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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002371-MR

CHAMPION PREFERRED AUTOMOTIVE SALES, INC. — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 00-CI-03409

ERIC GILLIAM; SARAH GILLIAM; AND YVONNE GILLIAM — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND THOMPSON, JUDGES; LAMBERT,[1] SENIOR JUDGE.

THOMPSON, JUDGE: Champion Preferred Automotive Sales, Inc. appeals the summary judgment in its favor but for an amount it argues is insufficient. For the reasons stated, we affirm.

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

In December 1999, Eric and Sarah Gilliam, husband and wife, began visiting Preferred for the purpose of leasing a new vehicle. Eventually, the couple decided to lease a 2000 Lincoln Navigator. During contract negotiations, the Gilliams offered to trade-in a 1996 Nissan Sentra as a down payment on the lease contract. At the time, the Gilliams did not own the Nissan but according to Preferred did not make this fact known.

After an agreement was reached, Sarah executed a vehicle verification certificate warranting that the Nissan was not a rebuilt vehicle. The document also contained the following:

> If any of the warranties or representations above are incorrect, the undersigned agrees to pay the difference in value resulting from the breach to the dealership forthwith, or the dealership may elect to rescind the acceptance or purchase of the vehicle at the option of the dealership.

Eric then executed documents to obtain the issuance of a duplicate title and to transfer the title to Preferred. On this documentation, Eric did not mark the box indicating that the Nissan Sentra was a rebuilt vehicle. Following these signings, Preferred allegedly granted the Gilliams a $6,000 credit for the trade-in on the lease price of the Lincoln Navigator. The amount of the credit listed on the lease was $5,140.16, which was adopted by the trial court as the actual trade-in credit.

Subsequently, Eric obtained a duplicate title and delivered it to Preferred which reviewed the title and discovered that the Nissan had been rebuilt. The title further showed that Yvonne Gilliam, Eric's mother, was the owner of the

Nissan Sentra, not Eric and Sarah Gilliam. Preferred President Keith Slaughter then contacted the Gilliams and stated that they had breached their contract by trading in a rebuilt vehicle. He demanded that they immediately pay the value assigned to the trade-in, $6,000, to Preferred and retrieve the Nissan Sentra.

The Gilliams responded by offering to rescind the entire agreement and to return the Lincoln Navigator in exchange for the Nissan Sentra. Preferred declined to agree to those terms and insisted on being paid $6,000. After it was notified that the Gilliams would not advance $6,000, Preferred filed an action against the Gilliams and further named Yvonne as a defendant in September 2000. From September 2000 to December 2002, Preferred did not actively prosecute this action until a pretrial conference was held in January 2003. After the hearing, the case went inactive until the trial court issued a show cause order to Preferred as to why its case should not be dismissed for lack of prosecution. Thereafter, the trial court continued Preferred's civil action on its docket.

On May 5, 2005, the trial court issued a second show cause order to Preferred to show why its case should not be dismissed for lack of prosecution. The trial court continued Preferred's case, but a third show cause order followed more than a year later. After it succeeded in keeping the case on the court's docket, Preferred filed a motion for summary judgment. Granting in part and denying in part, the trial court ruled that Preferred was not entitled to rescind only a portion of the contract relating to the trade-in and could only receive the diminished value related to the Nissan being a rebuilt vehicle (i.e., the difference

between the assigned value of the Nissan and the actual value of the Nissan on the day of the parties' transaction). The trial court then requested that the parties reach an agreement on an amount representing the value of the Nissan Sentra.

