

STATE OF MICHIGAN
COURT OF APPEALS

DIMMITT & OWENS FINANCIAL, INC.,

Plaintiff-Appellant,

v

MOTOR WHEEL CORPORATION,

Defendant/Cross-Plaintiff-Appellee,

and

PRESSLINE ROBOTICS, INC.,

Defendant/Cross-Defendant.

UNPUBLISHED

April 21, 2000

No. 210292

Washtenaw Circuit Court

LC No. 96-007923-CK

Before: Neff, P.J., and Murphy and J. B. Sullivan*, JJ.

PER CURIAM.

Plaintiff Dimmitt & Owens Financial, Inc. (“Dimmitt & Owens”) appeals as of right an order granting summary disposition in favor of defendant Motor Wheel Corporation (“Motor Wheel”). We affirm.

I

A trial court’s grant of summary disposition is reviewed de novo. *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). This Court must review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins.*, 458 Mich 288, 294; 582 NW2d 776 (1998); *Phillips v Deihm*, 213 Mich App 389, 398; 541 NW2d 566 (1995).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim; a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence available to it. *Id.* If the party opposing the motion fails to present evidentiary proofs creating

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

a genuine issue of material fact, summary disposition is properly granted. *Smith v Globe Life Ins Co*, 460 Mich 446, 455 & n 2; 597 NW2d 28 (1999).

II

Motor Wheel entered into a contract with defendant Pressline Robotics (“Pressline”) for a robotics system to be used by Motor Wheel in the production of brake drums for Chrysler Corporation. The contract required Pressline to develop and install two robots at a cost of \$138,500. Motor Wheel paid Pressline more than \$92,000 of the contract amount, however, ultimately rejected the robot when it failed to meet production requirements. The second robot was not delivered.

The day following the delivery of the first robot, Pressline assigned its Motor Wheel account to Dimmitt & Owens, which thereafter sought payment of the \$41,550 contract balance from Motor Wheel. When Motor Wheel had failed to pay two years later, and after Pressline apparently had ceased operations, Dimmitt & Owens filed the instant action to collect payment. In the course of the proceedings, Motor Wheel obtained a \$93,740 default judgment on its cross-claim against Pressline for breach of contract. Thereafter, the court granted Motor Wheel’s motion for summary disposition on the ground that, as Pressline’s assignee, Dimmitt & Owens was bound by the default judgment, and consequently, Dimmitt & Owens’ entire claim against Motor Wheel was subject to the setoff of the default judgment.

III

Dimmitt & Owens claims that the trial court erred in granting summary disposition because the default judgment, entered against the assignor, Pressline, for failing to answer, does not constitute an adjudication on the merits in an action by the assignee, Dimmitt & Owens. We disagree.

The parties agree that their rights under the assignment are governed by MCL 440.9318(1)(a); MSA 19.9318(1)(a), which provides in relevant part:

the rights of an assignee are subject to [a]ll the terms of the contract between the account debtor and assignor and any defense or claim arising therefrom.

Contrary to Dimmitt & Owens’ contention, it is not relevant that the assignment occurred before the breach of contract. “When the account debtor’s defenses on an assigned claim arise from the contract between him and the assignor, it makes no difference whether the breach giving rise to the defense occurs before or after the account debtor is notified of the assignment.” Comment 1 to Uniform Commercial Code (UCC), MCL 440.318; MSA 19.9318. Notification is an issue only where the claims asserted arise independently of the contract. *Id.*, citing ¶1(b). Moreover, the timing of the assignment is irrelevant in this factual context because the assignee Dimmitt & Owens was a party in the litigation and was not prejudiced by any inability to defend the action against the assignor Pressline. See *Rhode Island Hospital Trust Nat’l Bank v Ohio Casualty Ins Co*, 789 F2d 74, 82 (CA 1, 1986). Thus, Motor Wheel was entitled to assert Pressline’s failure to perform as a defense to Dimmitt & Owens’ claim for payment.

“As a general rule, a valid and final judgment is binding and conclusive on all the parties of record in the action in which the judgment is rendered.” 14 Michigan Law and Practice, Judgment, § 262, p 675; see also *Johnson v Bundy*, 129 Mich App 393, 401-402; 342 NW2d 567 (1983). A default judgment is as conclusive an adjudication between the parties of whatever is essential to support the judgment as one entered after answer and contest. *Schwartz v City of Flint*, 187 Mich App 191, 194; 466 NW2d 357 (1991); *Braxton v Litchalk*, 55 Mich App 708, 714-717; 223 NW2d 316 (1974); *Perry & Derrick Co, Inc v King*, 24 Mich App 616, 620; 180 NW2d 483 (1970).

In this case, the obligee-assignor, Pressline, the assignee, Dimmitt & Owens, and the obligor, Motor Wheel were all parties of record in the lower court proceeding, which was instituted by Dimmitt & Owens. Pressline’s breach on the underlying contract was clearly at issue because it was raised as an affirmative defense by Motor Wheel in answer to Dimmitt & Owens’ complaint and in the cross-claim against Pressline, of which Dimmitt & Owens had notice.

