

STATE OF VERMONT  
ORANGE COUNTY

FILED  
JAN 22 2009  
ORANGE SUPERIOR COURT

NANCYE O'NEAL,	)	
Appellant,	)	Orange Superior Court
	)	Docket No. 54-3-08 Oecv
v.	)	
	)	on appeal from
DEAD RIVER COMPANY OF MAINE	)	Docket No. 229-8-07 Oesc
and DOYLE, INC.,	)	
Appellees.	)	

SMALL CLAIMS APPEAL  
Decision

Plaintiff Nancye O'Neal appeals from a judgment of the Small Claims Court dated February 11, 2008. The court determined that Ms. O'Neal owed \$772.99 to defendant Dead River Company of Maine for home heating fuel that was delivered to her home, but not paid for; the court also entered judgment for Defendants on Ms. O'Neal's claims for consumer fraud, breach of contract, and negligent and wrongful use of credit card information. On appeal, Ms. O'Neal contends that the Small Claims Court reached erroneous conclusions and refused to hear evidence pertinent to her claim for damages.

This court has reviewed the record created before the Small Claims Court; read the transcript of the Small Claims hearing held February 11, 2008; reviewed the notice of appeal filed by Ms. O'Neal on March 11, 2008; read the statement of legal questions filed by Ms. O'Neal on April 11, 2008; read the legal memoranda filed by Ms. O'Neal on April 29, 2008; and read the responsive memoranda filed by Attorney Katherine Dumont on behalf of Dead River on May 15, 2008.

It is not the function of the Superior Court to substitute its own judgment for that of the Small Claims Court Judge. Rather, the role of the Superior Court is to determine whether or not the evidence presented at the hearing supports the facts that the Judge decided were the credible facts, and whether or not the Judge correctly applied the proper law and procedure.

Dead River's Motion to Dismiss Appeal

Dead River moved to dismiss the appeal on grounds that Ms. O'Neal's statement of question was untimely filed. The motion is based upon a notice that was sent to the parties by the court indicating that a statement of legal questions "must" be filed by the appellant within 30 days after the filing of the notice of appeal.

Statements of legal questions are helpful to the court in understanding the basis for the appeal, but they are neither required nor jurisdictional. Vermont Small Claims

Procedure Rule 10(a) allows statements of legal questions to be filed, but does not require them. In any event, Ms. O'Neal filed her statement of legal questions on April 11, 2008, which was within the period prescribed by the court's notice. Perhaps a copy was not served on Attorney Dumont, who had filed her notice of appearance the day before. In any event, the legal questions identified were repeated in substantially the same form in Ms. O'Neal's memo filed April 29, 2008. There was neither lack of notice of the issues nor prejudice to the Appellee. The motion to dismiss is accordingly *denied*.

### Small Claims Court Hearing

Ms. O'Neal filed her small claims complaint on August 14, 2007, alleging that heating-fuel suppliers Dead River and Doyle, Inc. (d/b/a JD Gas) had engaged in fraudulent and unlawful business practices, breached contractual obligations, negligently failed to safeguard personal and financial information, and wrongfully used her credit card. She sought money damages in the amount of \$2,968.00.

Dead River filed an answer and counterclaim on September 27, 2007. The counterclaim alleged that Ms. O'Neal had ordered propane from Dead River's predecessor (JD Gas), that Ms. O'Neal had not paid for the propane that was delivered to her home, and that the outstanding balance on her account was \$772.99.

The Small Claims Court held a hearing on February 11, 2008. During the hearing, Ms. O'Neal presented testimony indicating that she lacked sufficient home heating fuel for several months during the winter of 2006-07 and became sick as a result of the cold temperatures in her home. She attributed the lack of sufficient fuel to JD Gas' delivery of only 100 gallons of propane in February 2007, rather than the 200 gallons she had ordered. She furthermore claimed that she was denied propane delivery because she had a past-due balance, but that she had never been notified of any past-due balance before. Finally, she claimed that JD Gas improperly transferred her credit card information to Dead River during the asset sale, and that Dead River subsequently improperly attempted to charge her credit card for past-due balances without prior authorization.

