2012 IL App (2d) 120179-U
No. 2-12-0179
Order filed December 7, 2012

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

| | | |
|---|---|---|
| THE LAWN ENFORCERS, INC., | ) | Appeal from the Circuit Court |
| | ) | of Boone County. |
| Plaintiff-Appellant, | ) | |
| | ) | |
| v. | ) | No. 06-L-3 |
| | ) | |
| SHERRY KLOSTER, MARK CARLSON, | ) | |
| and DAVID CARLSON, | ) | |
| | ) | |
| Defendants-Appellees | ) | Honorable |
| | ) | Eugene G. Doherty, |
| (Harold Sundeen, defendant-appellee). | ) | Judge, Presiding. |

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Burke and Justice Schostok concurred in the judgment.

**ORDER**

¶ 1 *Held*: Offer of proof for loss-of-use damages did not show that the evidentiary exclusion harmed plaintiff. Therefore, plaintiff is not entitled to remand for a new damages hearing.

¶ 2 On July 19, 2007, the trial court entered an order of replevin in favor of plaintiff-appellant Lawn Enforcers, Inc. and against codefendents-coappellees Sherry Kloster, Mark Carlson, and David Carlson. This court affirmed the order of replevin. *The Lawn Enforcers, Inc. v. Sherry Kloster, et al.*, No. 2-08-0920 (2009) (unpublished order under Supreme Court Rule 23). After the date by

which defendants were required to return the property had passed, the trial court held a hearing on damages. The court awarded Lawn Enforcers $8,855, the value of the unreturned property plus interest. The court barred evidence concerning loss-of-use, but it accepted an offer of proof. Because that offer of proof was inadequate, we decline Lawn Enforcers' request for a new hearing on damages. Affirmed.

¶ 3 I. BACKGROUND

¶ 4 We review the facts and procedure most relevant to the instant appeal. Other background on this case may be found in our prior ruling (No. 2-08-0920).

¶ 5 Lawn Enforcers, Inc., is solely owned by Bruce Wigiton. Wigiton and defendant Sherry Kloster lived together on real property owned by Kloster. Defendants Mark and David Carlson are Kloster's adult sons. When Wigiton and Kloster ended their relationship, Wigiton sought the return of Lawn Enforcers' equipment, which apparently remained on Kloster's property. Lawn Enforcers, by Wigiton, brought a complaint in replevin against defendants.

¶ 6 Defendants answered the complaint, arguing that they had a "vested interest" in the company and in the equipment, which was titled to Lawn Enforcers. Defendants also filed a countercomplaint, alleging that they had a business partnership arrangement with Wigiton and that Kloster had provided more than $95,000 toward the operation of the business by way of mortgaging her real property.

¶ 7 On July 19, 2007, the trial court granted replevin. The court found that, regardless of the parties' colloquial use of the term "partner," Wigiton and defendants were not business partners in the legal sense. The court advised that defendants could seek remedy for their contributions to the business in an action to partition real estate.

¶ 8 On October 11, 2007, following several interceding motions, the trial court granted Lawn Enforcers leave to file a petition for damages in the replevin suit. The court specifically allowed for detention damages.

¶ 9 On August 13, 2007, the court granted defendants' motion to stay enforcement of the replevin order pending appeal, contingent on posting a $45,000 appeal bond. The bond was posted by Harold Sundeen, the fourth appellee in this case.

¶ 10 On August 21, 2007, defendants filed a notice of appeal. This court dismissed the appeal for lack of jurisdiction. *The Lawn Enforcers, Inc. v. Sherry Kloster, et al.*, No. 2-07-0855 (2008) (unpublished order under Supreme Court Rule 23). The appealed-from order was not yet final, because there were pending matters not yet resolved. *Id*. These matters included portions of defendants' countercomplaint. *Id*.

¶ 11 On September 10, 2008, in response to our 2008 Rule 23 Order dismissing the appeal, the trial court disposed of the then pending claims. On September 29, 2008, it entered a corresponding written order, which stated:

> "NOW COMES the [defendants] by and through their attorney and submits pursuant to [the 2008] Appellate Court Rule 23, Opinion and Order, this Court has now resolved all outstanding motions and all pending matters before it. Accordingly this Court issues a Final and Appealable Order. This is a Final and Appealable order and there is no just reason for the delay of enforcement or appeal of this matter."

