STATE OF MICHIGAN

COURT OF APPEALS

CADILLAC TOWER ASSOCIATES,

Plaintiff-Appellee,

V

BARR & ASSOCIATES and CHARLES J. BARR, Esquire,

Defendants-Appellants.

UNPUBLISHED
March 22, 2002

No. 227821
Wayne Circuit Court
LC No. 99-901408-CK

Before: O'Connell, P.J., and White and Cooper, JJ.

PER CURIAM.

Defendant Charles Barr and his law firm, Barr and Associates (hereafter jointly referred to as defendant), are long-term tenants of Cadillac Tower, in downtown Detroit. Defendant, along with several other lawyers, first occupied suite 2715 at Cadillac Tower in 1974.

I

1984 Lease Agreement, Promissory Note, and Security Agreement

Defendant and plaintiff Cadillac Tower Associates (CTA) entered into a lease for suite 2715 (2,343 gross rentable square feet for $1,659.63 monthly), in November 1984 that expired October 31, 1987. However, defendant continued his tenancy. Defendant failed to pay, or intermittently paid, rent such that as of April 7, 1994, he owed $70,140.65 in back rent. Plaintiff filed suit to collect the back rent and a settlement was negotiated. In connection with the 1984 lease, defendant executed a promissory note on March 7, 1996, in the amount of $70,766.20, to be discharged by the payment of $31,800.00, provided defendant made timely monthly payments of $530.00 for sixty months.

Defendant also executed a security agreement on March 7, 1996. The security agreement was entered into by Barr and Associates, as debtor, and plaintiff as secured party. Barr signed the agreement, as did Charles Pardon, plaintiff's building manager. The security agreement provided that "[t]he Debtor hereby grants to the Secured Party a security interest in the following collateral in order to secure the payment and performance of the obligation set out in this Agreement."

4. **Collateral**. The property serving as collateral and subject to the above security interest is as follows:

a. Collateral. The following described property including all parts, replacements, accessions, and all other property rights that may derive from or accrue to these assets whether by natural increase or otherwise:

(1) Equipment of the Debtor located at 2715 Cadillac Tower, Detroit, MI 48226

(2) Furniture of the Debtor located at 2715 Cadillac Tower . . .

(3) Fixtures of the Debtor located at 2715 Cadillac Tower . . .

(4) All of Debtor's accounts receivable

b. After-Acquired Collateral. All other property of a type described above that the Debtor may acquire over the course of this Agreement.

c. Proceeds. All proceeds of the above-described collateral.

5. **Obligations of Debtor.** The obligations of the Debtor that are subject to this Security Agreement are as follows:

a. Principle [sic] Obligation. This Security Agreement secures repayment of the sum of $70,766.20, which is evidenced by a promissory note executed by the Debtor and dated March 7, 1996.

b. Repayment Schedule. The Debtor agrees to repay the Secured Party in the following manner: 60 consecutive monthly payments of $530.00.

1995 Lease Agreement & Instant Complaint

In the interim, defendant and several non-party co-lessees entered into a new lease with plaintiff dated July 28, 1995, for the period from September 1, 1995 through August 31, 2000. Signators to the 1995 lease were Charles Pardon, plaintiff's building manager, and five lessees, including defendant.

Plaintiff filed a three-count complaint on January 19, 1999, seeking to recover funds due under the promissory note executed in connection with the 1984 lease, alleging breach of the 1995 lease agreement, and alleging that plaintiff was entitled to possession of assets defendant had pledged as security.

Defendant answered and counterclaimed, alleging breach of contract and estoppel. Defendant's contract claim alleged that since 1990, plaintiff had failed to provide premises fit for operation of professional legal services and to provide for the quiet enjoyment of the premises in various respects, including electrical, heating and air conditioning services, potable water, and telephone service. Defendant's estoppel claim alleged that since 1990, plaintiff unconscionably

charged him grossly excessive rental prices, which caused the deficit plaintiff referred to in its complaint. Defendant alleged that plaintiff breached the July 1995 lease agreement and forced him from the premises in October 1997, thereby abandoning its right to enforce the terms of the security agreement.

Plaintiff's first motion for summary disposition argued that it was entitled to judgment under both the promissory note and for defendant's breach of the 1995 lease, and was entitled to enforcement of its security interest under the security agreement defendant signed in connection with execution of the promissory note. Attached to plaintiff's motion were exhibits including an affidavit of Charles Pardon, plaintiff's building manager at all pertinent times, that stated in part:

