

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 18, 2003

Cornelia G. Clark
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. 02-3016-FT
STATE OF WISCONSIN**

Cir. Ct. No. 02-SC-2941

**IN COURT OF APPEALS
DISTRICT II**

ALASKAN FIREPLACE, INC.,

PLAINTIFF-RESPONDENT,

V.

DIANE EVERETT AND GARY EVERETT,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment and an order of the circuit court for Racine County: CHARLES H. CONSTANTINE, Judge. *Affirmed.*

¶1 SNYDER, J.¹ Diane Everett and Gary Everett (the Everetts) appeal from a judgment in favor of Alaskan Fireplace, Inc. and an order denying their motion for reconsideration. The Everetts argue that Alaskan Fireplace was subject

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

to the Wisconsin Consumer Act (WCA) and is liable for WIS. STAT. § 422.303 violations. We disagree and affirm the judgment and order of the trial court.

FACTS

¶2 Alaskan Fireplace is in the business of selling and installing fireplaces. On March 17, 2001, the Everetts visited Alaskan Fireplace's store at the direction of their home builder, Norm Keeker, and received a proposal for the installation of two fireplaces. The Everetts later signed the proposal.

¶3 The Everetts never discussed financing terms with Alaskan Fireplace. The proposal signed by the Everetts states: "Payment to be made as follows: payment net 30 days – 1.5% monthly service charge for overdue invoices." Alaskan Fireplace intended for payment within thirty days of the installation of the fireplaces with the 1.5% monthly charge intended to dissuade late payment.

¶4 On or about April 19, 2001, Alaskan Fireplace completed the rough installation of the fireplaces. Both the Everetts and Keeker instructed Alaskan Fireplace to send its invoice to Keeker; Alaskan Fireplace did so on April 20, 2001. Keeker did not pay the initial \$3,032.00. In fact, Keeker quit as the Everetts' builder shortly thereafter when the Everetts discovered several framing mistakes constituting serious structural defects.

¶5 On May 22, 2001, Alaskan Fireplace sent a second invoice to the Everetts via certified mail. This invoice included finance charges of \$54.58 for a total of \$3,086.58. Alaskan Fireplace made numerous phone calls to Diane Everett during the summer of 2001 seeking payment. The Everetts refused to pay Alaskan Fireplace until they worked out the problems with Keeker. The Everetts

never mentioned any problems with the fireplace installation or the late payment charges yet never paid the outstanding bill.

¶6 On June 19, 2002, Alaskan Fireplace filed a small claims action against the Everetts, seeking payment for the fireplaces and related equipment, in addition to the 1.5% monthly charge on the overdue invoice. The Everetts counterclaimed alleging that Alaskan Fireplace violated the WCA “by failing to give the written disclosures” required by WIS. STAT. § 425.303 and by “falsely advertising (through omission) that the agreement for purchase of the fireplace and installation services would subject defendants to a finance charge.” A bench trial was held on September 16, 2002; at the close of testimony, the trial court allowed the Everetts to amend their counterclaim to allege a federal truth in lending act violation.

¶7 The trial court ultimately dismissed the Everetts’ counterclaims, concluding that the transaction at issue was not a consumer credit transaction. The trial court held:

[T]he question is whether or not ... there is a consumer credit transaction here and consumer credit sale But “Consumer credit sale means a sale of goods, services or an interest in land to a customer on credit where the debt is payable in installments or financial charge is imposed...” And clearly, the debt as called for by the contract is not one that was supposed to be paid in installments....

Section 421.301(20) defines finance charge. “Finance charge means the sum of all charges payable directly or indirectly by the customer as an incident to or as a condition of the extension of credit whether paid or payable” et cetera, et cetera, et cetera. So we have arguably a finance charge but it has to be as a condition of the extension of credit.

