COURT OF APPEALS
DECISION
DATED AND FILED

January 21, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1888 **Cir. Ct. No. 02SC017310**

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

DOUGLAS KATERINOS,

PLAINTIFF-APPELLANT,

V.

CHASE BANKCARD SERVICES, INC.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: KITTY K. BRENNAN, Judge. *Affirmed.*

¶1 FINE, J. Douglas Katerinos appeals the trial court's order dismissing his complaint and denying his motion for leave to re-plead. We affirm.

I.

¶2 In June of 2002, Katerinos filed a small-claims action under WIS. STAT. ch. 799 against Chase Bankcard Services, Inc. Katerinos's complaint alleged

that Chase Bankcard "entered into a contract, and that, pursuant thereto, [Chase Bankcard] obtained services and monies from [Katerinos], and that [Katerinos] is the holder of said contract." The complaint alleged the contract to be one by which "open-ended credit services are offered and obtained by consumers." Katerinos did not, however, identify the transaction or transactions about which he complained. He sought $3,550 in damages. Following Chase Bankcard's answer, a hearing was held before a court commissioner, who dismissed Katerinos's complaint. Katerinos then sought a circuit-court trial, *see* WIS. STAT. § 799.207(3), and demanded a trial by jury, *see* WIS. STAT. § 799.21(3).

¶3 In circuit court, Chase Bankcard moved to dismiss Katerinos's complaint, arguing, among other things, that the "complaint fails to specify how or why Chase is indebted to him." Attached to the motion was an affidavit executed by Chase Bankcard's lawyer, who averred that Katerinos had testified at the small-claims hearing that he had purchased a lap-top computer in January or February of 1996 using his Chase Bankcard credit card, and, when the computer was not as he thought it should be, sought to charge the purchase price back to the Chase Bankcard approximately one month later.

¶4 Almost eight months after he filed his small-claims summons and complaint, Katerinos filed a motion for leave to amend his complaint in order to raise "new theories." The proposed amended complaint was attached to Katerinos's motion. Nine pages long, it alleged: violations of various federal and state consumer-protection laws, breaches of contract, and defamation. It, too, did not allege any facts identifying the underlying transactions, except a passing undated reference to his having "purchased a defective computer using [Chase Bankcard]'s extension of credit," various alleged but unspecified billing errors, an alleged failure to credit Katerinos's account with what the proposed complaint characterizes as

"reward points," and five instances of otherwise unspecified alleged breaches of contract in connection with Katerinos's "five transactions on or about April, 2001, with a retailer." The "defamation" claim did not specify "the particular words complained of," as is required by WIS. STAT. RULE 802.03(6).

¶5 The trial court dismissed Katerinos's original complaint and denied him leave to re-plead because, as the trial court told Katerinos at the hearing on his motion to file an amended complaint, he had not "pled any facts from which any relief can be granted to you, and even your proposed amended complaint fails in that regard." In response, Katerinos asked the trial court to "permit" him "to develop the factual averments within the proposed amended complaint for review," contending that "these are also things that could be easily developed through the discovery of [Chase Bankcard]." The trial court denied this request: "You're long past the time. It's now nine months later. You don't have any articulable claim."

II.

¶6 We review *de novo* the trial court's decision to dismiss for failure to state a claim. *See* ***Heinritz v. Lawrence Univ.***, 194 Wis. 2d 606, 610, 535 N.W.2d 81, 83 (Ct. App. 1995). A trial court's denial of leave to re-plead, however, is a matter that lies within its reasoned discretion. ***Habermehl Elec., Inc. v. State Dep't of Transp.***, 2003 WI App 39, ¶12, 260 Wis. 2d 466, 477, 659 N.W.2d 463, 468.

¶7 WISCONSIN STAT. RULE 802.02(1)(a) requires that a complaint have: "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." (Emphasis added.) As we explained previously:

> Wisconsin, like the federal system, has "notice pleading" so that legal disputes are resolved on the "merits of the case rather than on the technical niceties of pleading." ***Korkow v. General Casualty Co. of Wisconsin***, 117 Wis. 2d 187, 193, 344 N.W.2d 108, 112 (1984). If "notice pleading" is to have any efficacy at all, a pleading must give the defending party fair notice of not only the plaintiff's claim but "the grounds upon which it rests" as well. ***Conley v. Gibson***, 355 U.S. 41, 47 (1957) (interpreting Rule 8(a)(2) of the Federal Rules of Civil Procedure, the federal equivalent of Rule 802.02(1)(a), Stats.). As Professor James William Moore and Judge Harold F. Medina, Jr., recognized more than forty years ago in construing Rule 8(a)(2), "'it is not enough to indicate merely 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.'" ***Albert v. Dun & Bradstreet, Inc.***, 91 F. Supp. 283, 284 (S.D.N.Y. 1950) (quoting MOORE'S FEDERAL PRACTICE 1653 (2d 1948)); *see also* ***Klebanow v. New York Produce Exchange***, 344 F.2d 294, 299 (2d Cir. 1965) (complaint that merely alleged that "a defendant owns a car and injured plaintiff by driving it negligently" would not give adequate notice under the rule).

Hlavinka v. Blunt, Ellis & Loewi, Inc., 174 Wis. 2d 381, 403, 497 N.W.2d 756, 765 (Ct. App. 1993). On our *de novo* review, we agree with the trial court that Katerinos's original complaint fails even the modest notice-pleading test.

¶8 As material here, a plaintiff may amend a complaint "once as a matter of course at any time within 6 months after the summons and complaint are filed." WIS. STAT. RULE 802.09(1). After the expiration of the six-month period, the plaintiff may amend the complaint, also as material here, "only by leave of court ... and leave shall be freely given at any stage of the action when justice so requires." ***Ibid.*** The proposed amended complaint, however, must also comply with WIS. STAT. RULES 802.02(1)(a) and, if applicable, 802.03(6). Katerinos's proposed amended complaint does not, and he does not explain why extensive discovery would be needed to identify what he claims Chase Bankcard did to him that entitles

him to relief. Accordingly, the trial court did not erroneously exercise its discretion in denying Katerinos's motion to file the proposed amended complaint.[1]

By the Court.—Order affirmed.

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

[1] Katerinos has attached to his main brief on this appeal what he represents are the notes of the court commissioner in the small-claims stage of this case that reflect a proposed settlement. The document, however, is not part of the appellate record, and, putting aside all issues of admissibility and materiality, we may not consider matters that are not in the record. ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992). If Katerinos wanted us to consider the document, it was his burden to ensure that it was made part of the record. *See* ***Lee v. Labor & Indus. Review Comm'n***, 202 Wis. 2d 558, 560 n.1, 550 N.W.2d 449, 449 n.1 (Ct. App. 1996).