On October 31, 2008, the trial court issued a fourth show cause order for Preferred's failure to prosecute its action. The trial court expected that the parties would agree on the value of the Nissan on the day of the parties' exchange. During this time, Preferred did not tender to the trial court any evidence regarding the value of the Nissan on the day of the transaction. However, Eric tendered his affidavit providing NADA valuations and other evidence regarding the value of the Nissan Sentra on the day of the parties' transaction. According to Eric, the value of the Nissan Sentra with a salvaged title in 1999 was $4,350. Based on this evidence, the trial court issued a judgment in favor of Preferred for $790.16. This amount represented the difference between the assigned trade-in value as listed in the lease agreement, $5,140.16, and the value of the rebuilt Nissan in 1999.

Preferred contends that the trial court erred when it failed to rule that Preferred was entitled to a rescission of the trade-in agreement with the Gilliams. Preferred argues that it notified the Gilliams of its decision to rescind the trade-in agreement within forty-five days of the transaction and, thus, was entitled to a rescission of the lease agreement pursuant to KRS 186A.530(8).[2] We disagree.

The standard of review applicable to an appeal of a summary judgment is well-established. An appellate court must decide whether the trial court correctly

[2] The statute that Preferred cites is now codified in KRS 186A.530(9). We further note that this Court assumes that Preferred's statutory citations are to the laws in effect in 1999.

ruled that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law. *Barnette v. Hospital of Louisa, Inc.*, 64 S.W.3d 828, 829 (Ky.App. 2002). "Summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."' *Id*., *quoting* CR 56.03.

Summary judgment should only be granted when it appears that it would be impossible for the non-moving party to produce sufficient evidence to succeed at trial. *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985). Because summary judgments do not involve matters where there are disputed facts, we review the decision of the trial court *de novo* and, thus, without deference. *Kreate v. Disabled American Veterans*, 33 S.W.3d 176, 178 (Ky.App. 2000).

At the time of the transaction in question, KRS 186A.530(8), in pertinent part, provided the following:

> Failure of a dealer to procure the buyer's acknowledgment signature on the buyer's notification form or failure of any person other than a dealer to procure the buyer's acknowledgment signature on the vehicle transaction record form shall render the sale voidable at the election of the buyer. The election to render the sale voidable shall be limited to forty-five (45) days after issuance of the title. This provision shall not bar any other remedies otherwise available to the purchaser.

Although it contends that this statute permitted it to rescind the trade-in contract, Preferred failed to argue what facts brought its situation within the ambit of the statute. In its first argument, Preferred makes a vague argument that "Preferred was entitled to rescission as a matter of law because notice was given within 45 days that Preferred elected rescission." Based on the insufficiency of Preferred's argument, we cannot ascertain any basis for reversing the trial court's judgment. *Hadley v. Citizen Deposit Bank*, 186 S.W.3d 754, 759 (Ky.App. 2005) (it is not the function of an appellate court to construct a party's legal arguments).

Preferred argues that it was entitled to rescind the parties' trade-in agreement because the Gilliams failed to disclose that the car had been rebuilt. It further argues that the transaction was voidable because of the Gilliams' failure to disclose the branded title pursuant to KRS 186A.530(7) and (8). We disagree.

While Preferred correctly points out that a party must indicate that his car has been rebuilt to a buyer of the vehicle, the record shows that the Gilliams offered to rescind the entire agreement and exchange the Lincoln and Nissan. However, Preferred chose to rescind only a part of the contract related to the trade-in and to require the Gilliams to continue the Lincoln Navigator lease and pay $6,000 as a substitute for the trade-in. Thus, Preferred waived its right to rescind the contract by selectively choosing which part of the contract it wanted to rescind. *Clark v. Thompson*, 309 Ky. 850, 863-64, 219 S.W.2d 22, 30 (1949).