¶ 12 On October 1, 2008, defendants filed a notice of appeal "from the final judgment entered in this cause of action on September 29, 2008." On October 8, 2008, however, Lawn Enforcers filed a petition for rule to show cause.

¶ 13 On appeal, this court held that the filing of the October 8, 2008, contempt petition within the 30-day appeal period did not preclude our jurisdiction, stating:

> "We have considered the court's order of September 29, 2008, and have concluded that, although it lacks complete clarity, the trial court intended it to serve a finding of enforceability and appealability (210 Ill. 2d R. 304(a)) that applied to the orders on all the claims it decided before that date. Therefore, the filing of [Lawn Enforcers'] petition for rule to show cause did not delay the appealability of any of those orders." *Lawn Enforcers*, No. 2-08-0920, slip order at 7.

On the merits, however, this court rejected defendants' challenge to the replevin order.

¶ 14 On January 21, 2010, Lawn Enforcers petitioned for enforcement of the replevin order. The trial court ordered that Lawn Enforcers be allowed to retrieve the equipment on February 5, 2010. On March 5, 2010, Lawn Enforcers filed its petition for damages, as the trial court had given it leave to do back in October 2007. On April 7, 2011, the trial court determined that nine items had not been returned. It again continued the damages issue.

¶ 15 On January 13, 2012, the trial court conducted the damages hearing. Lawn Enforcers informed the court that it would be seeking damages for: (1) the unreturned items; (2) the returned items that were damaged; and (3) detention damages, which Lawn Enforcers characterized as loss of use based on rental value.

¶ 16 As to point one, the trial court assessed the value of the unreturned items to be $6,834 plus interest for a total of $8,855. As to point two, the court found that Lawn Enforcers failed to show that the returned items were damaged. As to point three, the court essentially stated that Lawn Enforcers had forfeited its opportunity to claim loss of use:

> "There was no claim made for loss of use before the [c]ircuit [c]ourt ***, before the appeal. The Illinois Appellate Court having taken the [2009] appeal essentially determined that it had jurisdiction because all of the issues had been adjudicated. *** In my mind, the Appellate Court having taken the case and having decided it [ha]s implicitly and unescapably determined all issues must have been decided or they wouldn't have had jurisdiction to proceed. Therefore, I don't feel I can go back and now adjudicate [a] new [type of] damage claim[] after the appeal."

On the merits, the court added:

> "The other issue is that detention damages [*i.e.*, loss of use] for a period of time when a case is on appeal would be entirely unjust. When the defendants held this property during the pendency of the appeal, it was pursuant to a Court order. I don't know how you can call that detention wrongful when it was approved by an order of the Court. I also don't know how you could at the end of that process say, by the way, when the Court gave you permission to hold those items, we're now telling you it is going to come at a cost. That wasn't a term originally imposed on [the order staying enforcement]."

At that, Sundeen's attorney wished to add argument for fear of waiving it:

> "[T]he business was shut down. *** Mr. Wigiton wasn't using the equipment anymore in the business. He was not in the business of renting equipment to other people. [Secondly], *** the[re were] items *** [that] were not returned and so now we had to pay for the value of those [so] *** asking for detention damages on top of that [is] sort of a double whammy."

¶ 17 Lawn Enforcers submitted an offer of proof, using market rental values for the items subject to replevin. It sought compensation for the returned items for a period of 49 months (from January 2006 when the suit was filed until February 2010 when the items were returned). Lawn Enforcers sought compensation for the unreturned items for a period of 72 months (from January 2006 to the date of hearing). This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 On appeal, Lawn Enforcers argues that the trial court erred in ruling that it was precluded from claiming damages for loss of use, a component of detention damages. Defendants did not file an appellate brief, but this appeal is amenable to decision on the merits. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 20 Lawn Enforcers *is* correct that the trial court mischaracterized the 2009 appellate ruling as finding jurisdiction based on the resolution of all claims. Rather, this court based its jurisdiction to consider the replevin order on Rule 304(a), allowing the trial court to retain jurisdiction in the case. Lawn Enforcers' opportunity for a damages hearing, including evidence on detention damages, was preserved. However, for the reasons that follow, remand for a new damages hearing is not warranted.