When a party to a lawsuit fails to respond to a motion that is adverse to the party’s interest, this Court will not require the trial court to rehear the matters previously at issue. *Johnson, supra* at 403-404. A party is not entitled to, in effect, relitigate an issue when it had a full opportunity to file pleadings and to be heard. *Id.* at 404; *Rhode Island, supra* at 82.

By stipulation and order of the trial court on March 31, 1997, both Dimmitt and Owens and Motor Wheel were entitled to bring forth their claims against Pressline in the instant proceeding. Motor Wheel’s liability for the amount owing, if any, on the assigned account was clearly at issue. Motor Wheel’s defense in the lawsuit was premised on Pressline’s failure to perform the underlying contract as alleged in its cross-complaint:

8. ... Cross-Defendant’s purported assignee, Dimmitt & Owens Financial, Inc. (“Dimmitt”) brought this action against Cross-Plaintiff to recover amounts alleged to be owed for the Equipment.

9. ... Cross-Plaintiff answered the complaint, denying any liability to Dimmitt, and further explaining that the Equipment has been rejected as non-conforming, and that any alleged contract between Cross-Plaintiff and Cross-Defendant was rescinded and/or revoked as a result. Cross-Plaintiff further informed Dimmitt that Cross-Defendant had breached its agreement with Cross-Plaintiff by tendering non-conforming equipment.

When Motor Wheel filed a motion for default judgment against Pressline, Dimmitt & Owens had an opportunity to respond to matters pleaded, but failed to do so. We concur with the reasoning and conclusion in *Rhode Island, supra* at 82, that an assignee’s apparent legal error in failing to defend an action against the assignor, in which both were parties, is insufficient justification to deny the obligor the preclusive effect of the prior determination. Under these circumstances, the trial court did not err in deciding that the default judgment was conclusive on the issue of Pressline’s breach of contract and defeated Dimmitt & Owens’ claim against Motor Wheel.

IV

Dimmitt & Owens also claims that Motor Wheel waived its right to assert a setoff by failing to timely notify Dimmitt & Owens of alleged defects in the machinery. We disagree.

The UCC, MCL 440.2602(1); MSA 19.2602(1), imposes a duty on the buyer of goods to timely reject nonconforming goods:

Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

Acceptance of the goods generally precludes rejection of the goods accepted, but does not impair the buyer's other remedies for nonconformity. MCL 440.2607(2); MSA 19.2607(2). However, where the acceptance of goods was on the reasonable assumption that the nonconformity would be seasonably cured, the prior acceptance can be revoked. *Id.*

In the instant case, acceptance of the goods was on the reasonable assumption that the nonconformity would be cured; thus, a later rejection was not precluded. According to the affidavit of Motor Wheel's former engineering manager, Motor Wheel notified Pressline of continuing problems with the robotics equipment and that it was not performing as Pressline promised. Pressline's efforts to remedy the problems over several months proved unsuccessful, and Motor Wheel ultimately removed the system and substituted an alternative, more costly manual process.

Even if Motor Wheel failed to timely reject the goods, a buyer may, upon timely notifying the seller of a breach "recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable," MCL 440.2714(1); MSA 19.2714(1); this includes damages resulting from the seller's failure to perform his obligations under the terms of the contract. Comment 2 to UCC, MCL 440.2714(1); MSA 19.2714(1).

The common-law right of setoff is codified in the UCC, MCL 440.2717; MSA 19.2717:

The buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract.

Motor Wheel properly notified Pressline of the breach and that Motor Wheel expected a refund of the monies paid. According to the affidavit of Motor Wheel's plant manager, Pressline was notified that due to Pressline's inability to correct the chronic problems with the robotics equipment, the equipment had been removed from service, and Motor Wheel expected a full refund of monies paid on the equipment. Written communications also evidenced that Pressline was fully aware of the continuing problems with the equipment.

An assignment transfers or sets over one's whole interest in the property from one person to another unless the assignment is qualified in some way. *Moore v Baugh*, 106 Mich App 815, 819; 308

NW2d 698 (1981). “The assignee is ordinarily subject to any setoff or counterclaim available to the obligor against the assignor.” *Id.*

Unless the account debtor has agreed not to assert defenses or claims arising out of a sale, the rights of an assignee are subject to all terms of the account debtor/assignor contract and any defenses or claims arising out of the contract. MCL 440.9318(1)(a); MSA 19.9318(1)(a). In this case, Motor Wheel did not agree not to assert defenses or claims arising out of the contract.

An assignee is entitled to recover only and just as his assignor might, had no assignment been made. *Ward v Alpine Twp*, 204 Mich 619, 631; 171 NW 446 (1919). Because an assignee is subject to any setoff available to the obligor against the assignor, the court properly held that Dimmitt & Owens’ claim was subject to a setoff of the default judgment entered against Pressline.

Affirmed.

/s/ Janet T. Neff

/s/ William B. Murphy

/s/ Joseph B. Sullivan