

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 24, 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. 03-1489
STATE OF WISCONSIN**

Cir. Ct. No. 02CV000677

**IN COURT OF APPEALS
DISTRICT III**

GARON INDUSTRIES INTERNATIONAL, INC.,

PLAINTIFF-RESPONDENT,

V.

KELLEY SUPPLY, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County:
PATRICK M. BRADY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Kelley Supply, Inc., appeals a judgment awarding Garon Industries International, Inc., \$17,251.41 plus interest and costs as payment for vegetables Garon shipped to Kelley. At the time this action was filed, Kelley had commenced another action against Garon and its officers alleging a violation of the Wisconsin Fair Dealership Law, defamation and tortious interference with

contracts. In the other action, Garon counterclaimed alleging fraud, misrepresentation, conversion, unfair trade practices, trade secret and copyright violations, false advertising and breach of contract. Kelley argues that (1) the trial court should have dismissed this collection action under WIS. STAT. § 802.06(2)(a)10¹ because of the other pending action; (2) the trial court improperly exercised its discretion when it refused to consolidate the actions; (3) Garon's claim should have been dismissed because Garon failed to provide Kelley with a notice of default as required in the contract; and (4) the summary judgment was based on an incorrect assertion that Kelley admitted it owed Garon under the invoices and the trial court erroneously refused to consider Kelley's affirmative defenses of setoff and/or recoupment. We reject these arguments and affirm the judgment.

¶2 The trial court properly denied the motion to dismiss pursuant to WIS. STAT. § 802.06(2)(a)10 based on the other action pending. The trial court may dismiss an action when there is another action pending between the same parties for the same cause. *See Regal Ware, Inc. v. TSCO Corp.*, 207 Wis. 2d 538, 683 n.3, 558 N.W.2d 679 (Ct. App. 1996). The two actions have some overlapping parties and partially involved the same contract, but the other action also involves other parties and entirely unrelated claims and counterclaims. The trial court correctly concluded that this simple collection action between the two corporate entities was not sufficiently related to the other action to justify dismissal under § 802.06(2)(a)10.

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶3 The trial court also properly exercised its discretion when it refused to consolidate the actions. See *Fire Ins. Exch. v. Basten*, 202 Wis. 2d 74, 95, 549 N.W.2d 690 (1996). The discretionary decision was based on an appropriate view of the facts and law. The court reviewed the pleadings and determined that the matters were not closely related and did not involve common questions of fact or law. Resolution of this lawsuit would have no impact on any issues in the other lawsuit. The court reasonably concluded that resolving the collection action in a separate proceeding promoted judicial economy.

¶4 The trial court correctly concluded that the contract did not require Garon to provide Kelley with a notice of default. Construction of a contract is a question of law we decide without deference to the trial court. *Kailin v. Armstrong*, 2002 WI App 70, ¶18, 252 Wis. 2d 676, 643 N.W.2d 132. While the Distributor Agreement required a notice of default and set up a procedure for resolving some disputes, the requirement to pay on the invoices is governed by a different provision. The contract required Kelley to “promptly pay for the products in accordance with the terms upon invoice from Garon.” The invoices required payment within thirty days. Kelley’s proposed construction of the agreement to require a notice of default and ninety days to cure would be inconsistent with the terms of the contract that require prompt payment in accordance with the invoices.

¶5 Kelley argues that the circuit court incorrectly stated that Kelley admitted owing Garon for the goods delivered. Kelley contends that it did not owe Garon because it was allowed to withhold payment as a setoff against the damages that Kelley alleges in the other lawsuit. This argument is merely a matter of semantics. Kelley admitted that Garon delivered vegetables and that it had not paid the invoices for those shipments. Whether Garon owes Kelley damages on

any of its other claims will be litigated in the other lawsuit. The prospect of having a setoff or recoupment does not contradict the trial court's finding that Kelley has admitted to all of the facts necessary to support judgment on the invoices. The trial court's decision does not deny Kelley any right to present evidence of Garon's alleged wrongdoing. It merely requires that the evidence be presented in the other forum.

By the Court.—Judgment affirmed.

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

