

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 19, 2004

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. 03-0313
STATE OF WISCONSIN**

Cir. Ct. No. 01CV000598

**IN COURT OF APPEALS
DISTRICT IV**

JANESVILLE & SOUTHEASTERN RAILWAY COMPANY,

PLAINTIFF-RESPONDENT,

v.

**GARDNER REALTY CORPORATION AND WISCONSIN &
SOUTHERN RAILROAD COMPANY,**

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Rock County:
JAMES E. WELKER, Judge. *Reversed and cause remanded with directions.*

Before Dykman, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Gardner Realty Corporation and Wisconsin & Southern Railroad Company (collectively referred to as Gardner Realty) appeal a money judgment against it for breach of contract. The issues relate to sufficiency of the evidence and the authority to award attorney fees. Although we conclude

that some of the award is supported by the evidence, some of it is not, and, therefore, we reverse and remand with directions to amend the judgment and consider costs on a motion.

¶2 Gardner Realty first argues that the complaint filed by Janesville & Southeastern Railway Company (the Railway Company) did not state a claim for one of the damage theories the Railway Company pursued at trial. The complaint alleged that the Railway Company sold real estate known as “the Roundhouse” to Gardner Realty;¹ that the contract of sale allowed the Railway Company to use the property rent-free for two years; that the Railway Company had obtained a buyer for its locomotives stored there; and that Gardner Realty then agreed to allow removal of the locomotives only on the condition of a further payment to it. The complaint further alleged that Gardner Realty also breached the contract by removing one of the Railway Company’s locomotives from the Roundhouse building without the Railway Company’s consent or proper winterizing or protection from the elements; and by changing the locks on the Roundhouse building, thereby denying the Railway Company’s contractual right of access to the building.

¶3 Whether a complaint states a claim is a question of law. *Paskiet v. Quality State Oil Co.*, 164 Wis. 2d 800, 805, 476 N.W.2d 871 (1991). Gardner Realty argues that the complaint failed to give it adequate notice that the Railway Company would seek damages for impaired ability to market its locomotives. We disagree. This argument is directed at the specificity with which particular items

¹ This reference to “Gardner Realty” is only to Gardner Realty, not the appellants collectively.

of damage must be pleaded. We conclude that the complaint gave Gardner Realty clear notice that the Railway Company sought damages for impaired access to the building. Under notice pleading concepts, there is no legal requirement that the complaint spell out precisely the way in which impaired access caused damage to a plaintiff. As the Railway Company points out, an inquiry into the precise nature of damages would be proper in discovery.

¶4 Gardner Realty next argues that the evidence at trial did not support the court's award of damages for impairment of the Railway Company's ability to market the locomotives. Gardner Realty challenges the evidence for several steps in the logical chain of this theory. When determining the sufficiency of the evidence, we view the evidence in a light most favorable to the verdict and affirm unless there is no credible evidence to sustain the verdict. WIS. STAT. § 805.14(1) (2001-02).²

¶5 Gardner Realty argues that there was insufficient evidence to prove it breached the contract by impeding the Railway Company's access to the property to conduct inspections of the locomotives with potential buyers, because the Railway Company did not put on evidence that it ever asked for such permission. We disagree. The evidence included an exchange of correspondence between the parties in which Gardner Realty imposed certain conditions for access to the property that were not included in the contract, and then ceased responding to efforts at communication. Under these circumstances, in which Gardner Realty had already imposed these conditions in breach of the contract, the Railway

² All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

Company need not have produced evidence that it made a specific request for access in connection with a potential purchaser.

¶6 Gardner Realty argues there was insufficient evidence that the lack of access impaired the Railway Company's ability to conduct inspections with potential buyers. However, the Railway Company's witness who was involved in marketing the locomotives, Jack Wheelihan, explained how access to the property was necessary to conduct full inspections. Gardner Realty argues there was insufficient evidence that the lack of ability to inspect the locomotives reduced buyer interest in them. Again, however, Wheelihan testified that in his experience potential purchasers of locomotives would want to conduct such inspections.

¶7 Gardner Realty argues there was insufficient evidence that, even if inspections had been possible, any buyer would have been willing to pay more than the \$135,000 that was received for all five locomotives together. It argues that the Railway Company failed to specifically identify any such buyer that existed during the time the locomotives were for sale. Once more we disagree. It is clear from Wheelihan's testimony that the process of negotiating with potential buyers was impeded by his inability to offer an inspection. It is unreasonable to expect that there would be a specific buyer who intended to buy, and had negotiated a specific price, without having yet inspected the locomotives. Although the eventual purchaser did indeed purchase without a full inspection, he did so at a price Wheelihan described as "equivalent to scrap values."