John Doyle testified on behalf of Doyle, Inc. He stated that Ms. O'Neal had entered into a cash-on-delivery account for home heating fuel, and that she had not paid for approximately 300 gallons of propane delivered to her home. He testified that his normal practice with COD customers was to deliver fuel and then charge their credit card, and that many customers left their credit card number with him for that purpose. He stated that it was his understanding that Ms. O'Neal had entered into a similar arrangement, but that when he attempted to charge her card, it was declined.

Finally, an account manager employed by Dead River testified that Ms. O'Neal had an overdue propane account. Attorney Dumont later clarified that the past-due balance was \$696.07 plus interest, for a total due of \$772.99.

Decision and Order of the Small Claims Court

The Small Claims Court Judge announced his decision at the end of the hearing, but did not state any findings of fact or conclusions of law on the record. Instead, he stated only as follows:

COURT: Okay. Here's what I am going to do. On Plaintiff's claim, she's getting zero. Counterclaim, \$772.99. Thank you.

This brief statement does not meet the requirements of Small Claims Rule 6(a), which requires the Judge to "make findings of fact orally on the record after the close of evidence, state the relevant conclusions of law, and enter a judgment" in every small claims action.<sup>1</sup> The obligation to state findings of fact and conclusions of law derives from the responsibility of the court to explain to the parties, and to appellate courts, the basis for its decision: what was decided, and how the decision was reached. *Bartley-Cruz v. McLeod*, 144 Vt. 263, 265 (1984) (Underwood, J., dissenting); *Harman v. Rogers*, 147 Vt. 11, 19 (1986). The Small Claims Judge did not discharge his duty of explanation here.

The court has therefore carefully considered whether the judgment of the Small Claims Court should be remanded, so that the Judge may have an opportunity to explain his reasoning.

After reviewing the evidence, however, this court has determined that remand is unnecessary because the record supports the decision reached by the Small Claims Judge. *Bartley-Cruz v. McLeod*, 144 Vt. 263, 264 (1984) (majority). Even in the absence of findings, appellate courts may review the record "to see whether a given result is supportable." *Chittenden Trust Co. v. Maryanski*, 138 Vt. 240, 243 (1980) (citation omitted); *Goss Dodge, Inc. v. Acciavatti*, 143 Vt. 217, 218 (1983). A review of the record in this case makes it clear why the Judge reached the result he did, and remand would not serve the purpose of clarifying any material issues. For these reasons, appellate review is appropriate on the basis of the existing record.

Counterclaim for past due balance on home heating fuel account

The Judge concluded that Ms. O'Neal owed \$772.99 to Dead River. This conclusion is supported by the undisputed evidence at trial, which was that Ms. O'Neal received approximately 300 gallons of propane from JD Gas and did not pay for it. The total amount due is supported by an overdue notice sent on August 24, 2007, showing the account balance to be \$772.99. The amount consists of the value of the delivered propane plus interest.

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<sup>1</sup> The Judge may also chose to take the matter under advisement and issue a written decision.

Ms. O'Neal argues on appeal that she did not enter into an agreement for the delivery of home heating fuel because there was no meeting of the minds regarding payment terms. It was undisputed, however, that she received the propane and used it. Regardless of whether an actual contract was formed, the law implies a promise to pay when a party receives a benefit and retention of the benefit without payment would be inequitable. *DJ Painting, Inc. v. Baraw Enters., Inc.*, 172 Vt. 239, 242 (2001); *In re Estate of Elliott*, 149 Vt. 248, 252 (1988). The same principle applies to Ms. O'Neal's claims that she never received invoices for the delivered propane—the promise to pay exists whether or not written invoices were sent.