Section 14 defines credit, and it “means the right granted by a creditor to a customer to defer payment of debt, to incur debt and defer its payment or to purchase

goods, service or interests in land on a time price basis.” And that’s where I think the argument fails. This is a cash transaction. There was never any intent by Alaskan Fireplace to extend any credit to the Everetts, and in fact, I think you could argue it’s a form of finance charge but it’s not incident to or as a condition of the extension of credit. In fact, it’s incident or extension of nonpayment as required and I think if I took the consumer credit and accepted the argument of the Everetts, that means that there is no penalty as it were for nonpayment. In essence, the consumer has the right simply not to pay in cash transactions because there is not going to be any consequences. So in terms of the counterclaim as amended the counterclaims are dismissed.

¶8 The trial court awarded Alaskan Fireplace \$2,986.58 on its claim against the Everetts for the fireplaces and installation, as well as a 1.5% monthly charge from May 23, 2001, the date the invoice was delivered to the Everetts. On October 18, 2002, the Everetts filed a motion for reconsideration which was denied. The Everetts appeal.

DISCUSSION

¶9 The Everetts argue that Alaskan Fireplace is subject to the WCA and is therefore liable for violations of WIS. STAT. § 422.303. We disagree.

¶10 This matter involves the interpretation of the WCA, a question of statutory interpretation we review independently. *See State v. Isaac J.R.*, 220 Wis. 2d 251, 255, 582 N.W.2d 476 (Ct. App. 1998). However, the trial court’s factual findings must be upheld unless clearly erroneous. WIS. STAT. § 805.17(2).

¶11 WISCONSIN STAT. § 422.303 states:

(1) In a consumer credit sale other than one pursuant to an open-end credit plan or a credit sale in which the only finance charge is a prompt payment discount as described in s. 422.201(8), the customer’s obligation to pay the total of payments shall be evidenced by a single instrument, which shall include, in addition to the other disclosures

required by this subchapter, the signature of the seller, the signature of the customer, the date on which it was signed and a description of any property the customer transfers to the seller as a trade-in.

(2) The terms of such instrument evidencing a consumer credit sale shall be set forth in not less than 8-point standard type, or such similar type as is prescribed in rules adopted by the administrator, to the extent that larger type is not specifically required by chs. 421 to 427.

(3) Except as provided in sub. (4), every writing evidencing the customer's obligation to pay under a consumer credit transaction other than one pursuant to an open-end credit plan or a motor vehicle consumer lease, shall contain immediately above or adjacent to the place for the signature of the customer, a clear, conspicuous, printed or typewritten notice in substantially the following language:

NOTICE TO CUSTOMER

(a) DO NOT SIGN THIS BEFORE YOU READ THE WRITING ON THE REVERSE SIDE, EVEN IF OTHERWISE ADVISED.

(b) DO NOT SIGN THIS IF IT CONTAINS ANY BLANK SPACES.

(c) YOU ARE ENTITLED TO AN EXACT COPY OF ANY AGREEMENT YOU SIGN.

(d) YOU HAVE THE RIGHT AT ANY TIME TO PAY IN ADVANCE THE UNPAID BALANCE DUE UNDER THIS AGREEMENT AND YOU MAY BE ENTITLED TO A PARTIAL REFUND OF THE FINANCE CHARGE.

(4) The notice described in sub. (3)(a) is not required when no terms appear on the reverse side of the writing. The notice described in sub. (3)(d) is not required with respect to a consumer credit transaction secured by a first lien mortgage or equivalent security interest on real property, the original term of which is 10 years or more.

(5) The creditor shall retain a copy of such writing evidencing a consumer credit transaction, other than one pursuant to an open-end credit plan, and of any proposal for a consumer credit transaction which the merchant has required or requested the customer to sign and which the customer has signed during contract negotiations, for a

period of one year after the last payment scheduled under the transaction, or one year after the transaction has been repaid in full, whichever is sooner. The creditor shall supply the customer with copies of such documents upon any demand of the customer made within such period; one copy shall be furnished at no charge; and subsequent copies shall be furnished on the condition that the customer pay the creditor's reasonable costs of preparing and forwarding the copy. Copies supplied under this subsection are in addition to those copies required by s. 422.302.

(6) A violation of this section is subject to s. 425.304.

Section 422.303 applies only to “consumer credit transactions.” WIS. STAT.

