

STATE OF MICHIGAN
COURT OF APPEALS

STERLING BANK & TRUST, F.S.B.,

Plaintiff-Appellant,

v

PRIME FINANCIAL LEASING
CORPORATION,

Defendant-Appellee.

UNPUBLISHED
September 28, 2001

No. 221920
Oakland Circuit Court
LC No. 98-010302-CZ

Before: K. F. Kelly, P.J., and Hood and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

This action arose from defendant's assignment of an equipment lease to plaintiff. Lakeside United Foods, Inc. (Lakeside) selected equipment, specifically a "4 Headed Wedge Cutter," from J & B Equipment Company (J & B). J & B sold the equipment to defendant, and the invoice indicated that the equipment purchase price was \$99,650. Lakeside agreed to pay defendant \$2509.96 in monthly rent for a period of sixty months for the equipment. Defendant then assigned the monthly rental payments to plaintiff. The assignment agreement provided that defendant assigned to plaintiff "without recourse as to the financial ability of the lessee to pay" its rights to receive rentals, its security interest, and its right to enforce the lease. In exchange for the assignment, plaintiff expended \$115,555.56. Plaintiff paid J & B directly for the equipment. For its role in the transaction, defendant was paid a commission of approximately \$6,500 by plaintiff. The assignment agreement contained the following provision:

To induce Assignee [plaintiff] to accept this assignment, Assignor [defendant] represents and warrants (1) the Lease, guarantees if any, and all documents related to the Lease are genuine and enforceable; (2) all signatures are genuine and all signers are of legal age, competent, and authorized to sign; (3) *the leased equipment is new (unless otherwise specified), is accurately described and has been delivered to and accepted by the Lessee*; (4) the leased equipment is free from all liens and encumbrances, except the Lessee's interest pursuant to the Lease; (5) at the date of this assignment there is no event of default by Lesser or Lessee; (6) there are no offsets, counterclaims, or other defenses to the Lease to the Assignor's knowledge; (7) the Assignor has complied with all filing and

recording requirements to perfect any security interest it may have in the leased property; and (8) the Assignor has complied with and will continue to comply with and perform all obligations and duties of Lessor pursuant to the Lease. Should any of these representations or warranties be false, or should any claim of breach of warranty be made by the Lessee or its assigns, the Assignor shall immediately pay to the Assignee, on demand, all unpaid assigned rentals, plus all other damages, costs, expenses and reasonable legal fees incurred by the Assignee. [Emphasis added.]

Lakeside defaulted on the lease, and plaintiff repossessed the equipment. Following repossession, an appraisal revealed that the equipment had a current fair market value of \$2,000 and a forced sale value of \$700. Additionally, the appraisal concluded that the equipment could be “reproduced”¹ at a cost that would not exceed \$20,000. Plaintiff filed suit alleging breach of contract and innocent misrepresentation. Plaintiff alleged that defendant breached the terms of the lease because the equipment was not new or accurately described in the lease. Plaintiff also alleged that defendant misrepresented that the value of the equipment was \$99,650. The trial court granted defendant’s motion for summary disposition.

Plaintiff first argues that the trial court erroneously granted summary disposition because defendant breached the express warranty contained in the lease. We disagree. Our review of the grant or denial of summary disposition is de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Additionally, the construction and interpretation of a contract presents a question of law that is subject to de novo review. *Bandit Industries, Inc v Hobbs Int’l, Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001). The goal of contract construction is to determine and enforce the parties’ intent from the plain language of the contract itself. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). However, this Court may construe the contract in an effort to find and enforce the parties’ intent when a contract is ambiguous. *Id.* The failure to define a contract term does not render the contract ambiguous. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). Rather, the terms of a contract must be interpreted in accordance with their commonly used meanings. *Id.* Extrinsic evidence is generally not admissible where a contract is clear and unambiguous. *Schroeder v Terra Energy, Ltd*, 223 Mich App 176, 191; 565 NW2d 887 (1997).