Although Preferred argues that the trade-in of the Nissan Sentra and the lease of the Lincoln Navigator constituted two separate contracts, the value

assigned to the trade-in was an integral part of completing the lease of the Lincoln Navigator. *In re Peaslee*, 13 N.Y.3d 75, 82, 913 N.E.2d 387, 390 (2009), the trade-in transaction is an integral part of the completion of the sale. As shown by the record, the Gilliams did not have sufficient funds to make a down payment on the Lincoln unless Preferred accepted the trade-in as part of the consideration for the lease of the Lincoln. Although there is no direct Kentucky case law on the subject, it is clear that the Nissan's trade-in value was inextricably linked to the lease of the Lincoln to a degree that it was a part of the agreement to lease the Lincoln. *Apple Imports, Inc. v. Koole*, 945 S.W.2d 895, 898 (Tex.App.-Austin 1997). Therefore, Preferred was not entitled to partially rescind its agreement with the Gilliams.

Preferred contends that the trial court erred by failing to award interest on the amount the Gilliams owed due to its rejection of the trade-in from the time of the transaction until it sold the Nissan on September 17, 2008. It argues that the Gilliams' debt was a liquidated damage and was subject to the mandatory application of interest from the time the debt became due. We disagree.

While it is not always clear when an amount qualifies as liquidated, generally liquidated means that an amount has been made certain or fixed by the parties' agreement or by operation of law. *Nucor Corp. v. General Elec. Co.*, 812 S.W.2d 136, 141 (Ky. 1991). Liquidated damages are subject to prejudgment interest as a matter of course. *Id*. However, unliquidated damages are subject to an award of prejudgment interest only at the discretion of the trial court. *3D*

Enterprises Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer Dist., 174 S.W.3d 440, 450 (Ky. 2005).

After reviewing the record, we conclude that Preferred's damages were not liquidated in nature because the Gilliams' debt was not fixed in amount. In this case, when Preferred chose to reaffirm the parties' leasing agreement by not accepting the Gilliams' offer to return the Lincoln Navigator, the determination of Preferred's damages became the difference in the value of the assigned value of the Nissan Sentra and the market value of the rebuilt Nissan Sentra. As stated in *Perkins Motors, Inc. v. Autotruck Federal Credit Union*, 607 S.W.2d 429, 430 (Ky.App. 1980), " [i]t is well established in this jurisdiction that the measure of damages for breach of contract is that sum which will put the injured party into the same position he would have been in had the contract been performed."

After the Gilliams breached the leasing agreement, the central issue became the determination of the market value of the rebuilt Nissan Sentra at the time of the transaction, which would determine what additional money was owed to Preferred. Because the value of the Nissan Sentra was uncertain and subject to dispute as evidenced by Eric's introduction of various valuation proof, the damage from the breach was not certain and was subject to dispute. Therefore, the trial court did not error by ruling that Preferred's damages were not liquidated and subject to mandatory prejudgment interest. *Faulkner Drilling Co., Inc. v. Gross*, 943 S.W.2d 634, 638 (Ky.App. 1997).

Preferred contends that it had a statutory right to rescind the parties' agreement and, thus, had no duty to mitigate its damages. Preferred cites KRS 186A.530(9)[3] for the proposition that it is exempt from common law mitigation requirements when another party has breached a contract. We disagree.

We have previously addressed this issue although Preferred's previous argument was couched in different terms. Regardless, Preferred elected to reaffirm the contract by refusing to permit the Gilliams to exchange vehicles and rescind the parties' prior agreement. At that point, Preferred had to mitigate the damages flowing from the Gilliams' breach by reasonably maximizing the value of the Nissan Sentra. *Dulworth v. Hyman*, 246 S.W.2d 993, 996 (Ky. 1952). However, Preferred permitted the Nissan Sentra to waste away losing value year after year for a period of seven years. Further, the plain language of the statute and our interpretation of the intent of the legislature provide Preferred with no relief. *Johnson v. Branch Banking and Trust Co.*, 313 S.W.3d 557, 559-60 (Ky. 2010).

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Frederick J. Anderson Lexington, Kentucky	Jay E. Ingle Lexington, Kentucky

[3] Preferred cites the current version of the statute but this statute was codified at KRS 186A.530(8) in the version of the statute in effect at the time of the parties' transaction.