Jacksons, the amended complaint after which the Jacksons purportedly modeled their proposed second amended complaint was

the plaintiff's first amended complaint, filed within six months of filing the original complaint, as permitted by WIS. STAT. § 802.09(1). Therefore, the circuit court in Case No. 2009CV4420 did not have to determine whether "justice … require[d]" the amendment. Second, even if Case No. 2009CV4420 was identical to this case, a given fact situation may present multiple reasonable results. We have "recognized that a [circuit] court in an exercise of its discretion may reasonably reach a conclusion which another judge or another court may not reach." ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). In other words, it does not matter what another court would do under similar circumstances because we conclude the circuit court properly exercised its discretion here.

II. Toyota's Motion to Dismiss

¶15 Next, the Jacksons argue that the circuit court erred in granting Toyota's motion to dismiss because their allegation that Toyota "hired" Select Recovery sufficiently sets forth a claim for Toyota's vicarious liability for Select Recovery's actions. We disagree.

¶16 A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint and presents a question of law that we review *de novo*. ***Wausau Tile, Inc. v. County Concrete Corp.***, 226 Wis. 2d 235, 245, 593 N.W.2d 445 (1999). "The facts set forth in the complaint must be taken as true and the complaint dismissed only if it appears certain that no relief can be granted under any set of facts that the plaintiffs might prove in support of their allegations." ***Northridge Co. v. W.R. Grace & Co.***, 162 Wis. 2d 918, 923, 471 N.W.2d 179 (1991).

¶17 However, we also note that Wisconsin adheres to a notice pleading philosophy. *See* ***Anderson v. Continental Ins. Co.***, 85 Wis. 2d 675, 683, 271 N.W.2d 368 (1978). And "if 'notice pleading' is to have any efficacy at all, the complaint must give the defendant fair notice of not only the plaintiff's claim but 'the grounds upon which it rests' as well." ***Midway Motor Lodge of Brookfield v. Hartford Ins. Group***, 226 Wis. 2d 23, 35, 593 N.W.2d 852 (Ct. App. 1999) (citation omitted). It is not enough to indicate "'that the plaintiff has a grievance, but sufficient detail must be given so that the defendant, and the court, can obtain a fair idea of what the plaintiff is complaining, and can see that there is some basis for recovery.'" ***Id.*** (citation omitted).

¶18 In other words, a "'bare conclusion [does] not fulfill[] a plaintiff's duty of stating the elements of a claim in general terms.'" ***Doe 67C***, 284 Wis. 2d 307, ¶36 (citation omitted; alterations in ***Doe 67C***). "[W]e will dismiss a complaint if, 'under the guise of notice pleading, the complaint before us requires the court to indulge in too much speculation leaving too much to the imagination of the court.'" ***Id.*** (citation and alteration omitted). A plaintiff must do more than "contend that the requisite facts will be 'supplied by the discovery process.'" ***Id.*** (citation omitted).

¶19 The Jacksons' claims against Toyota are based upon the altercation that occurred in May 2009 between the Jacksons and the Select Recovery employees sent to repossess the Solara. The Jacksons do not allege that Toyota or its employees were present at the time. Instead, the Jacksons' claims against Toyota are based upon a theory of vicarious liability under the doctrine of respondeat superior.

¶20 "Vicarious liability is 'liability that a supervisory party … bears for actionable conduct of a subordinate or associate … based on the relationship between the two parties.'" ***James Cape & Sons Co. ex rel. Polsky v. Streu Constr. Co.***, 2009 WI App 144, ¶9, 321 Wis. 2d 522, 775 N.W.2d 277 (citations and brackets omitted). "Courts impose this type of liability only where the principal has control or the right to control the physical conduct of the agent such that a master/servant relationship exists." ***Id.*** A party hiring an independent contractor will not be held vicariously liable for the torts of the independent contractor in his or her service because the hiring party has no right of control over the independent contractor's actions. *See* ***Kerl v. Dennis Rasmussen, Inc.***, 2004 WI 86, ¶24, 273 Wis. 2d 106, 682 N.W.2d 328; ***Arsand v. City of Franklin***, 83 Wis. 2d 40, 49, 264 N.W.2d 579 (1978).

¶21 The Jacksons' first amended complaint merely alleges that Toyota "hired" Select Recovery and does not set forth any facts demonstrating that Toyota had control over Select Recovery's actions or that a servant/master relationship existed between the two. Moreover, the complaint leaves open the question of whether Select Recovery was Toyota's "servant" or an "independent contractor."[6] Accordingly, the complaint "'leav[es] too much to the imagination of the [circuit] court,'" requires that the circuit "'court [] indulge in too much speculation,'" and

[6] The Jacksons' assertion in the proposed second amended complaint that Select Recovery and its employees were Toyota's "agents" does not save this claim because while "a servant is necessarily an agent, … an agent is not invariably a servant." *See* ***Arsand v. City of Franklin***, 83 Wis. 2d 40, 50, 264 N.W.2d 579 (1978). In other words, an assertion of agency alone does not properly assert a claim of a servant/master relationship necessary to establish vicarious liability. *See* ***id.***

therefore, does not set forth a claim on which relief against Toyota can be granted.[7] *See* ***Doe 67C***, 284 Wis. 2d 307, ¶36 (citation omitted).

¶22 We are aware that the Jacksons are proceeding *pro se*, and that we are to liberally construe *pro se* pleadings. *See* ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 520, 335 N.W.2d 384 (1983). However, here, even if we liberally construe the facts set forth by the Jacksons, they do not state a claim for vicarious liability against Toyota because they failed to set forth facts that indicate that Toyota had control over the actions of Select Recovery. Although the first amended complaint's allegation that Toyota "hired" Select Recovery perhaps demonstrates an agency relationship between the two, it does not demonstrate the master/servant relationship necessary to plead vicarious liability. *See* ***Arsand***, 83 Wis. 2d at 50 ("[A] servant is necessarily an agent, but an agent is not invariably a servant.").

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[7] In support of their argument to the contrary, the Jacksons rely on ***Williamson v. Fowler Toyota, Inc.***, 956 P.2d 858 (Okla. 1998), for the proposition that a lender can be held liable for the actions of an independent contractor hired by the lender to repossess secured property. *See* ***id.*** at 859. However, the Oklahoma Supreme Court's decision was based upon an Oklahoma state statute and is not determinative in an examination of Wisconsin law. *See* ***id.***

¶23 FINE, J. (*dissenting*). I respectfully dissent because, in my view, the first amended complaint's use of the word "hired" is broad enough to encompass the concepts that pass muster at this point, especially in light of the fact that the lead plaintiff is *pro se*, apparently marginally lettered, and has, in her complaint's narrative, set out facts that, if true, show that she was treated improperly and perhaps unlawfully. As the Majority recognizes, WIS. STAT. RULE 802.02(1)(a) merely requires "[a] short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief." In my view, the first amended complaint passes muster under the Rule. It may very well be that this case can be dismissed on summary judgment for many of the reasons the Majority gives. But this is not summary judgment. The amended complaint here is lengthy and gives notice to the defendants of "the transaction or occurrence or series of transactions or occurrences out of which the claim arises." Accordingly, without addressing the circuit court's denial of the plaintiffs' motion to further amended their complaint, I would reverse.