Review of the assignment agreement in the present case reveals that defendant, to comply with the warranty provision, had to establish that the leased equipment was new at the time of purchase, accurately described, and had been delivered to Lakeside.² In support of its motion for summary disposition, defendant submitted the affidavit of J & B employee Edward P. Maloney. The affidavit provided that Lakeside selected the equipment listed in the invoice, a “4 Headed Wedge Cutter,” and the equipment was new when it was acquired for Lakeside. The invoice reflected the selection of that equipment. Thus, defendant met its summary disposition burden of

¹ There was no foundation in the appraisal opinion to determine the basis of this conclusion. Additionally, the appraiser did not establish what “reproduce” meant. Therefore, it is unknown whether a manufacturer of this product would, in fact, value the equipment at \$20,000.

² We note that the lease assignment contains numerous other warranty provisions. However, defendant has not challenged the other provisions, and consequently, we will not address them.

establishing that the equipment was new and accurate at the time of purchase with admissible documentary evidence. MCR 2.116(G)(3); *SSC Associates Limited Partnership v General Retirement System of Detroit*, 192 Mich App 360, 363-364; 480 NW2d 275 (1991).

In opposition to the dispositive motion, plaintiff presented an opinion from appraiser Curtis B. Kaye. However, the documentary evidence offered in opposition to a dispositive motion must be substantively admissible evidence. *Maiden, supra*. Opinions, conclusive denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule. *Marlo Beauty Supply, Inc v Farmers Ins Group*, 227 Mich App 309, 321; 575 NW2d 324 (1998). However, even assuming that plaintiff had filed the appraiser's opinion in the form of a sworn affidavit based on personal knowledge, Kaye did not examine the equipment in dispute at the time of purchase and cannot dispute the accuracy of the description or condition upon purchase. Rather, Kaye merely opined that the equipment could be "reproduced" at a cost that would not exceed \$20,000.

Plaintiff also submitted the affidavit of employee Mark Pacitto. This affidavit also does not dispute that the equipment was new at the time of purchase or the accuracy of its description. Rather, Pacitto asserted that the purpose of the warranty language in dispute was to ensure that the "value of the collateral which is the subject of the lease is worth the amount represented to the Bank." This affidavit also does not create a genuine issue regarding any material fact. The contract in dispute is unambiguous, and therefore, plaintiff's intention that "new" or "accurate" refer to valuation for purposes of establishing the net worth of the equipment as collateral is not contained within the plain language of the contract. *Old Kent Bank, supra*. Furthermore, the commonly used meanings of the terms "new" or "accurate" is inconsistent with valuation or worth. *Henderson, supra*. Accordingly, the trial court properly granted defendant's motion for summary disposition of the breach of warranty claim.

Plaintiff next argues that the trial court erred in granting summary disposition of the innocent misrepresentation claim. We disagree. Our review of this issue is also de novo. *Maiden, supra*. A claim of innocent misrepresentation is established if a party relies, to its detriment, upon a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation. *M & D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998). The plaintiff alleging innocent misrepresentation need not prove a fraudulent intent or purpose on the part of the acting defendant, but must show that the representation was made in connection with the making of the contract. *Id.* at 27-28.

In the present case, plaintiff alleges that it required the production of the purchase receipt between defendant and J & B prior to executing the assignment agreement. Plaintiff further alleges that this purchase receipt served as evidence of value of the collateral. A false representation of a fact may be by words or conduct, by false or misleading allocations, or by concealment of that which should have been disclosed. *In re Benker*, 97 Mich App 754, 756; 296 NW2d 167 (1980), rev'd on other grounds 416 Mich 681 (1982). We cannot conclude that the mere production of a receipt constitutes a misrepresentation regarding the value of collateral. "Receipt" is defined as "a written acknowledgment of having received money or goods as specified." *Random House Webster's College Dictionary*, (1997), p 1085. Review of the receipt in the present case reveals that it contains the purchase price of the equipment. There is no indication on the receipt that it evidences the *value* of the equipment or that the equipment was purchased at cost. Furthermore, plaintiff solely relies on the production of the receipt to

establish any alleged misrepresentation. Plaintiff fails to identify any conversations or other communications with defendant's employees that would indicate that the production of the receipt would constitute valuation of collateral. Accordingly, the trial court properly granted summary disposition of this claim.³ *SSC, supra*.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Harold Hood

/s/ Brian K. Zahra

³ Within the discussion of this issue, plaintiff alleged that the trial court improperly made factual findings in reaching this issue. This allegation is without merit.