*Claims related to timeliness and quantity of propane deliveries*

Ms. O'Neal contends that she went without heat for several months in the winter because (1) JD Gas delivered only 100 gallons of propane in February 2007, rather than the 200 gallons she ordered, and (2) JD Gas did not tell her that her account was overdue. She asserts that no fuel was delivered to her home during the latter part of February through early April. During this time, she implemented fuel conservation practices, which resulted in her home becoming very cold and unusable.

Ms. O'Neal's first argument is that JD Gas breached the contract by delivering only 100 gallons of propane in February, rather than 200 gallons. However, the evidence at trial did not establish whether the parties agreed to the delivery of a specific number of gallons. Instead, the record shows only that Ms. O'Neal requested a delivery of propane, and that 100 gallons were delivered on February 16th. Furthermore, the undisputed testimony was that the amount of propane delivered was influenced by a railroad strike affecting all customers of JD Gas, as well as customers of other heating-fuel suppliers.

Similarly, although Ms. O'Neal testified that she "assumed that when the strike was over they would come and deliver the remaining 100 gallons," there was no evidence that JD Gas made a specific promise to deliver 100 more gallons after February 16th. There was no automatic delivery obligation. Ms. O'Neal was a will-call customer whose propane was delivered upon request, and she did not request any more propane until early April. The evidence therefore supports the conclusion that JD Gas did not breach the contract by delivering "only" 100 gallons of fuel on February 16th.

Ms. O'Neal's second argument is that JD Gas did not deliver propane because her account was overdue, but that JD Gas never told her about any past-due balances. Her argument appears to be that she made no effort to pay for past deliveries because she assumed that her credit card had been charged, and she was never told otherwise. This argument does not amount to a defense to the obligation to pay for the heating fuel that was delivered to her home at her request. Moreover, it does not support a finding of a breach of contract. The evidence supports the conclusion that Defendants did not commit breach with respect to the delivery of propane.

Claims related to timeliness of credit for dryer installation

Ms. O'Neal argues on appeal that JD Gas demonstrated bad faith in connection with the installation of her dryer. She contends that Maytag delivered a dryer that was not compatible with propane, and that they issued her a \$70 credit as compensation for the error. Ms. O'Neal asserts that she arranged for the credit to be forwarded directly to JD Gas, and that the credit was sent in mid-October, but that JD Gas did not reflect the credit on her account until February 1, 2007.

There is no explanation in the record for the delay. Mr. Doyle testified that the credit was deposited as soon as it was received. Ms. O'Neal speculated that JD Gas might have been trying to retain the credit for themselves, but her speculation was not supported by any evidence, and the Small Claims Judge was not required to accept malfeasance as the explanation for any delay, or to find a breach of the covenant of good faith and fair dealing. It is undisputed that Ms. O'Neal ultimately received the credit, and no damages were shown in connection with this event. On this record, the court finds no error in the Judge's decision not to award damages on this claim.

Claims related to attempted charging of credit card

Ms. O'Neal contended during the hearing, and on appeal, that JD Gas and Dead River acted improperly by attempting to charge her credit card for overdue balances in February and April. She claimed that JD Gas improperly retained her card numbers from a single transaction in December, and that she did not authorize the attempted charges.

It was not obvious at trial what theory Ms. O'Neal was pursuing with respect to these claims. The complaint mentioned fraudulent and unlawful business practices, as well as unlawful use of financial information, and the allegations might reasonably be construed as claims for consumer fraud, ordinary fraud, or conversion. On appeal, Ms. O'Neal has taken the position that her claim was for fraudulent use of a credit card, 9 V.S.A. § 4043, but that is a criminal provision, with penalties set forth in § 4044.