¶ 21 The replevin statute provides that: "If judgment is entered in favor of the plaintiff in replevin, the plaintiff shall recover damages for the detention of the property while the same was wrongfully detained by the defendant." 735 ILCS 5/19-125 (West 2010). Under this section, plaintiffs are to be fully indemnified for losses suffered as a result of the defendant's actions. *Culligan Rock River Water Conditioning Co. v. Gearhart*, 111 Ill. App. 3d 254, 257-58 (1982). Damages are generally measured by the property's reasonable rental value, plus any depreciation that occurs as a result of

the defendant's use of the property. *Id*. at 258. The rental value may pertain to the plaintiff's cost in renting replacement property or the plaintiff's lost opportunity to use the property. See *International Harvester Credit Corp. v. Helland*, 151 Ill. App. 3d 848, 858 (1986). The plaintiff must set forth some evidence to suggest that he was actually, not just hypothetically, damaged by loss of use. *Id*. at 858-59 (Second District finds the establishment of actual loss to be the "better practice"). For example, a plaintiff may not recover rental value when: (1) he had no intention of putting his property to use or renting it out (*i.e.*, a tractor he had intended on keeping in a garage all winter); (2) no rental market exists for the type of property at issue; or (3) he had other property in stock that performed the same function that he choose not to rent to the public. *Id*.

¶ 22 The trial court gave Lawn Enforcers an opportunity to make an offer of proof concerning loss of use. The purpose of an offer of proof is to disclose the nature or substance of the barred evidence for the trial judge and opposing counsel and to enable the reviewing court to determine whether the exclusion was erroneous and harmful. *Little v. Tuscola Stone Co.*, 234 Ill. App. 3d 726, 730-31 (2000). A party cannot establish prejudice where it fails to set forth an element of the claim in its offer of proof. See, *e.g.*, *Madison Associates v. Bass*, 158 Ill. App. 3d 526, 541 (1987) (defendant made no offer of proof as to many of the elements of damages he sought); *Trojcak v. Hafliger*, 7 Ill. App. 3d 495, 502-03 (1972) (no error in excluding checks under the Dead Man's Act where the defense failed to set forth in its offer of proof that the checks were made in the ordinary course of business or any of the other requisite elements under this exception). Here, Lawn Enforcers did not offer proof that it *actually* would have rented the property or put it to use. It merely listed hypothetical rental values. Even if accurate, this evidence does not constitute a claim for loss of use. Lawn Enforcers cannot establish prejudice where it failed to offer proof of actual, not just

hypothetical, loss. See *International Harvester*, 151 Ill. App. 3d at 858-59. Therefore, remand is not necessary.

¶ 23 We reject Lawn Enforcers' argument that the trial court violated the replevin statute by denying it the opportunity to present detention damages. Again, the statute provides that a successful plaintiff "shall recover damages for the detention of the property while the same was wrongfully detained by the defendant." 735 ILCS 5/19-125 (West 2010). Here, the trial court *did* address detention damages. Whether a defendant harmed the property through use or storage is a component of detention damages. See *Culligan*, 111 Ill. App. 3d at 258. The court heard evidence on whether the returned items were damaged, or suffered depreciation, during defendants' use, but it found the evidence insufficient on this point. Lawn Enforcers did not challenge this finding.

¶ 28 Our above reasoning is dispositive. However, we remind Lawn Enforcers of the uphill battle it would have faced had we granted remand. The trial court made it clear it did not find loss-of-use damages appropriate in this case. Indeed, as to *returned* items, a plaintiff is not entitled to loss-of-use damages where the right to use the property does not exist or where the other party possessed the property under court authority. *International Harvester*, 151 Ill. App. 3d at 856 (the property must be *unlawfully* detained); 77 C.J.S. Replevin § 106 (2012). Here, the trial court authorized defendants to retain possession pending appeal, and the order granting stay did not imply a usage fee. And, although case law is sparse on the point, a plaintiff generally cannot receive rental value for *unreturned* items when he or she, as here, has already received cost *plus interest*. See, *e.g.*, 36 A.L.R. 2d 337 § 81 (concerning the related action of detinue).

¶ 29 In sum, Lawn Enforcers is not entitled to a new hearing on damages.

¶ 30 III. CONCLUSION

¶ 31 For the aforementioned reasons, we affirm the trial court's judgment.

¶ 32 Affirmed.