STATE OF MICHIGAN

COURT OF APPEALS

KEITH BROOKS,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION and WILLIAMSON CHEVROLET-GEO-CADILLAC, INC.,

Defendants-Appellees.

UNPUBLISHED
January 7, 2000

No. 209701
Wayne Circuit Court
LC No. 97-702381 CK

Before: Jansen, P.J., and Saad and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition of plaintiff's several claims for breach of warranty, revocation of acceptance, violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.*; MSA 19.418(1) *et seq.*, breach of contract, and rescission, pursuant to MCR 2.116(C)(10). We reverse and remand.

I

On September 10, 1996, plaintiff entered into a one-year, 15,000-mile lease agreement for a new 1996 Chevrolet truck, manufactured by defendant General Motors Corporation ("GM"), with defendant Williamson Chevrolet-Geo-Cadillac, Inc. On four occasions during December 1996 and January 1997, plaintiff brought the truck to GM authorized dealers, including Williamson, for repairs when the vehicle failed to start due to a dead battery. On each occasion, the dealer made repairs, including the installation of two new batteries. However, plaintiff alleges that the problem with the truck's battery and electrical system was never corrected and continued until the end of the lease. Plaintiff returned the vehicle to Williamson at the expiration of the lease term in September 1997, having used more than the 15,000 allotted miles.

II

Plaintiff argues that the trial court improperly dismissed his complaint on the trial court's sua sponte conclusion that plaintiff's revocation of acceptance claim was barred because plaintiff continued to use the vehicle. Plaintiff argues that the trial court should not have dismissed his claim on grounds not raised by defendant, and that the trial court's decision was substantively wrong.

This Court reviews decisions on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Motions under MCR 2.116(C)(10) test the factual support of the plaintiff's claim. *Id.* The court considers the affidavits, pleadings, depositions, admissions, and other evidence submitted to determine whether a genuine issue of any material fact exists to warrant a trial. *Id.* Both this Court and the trial court must resolve all reasonable inferences in the nonmoving party's favor. *Bertrand v Allan Ford, Inc*, 449 Mich 606, 618; 537 NW2d 185 (1995).

In their summary disposition motion, defendants raised only one argument: that plaintiff failed to support his breach of warranty claims with evidence that defendants did not cure the nonconformity within a reasonable time. Defendants sought dismissal of plaintiff's entire complaint on this basis alone. They did not raise any argument addressing plaintiff's revocation of acceptance claims or plaintiff's continued use of the vehicle. The trial court, however, did not address either defendant's argument or any of the arguments plaintiff made in his opposition brief. Rather, the trial court sua sponte raised the issue that plaintiff did not properly revoke acceptance of the vehicle because he continued to drive it until the end of his lease term. The trial court granted summary disposition in defendants' favor on this basis alone.

We do not categorically disapprove of a court deciding a case on grounds not raised by either party. We acknowledge that though the practice is not encouraged, it may be appropriate where no material facts are in dispute and where the party opposing summary disposition has the opportunity to respond to the trial court's proposed resolution of the case. See *Haji v Prevention Ins Agency, Inc*, 196 Mich App 84, 88-90; 492 NW2d 460 (1992) (Corrigan, J., concurring), where Judge (now Justice) Corrigan observed "that a federal district court sua sponte may properly enter summary judgment where there is an absence of an issue of material fact and the movant is entitled to judgment as a matter of law," provided that the party opposing summary judgment is "afforded notice and a reasonable opportunity to respond to all issues the court identifies." *Id.*, 89. Judge Corrigan further commented "[w]hen any court contemplates sua sponte summary disposition against a party, that party is entitled to unequivocal notice of the court's intention and a fair chance to prepare a response." *Id.*, 90.

Here, plaintiff had no opportunity to respond to the trial court's proposition that plaintiff's continued use of the vehicle barred his claim for revocation of acceptance. On appeal, plaintiff argues that he was entitled to continue using the car to mitigate damages. Defendants respond that mitigation was unnecessary in the particular circumstances of this case, and that in any event, plaintiff did not merely mitigate damages, but actually exceeded the mileage allotted by the lease agreement. Plaintiff cites case law in support of his mitigation argument, while defendant argues that those cases are factually distinguishable. Because the parties did not develop a lower court record relating to these legal and factual issues, we are unable to review meaningfully the trial court's decision. See *Westfield*

Companies v Grand Valley Health Plan, 224 Mich App 385, 387; 568 NW2d 854 (1997) (this Court may review unpreserved issue provided that the question is one of law and all facts necessary for its resolution have been presented). We therefore conclude that in this instance, it was inappropriate for the trial court to dismiss plaintiff's complaint because plaintiff had no opportunity to respond and because material facts may be in dispute.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Hilda R. Gage