In any event, none of the possible theories are supported by the evidence. Mr. Doyle testified that it was his practice to deliver fuel to COD customers and then to seek payment by credit card, and that many of his COD customers left credit card numbers on file for this purpose. He also testified that he believed Ms. O'Neal to have made similar arrangements. The Judge was free to credit this testimony when resolving claims related to credit card usage—especially in light of Ms. O'Neal's argument that she did not know that her account was overdue because she had tendered her card for payment of propane deliveries.

Moreover, it was undisputed that the attempted charges were declined, and that no money exchanged hands as a result. The evidence therefore supports the conclusion—which is implicit in the Judge's decision—that Ms. O'Neal did not meet her burden of proving any damages related to the attempted charges. Failure to prove damages is fatal to a claim for fraud. See *Smith v. Country Village Intern., Inc.*, 2007 VT 132, ¶¶ 8, 10

(explaining that a plaintiff's measure of damages in an action for fraud "is the net amount of the money he has actually lost as a result of the fraud practiced on him") (quoting *Larochelle v. Komery*, 128 Vt. 262, 268 (1969)).

Failure to prove cognizable injury is also fatal to a claim for consumer fraud. *Greene v. Stevens Gas Service*, 2004 VT 67, ¶ 13, 177 Vt. 90. Proof of actual damages is not required, but the consumer-fraud statute requires proof of some "damages or injury as a result of any false or fraudulent representations or practices" on the part of the defendant. 9 V.S.A. § 2461(b); *Peabody v. P.J.'s Auto Village, Inc.*, 153 Vt. 55, 58–59 (1989). Even if the definition of "injury" is interpreted broadly, the evidence in this case does not show that any money changed hands during the attempted transaction, or that any other injury occurred. The record therefore supports the conclusion that Ms. O'Neal did not meet her burden of proving the elements of consumer fraud in relation to the attempted credit-card transaction.

#### Claims related to "in camera review of medicals"

Ms. O'Neal argues on appeal that the Judge erred by declining to conduct an *in camera* review of her "medicals."

The record shows that Ms. O'Neal requested *in camera* review of "medicals" at the start of the hearing, but did not explain the relevance of the request. It is not clear what evidence Ms. O'Neal was trying to introduce. The Judge declined to conduct the review at that time, stating that he would "wait on that to see if I need one."

During the presentation of her case, Ms. O'Neal did not make any further attempts to offer evidence pertaining to medical records or expenses, or repeat her request for *in camera* review of medical evidence. She also clarified, in response to a question from the Judge, that her claim for damages was composed of rent. She did not assert medical damages as part of her claim. The court therefore concludes that Ms. O'Neal waived her claim of medical damages during the hearing.

Furthermore, even if not waived, it does not appear that a review of medical evidence was necessary because Ms. O'Neal did not meet her burden of showing that JD Gas or Dead River breached the contract by failing to deliver propane. The evidence did not show any causal link between the cold temperatures in the home and any actions on the part of Defendants; it was Ms. O'Neal's decision to implement fuel conservation practices. Under these circumstances, it was not error for the court to decline *in camera* review of medicals.

#### Claims related to "good faith" and "bad faith"

Finally, on appeal, Ms. O'Neal contends that the trial court must have erroneously concluded that she failed to act in good faith. This is not necessarily true. All that the trial court was required to find to support its judgment was that Ms. O'Neal had not met

her burden of proving her claims for damages, and that she had not paid for her propane deliveries. A finding of "bad faith" was not necessary to any of these determinations.


Conclusion

For the foregoing reasons, the court concludes that the evidence is sufficient to support the decision of the Small Claims Court: that Ms. O'Neal did not prove her claim for damages, and that she owes \$772.99 to Dead River for propane delivered to her home, but not paid for. For these reasons, the decision of the Small Claims Court is *affirmed*.

**ORDER**

The Judgment of the Small Claims Court dated February 11, 2008, is *affirmed*.

Dated at Chelsea, Vermont this 22<sup>nd</sup> day of January, 2009.

  
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Hon. Mary Miles Teachout  
Superior Court Judge