

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 1, 2011

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. 2010AP1807

Cir. Ct. No. 2007CV113

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

CONDOR CAPITAL CORPORATION,

PLAINTIFF-RESPONDENT,

V.

ROBERT LANSING,

DEFENDANT-APPELLANT,

JOLENE LANSING,

DEFENDANT.

APPEAL from an order of the circuit court for Shawano County:
JAMES R. HABECK, Judge. *Affirmed in part; reversed in part and cause
remanded.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Robert Lansing appeals an order denying his motion to reopen a replevin judgment. He argues that the judgment is void for two reasons: (1) Condor Capital Corporation failed to provide all of the notices listed in WIS. STAT. § 425.205(1g)(a) (2009-10);¹ and (2) the action was not properly venued in Shawano County. We conclude that WIS. STAT. § 425.205(1g) does not apply. However, the court improperly denied the motion to vacate the judgment based on the venue issue because an evidentiary hearing was required to provide a factual basis to resolve the venue issue.

BACKGROUND

¶2 Robert and Jolene Lansing purchased a vehicle in Pennsylvania using credit granted by Condor Capital. In 2004, the Lansings defaulted on payments and, in 2006, Condor sent a notice of default and right to cure letter to the Lansings' then address in Shawano, Wisconsin. The Lansings and Condor then reached a payment agreement and, beginning in December 2006, the Lansings made a series of payments, each with an address located in Madison, Dane County, Wisconsin. The Lansings also received written statements from Condor at their Madison address.

¶3 Nonetheless, when the Lansings again missed payments, Condor filed a lawsuit in Shawano County naming Robert and Jolene Lansing as defendants. Condor's process server was unable to locate the Lansings at the Shawano address and was told by a neighbor that the Lansings had moved "a couple of months ago." Condor then filed an amended summons that was mailed

¹ All references to the Wisconsin Statutes refer to the 2009-10 version unless otherwise noted.

to the Lansings, indicating a Shawano address for Robert and a Pennsylvania address for Jolene, and the summons was published in a Shawano newspaper. After the Lansings failed to answer, Condor obtained a default judgment.

¶4 The Lansings learned of the judgment when their car was taken and they were sued for a deficiency in Dane County. The Lansings then filed a motion to reopen the Shawano judgment and the Dane County action was stayed pending resolution of the motion. Condor opposed reopening the replevin judgment, arguing that the mailed summons had never been returned to its attorney and that it had numerous difficulties trying to find the Lansings. The circuit court focused on whether Condor should be penalized for any wrongdoing, and whether there was proper service and actual notice. It concluded that Condor made reasonable efforts to locate the Lansings and found no evidence that Condor “really knew that Mr. Lansing was in Madison.” The court observed that “apparently the vehicle was not actually there [the Shawano County address]” and found that Robert Lansing “did reside somewhere else,” although the court did not specify that Lansing resided outside of Shawano County at that time.

DISCUSSION

¶5 Condor’s failure to provide some of the notices listed in WIS. STAT. § 425.205(1g)(a) does not render the replevin judgment void. That statute applies only when the creditor takes possession of a motor vehicle under WIS. STAT. § 425.206(1)(d), which only applies when the merchant avails itself of “self-help.” Condor indicates that it did not utilize the self-help option, and Lansing’s reply brief does not contradict that statement, in effect conceding the point. Rather, Lansing argues that Condor was statutorily required to provide the notices listed under § 425.205(1g) based on the requirements of WIS. STAT. § 425.104. That

argument was raised for the first time in the Lansings' reply brief. We do not consider issues raised for the first time on appeal, see *Terpstra v. Soiltest Inc.*, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974), and particularly when an argument is made for the first time in a reply brief. See *Northwest Wholesale Lumber v. Anderson*, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995).

¶6 However, the court erred by denying the Lansings' motion based on improper venue without conducting an evidentiary hearing. In a consumer action, a defect as to venue is a jurisdictional defect. See *Kett v. Community Credit Plan*, 228 Wis. 2d 1, 13 n.12, 596 N.W.2d 786 (1999). The circuit court's focus on Condor's knowledge of the Lansings' whereabouts and its efforts to serve them mistakenly equates personal jurisdiction with appropriate venue. The consumer act requires an action to be brought in a proper venue. To obtain venue in Shawano County, the customer must reside there or the vehicle must be located there. See WIS. STAT. § 421.401. While due diligence to locate a defendant can justify a plaintiff's service by publication, the consumer act makes no exception to the venue requirement. Condor's knowledge or lack of knowledge of the Lansings' correct address is irrelevant.

¶7 Robert Lansing submitted an affidavit with his motion to vacate the default replevin judgment stating that he received a notice of the right to cure and other written statements from Condor at his Madison address. The affidavit implied, but did not directly state, that neither of the Lansings resided in Shawano County and that the vehicle was not in Shawano County at the time the action was commenced. The Lansings' attorney stated that Robert was available to testify if the court found any gap in the affidavit. Because the court focused on issues that relate to service of process instead of venue, the court made its ruling without conducting an evidentiary hearing. On the state of the record at this time, we

cannot definitively say whether either of the Lansings resided in Shawano County or where the vehicle was located at the time the action was commenced. Although the court found that the vehicle “apparently” was not “there” [the specific Shawano County residence] and suggested that the Lansings were in Madison, it did not take testimony or make conclusive findings to resolve the venue issue. Therefore, we remand the matter to the circuit court for an evidentiary hearing and findings as to where the Lansings resided and where the vehicle was located at the time the action was commenced.

By the Court.—Order affirmed in part; reversed in part and cause remanded. No costs on appeal.

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