¶8 Finally, Gardner Realty argues that the evidence did not support a finding that the Railway Company could have obtained an additional \$50,000 for the locomotives. However, Wheelihan testified that the fair market value of the five locomotives totaled nearly \$500,000, and that he believed he would have been

able to obtain those prices if access had not been impeded. The circuit court rejected that figure as too high, but concluded that the Railway Company could have obtained “at least \$50,000” more, and awarded damages in that amount. Gardner Realty seemingly contends that the circuit court had to either accept the full \$500,000 valuation or conclude there was no evidence of fair market value. However, credibility judgments do not always involve a take-it or leave-it choice. Here, the circuit court obviously found that Wheelihan’s value testimony was credible enough to be given some weight, but also that it was exaggerated to some extent. The phrase “at least” is significant here, because it indicates that the court conservatively awarded an amount at the low end of what it believed an unimpeded sale might have produced. We conclude the evidence is sufficient to support the award.

¶9 Gardner Realty raises other issues. It argues that the court erred by awarding \$9,900 in interest. We agree. The court found that Gardner Realty breached the contract by interfering with the removal of the locomotives from the property after the sale had been negotiated. The court appeared to find that Gardner Realty had thereby forced the Railway Company to escrow \$108,000 to cover claims Gardner Realty intended to make against the Railway Company, and that the Railway Company was now entitled to interest on that money for a period from when Gardner Realty’s interference began. Gardner Realty argues that there is no evidence that any money was placed in escrow or, if it was, no evidence that it was placed in a non-interest-bearing account. We agree. The Railway Company has not directed our attention to any evidence showing that money was placed in escrow or, more importantly, showing that money was placed in a non-interest-bearing escrow account. The Railway Company argues that the court’s award was on a broader basis, namely, for interest for the *entire* delay of the sale

that was attributable to Gardner Realty's breaches. However, this is not a reasonable reading of the court's decision. Therefore, we reverse the \$9,900 interest award.

¶10 Gardner Realty argues that the court erred by awarding \$8,000 for damage to one locomotive's batteries caused by Gardner Realty's moving the locomotive out of the roundhouse and storing it outside. Gardner Realty argues that Clint Jones, the purchaser of that locomotive, was the only witness with personal knowledge of the batteries' condition. We agree. Jones testified that the batteries were functional. It is true that Wheelihan testified that the batteries were "pretty well ruined," but Wheelihan also admitted on recross-examination that he had not personally seen the locomotive during the relevant time period. Accordingly, the only testimony in the record on this topic from a person with personal knowledge of the batteries during the pertinent time is Jones.

¶11 Finally, Gardner Realty argues that the court erred by awarding \$25,000 for attorney's fees. The award was for legal fees incurred by the Railway Company's attempts to force Gardner Realty to comply with the contract. The circuit court regarded this as damages caused by the breach of the contract. Gardner Realty argues that there was no legal basis to award attorney's fees in a manner contrary to the usual "American Rule," which provides that each party pay its own legal fees. The Railway Company's only response to this argument is that the award was authorized by the parties' stipulation. The relevant provision of that stipulation stated: "The issue of whether the Plaintiff is entitled to costs and expenses associated with having to bring this Motion and any amount thereof will be addressed as an issue before the Court in connection with a final disposition of this case." We conclude that this provision does not authorize any award, but merely states that the issue of whether to make an award is being deferred.

Furthermore, the phrase “costs and expenses” does not ordinarily include attorney fees, and is not specific enough to be read as authorizing such an award in derogation of the usual rule. In the absence of any proffered legal theory supporting the award, we conclude that the award must be reversed. At the same time, we note that even without a stipulation the court may make an award of up to \$50 costs on a motion, under WIS. STAT. § 814.07. We remand to allow the court an opportunity to address that issue.

¶12 In summary, we affirm the award of \$50,000 for interference in the marketing of the locomotives, but we reverse the awards of \$9,900 for interest, \$8,000 for batteries, and \$25,000 for attorney’s fees. We remand for the circuit court to consider the award of costs on the injunction motion, and to enter an amended judgment reflecting our decision. No costs on this appeal.

By the Court.—Judgment reversed and cause remanded with directions.

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