§ 422.102. A “consumer credit transaction” is defined as

a consumer transaction between a merchant and a customer in which real or personal property, services or money is *acquired on credit* and the customer's obligation is payable in installments or *for which credit a finance charge is or may be imposed*, whether such transaction is pursuant to an open-end credit plan or is a transaction involving other than open-end credit. The term includes consumer credit sales, consumer loans, consumer leases and transactions pursuant to open-end credit plans. (Emphasis added.)

WIS. STAT. § 421.301(10). A “consumer credit sale” is “a sale of goods, services or an interest in land to a customer on credit where the debt is payable in installments or a finance charge is imposed.” Sec. 421.301(9).

¶12 There was no “consumer credit transaction” here. The Everetts did not acquire personal property, services or money on credit; “credit” is defined as “the right granted by a creditor to a customer to defer payment of debt.” WIS. STAT. § 421.301(14). Alaskan Fireplace did not grant the Everetts permission to defer payment of their debt. As the trial court found, “[t]his [was] a cash transaction. There was never any intent by Alaskan Fireplace to extend any credit”

¶13 Furthermore, the late payment fee assessed against the Everetts was not a “finance charge.” A “finance charge” is “the sum of all charges, payable directly or indirectly by the customer as an incident to or as a condition of the extension of credit.” WIS. STAT. § 421.301(20). The trial court found that the late payment charge was not incident to or as a condition of an extension of credit. Again, the trial court’s factual findings must be upheld unless clearly erroneous. WIS. STAT. § 805.17(2). These findings are not clearly erroneous.

¶14 WISCONSIN ADMIN. CODE § DFI-Bkg 80.07 supports this position:

A delinquency or default charge is not a finance charge within the meaning of s. 421.301 (20), Stats. if imposed for actual unanticipated late payment, delinquency, default or other such occurrence. However, when a merchant’s billings are not paid in full within a stipulated time period and under such circumstances the merchant does not, in fact, regard such accounts in default (For example, by customarily failing to institute collection activity or by continuing to extend credit) and imposes charges periodically for delaying payment of such accounts from time to time until paid, the charge so imposed comes within the definition of a finance charge and the credit so extended comes within the definition of open-end credit.

The late payment charge is not a “finance charge” because it was imposed for actual unanticipated late payment and because Alaskan Fireplace viewed the account as in default. The trial court found:

[I]n this particular case a contract [was] entered into between the Everetts and Alaskan Fireplace [C]learly the payment was due net 30 days.... At the time that the fireplace was installed, the Everetts got into a disagreement with their builder and that is a draw was requested and they had a structural engineer look at the house. The structural engineer said there [are] problems with framing.... [T]he Everetts wouldn’t authorize the draw and as a consequence Alaskan Fireplace did not get paid. They continued to request payment. They filed a lien and they never got payment. They never got any complaints. They never got anything. They just didn’t get paid.

These findings are not clearly erroneous. Thus, the late payment charge is not a “finance charge.”

¶15 The Everetts also argue that they had an “open-end credit plan” with Alaskan Fireplace. Under WIS. STAT. § 421.301(27)(a), an “open-end credit plan” exists only when “[t]he customer has the privilege of paying the balance in full or in installments.” The Everetts did not have such a privilege; payment was required in full within thirty days. Similarly, under WIS. ADMIN. CODE § DFI-Bkg 80.07, “open-end” credit exists only when a merchant imposes periodic late charges and when the merchant does not regard the account in default. Alaskan Fireplace regarded the Everetts’ account in default.

¶16 The Everetts further attempt to characterize the late payment charge as a “carrying charge” and thus a “finance charge” under WIS. STAT. § 421.301(20). “Carrying charge” is defined as a charge “made by a creditor, in addition to interest, for carrying installment credit.” BLACK’S LAW DICTIONARY 205 (7th ed. 1999). The late payment fee was not a charge, in addition to interest, for carrying installment credit; in fact, there was no extension of installment credit here. The trial court made a specific factual finding that this was a cash transaction. Again, this finding is not clearly erroneous.

CONCLUSION

¶17 In the instant case, Alaskan Fireplace was not subject to the WCA and the transaction between it and the Everetts was not a consumer credit transaction. We therefore affirm the judgment and order of the trial court.

By the Court.— Judgment and order affirmed.

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