> 3. Charles Barr ("Barr") executed a lease with CTA on November 1, 1984. Barr defaulted on that lease as early as 1988.
>
> 4. Throughout the late 1980's and up until 1996, Barr continually failed to pay his rent under the lease agreement as it became due. In some cases he would eventually make a late payment, however, as of August 1995 he was $71,149.83 in arrears.
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> 5. In settlement of his obligations under the 1984 lease, Barr executed a Promissory Note in the amount of $70,766.20.
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> 6. Barr failed to make timely payments due under that Note, and has paid only $2,082.00 toward that debt. This amount includes a $200.00 check Barr sent CTA after receiving notice of default on the Note, and which is currently held in escrow.
>
> 7. Barr also executed a separate and additional lease with CTA, along with other co-lessees, in 1995, for Suite 2715.
>
> 8. The parties to the 1995 lease to Suite 2715, including Barr, defaulted on their obligations to pay rent. All other parties, excluding Barr, have settled their liability under this lease with CTA. Barr still owes $21,633.41 under the 1995 lease.
>
> * * *
>
> 10. Since 1988 Barr has had a history of failing to pay his lease obligations as they became due. This is true for both the 1984 lease and the 1995 lease. On a continual basis from 1988 until the present, CTA has contacted Barr and made numerous and repeated requests for payment.

Plaintiff's motion argued that "it is uncontroverted that Barr failed to make all his payments as they became due [under the promissory note] indeed Barr has admitted this fact," attaching in support plaintiff's first request for admissions, which, plaintiff argued, defendant never answered. Plaintiff's requests to admit included the following:

> Admit that you did not make every payment on the Promissory Note, attached as Exhibit A of the First Amended Complaint, as that payment became due.
>
> Admit that you have not made all required payments on the Promissory Note . . .
>
> Admit that there is an outstanding balance due on the Promissory Note . . .
>
> Admit that Cadillac Tower Associates made demand for payments under the Promissory Note . . .

The requests to admit also addressed the 1995 lease agreement:

> Admit that during the term of your 1995 lease, attached as Exhibit B of the First Amended Complaint, you never filed any written complaints with Cadillac Tower Associates regarding the performance of their obligations under that lease.
>
> Admit that you did not pay rent under the 1995 lease . . . as that rent became due.
>
> Admit that you still owe money under that 1995 lease . . .

There is no evidence that defendant answered these requests to admit, nor does defendant argue that he did so. Thus, they are deemed admitted. MCR 2.312(B)(1) and (D).

Defendant's response to plaintiff's motion stated that he, practicing as Barr and Arsenault, entered into a lease in 1984 that expired on October 31, 1987, and thereafter occupied the space as a month-to-month tenant.[1] Defendant submitted his own affidavit in support of his response to plaintiff's motion, stating:

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[1] Defendant's response further stated:

> By 1990, CTA was fully aware that only two of the four offices in the suite were occupied. In light of the low occupancy rate of CTA at that time, there seemed no point to undergoing the pain of moving. Although CTA regularly increased the monthly rental, they were happy to accept the *de facto* lower payments that were being made, in recognition of the fact that the CTA occupation was low. By 1994, only one of the four offices was occupied, a fact well known to CTA. By continuing to charge Barr an increasing month to month rental rate on the entire space, CTA was charging Barr a portion of the CTA vacancy. It should be emphasized that **there was no lease between CTA and Barr from 1987 to 1995.**
>
> In 1995, CTA combined Barr's space (with Barr's acquiescence) with adjoining space, and the 1995 lease was signed, between CTA and Barr with four other tenants. Unfortunately (and unconscionably), CTA required Barr to sign the promissory note . . . as a condition of entering into the 1995 lease. Contrary to Defendant's [sic plaintiff's] assertion in its motion, the promissory note was not entered into to settle a suit for back rent. Barr was comfortable entering into the

(continued…)

> 2. Contrary to the statement of Charles Pardon in his affidavit, there was no lease agreement in effect between Cadillac Tower Associates (CTA) and me (Barr) between November of 1987 and July 28, 1995.
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> 3. Contrary to the statement of Charles Pardon in his affidavit, there was an implicit agreement between CTA and Barr that lesser payments were acceptable, given the fact that the space Barr was occupying was not filled with tenants and the fact that the CTA was no where [sic] close to full occupancy.
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> 4. CTA unconscionably required Barr to sign a promissory note in March of 1996 to continue his tenancy, despite the implicit agreement between CTA and Barr that lesser payments were acceptable, given the fact that the space Barr was occupying was not filled with tenants and the fact that the CTA was no where [sic] close to full occupancy.
>
> 5. At no time did CTA give Barr an opportunity to participate in the settlement negotiations which permitted the other signers of the 1995 lease to settle with CTA.
>
> 6. The attempt to assign all of the remaining arrearage from that lease to Barr is outrageously unconscionable.
>
> 7. All of the allegations in Defendant's counterclaim are true and will be supported by testiomony [sic] of Defendant and by witnesses listed by Plaintiff.

Defendant filed a supplemental response to plaintiff's motion in which he argued that the security agreement was a modification of the promissory note, under MCL 440.3117, see n 2 *infra*, that the security agreement identified collateral for the promissory note, and that the value of the collateral could offset the amount owing on the promissory note, should plaintiff accelerate defendant's obligations. Defendant noted that in 1997, well before plaintiff accelerated the payment of the promissory note, plaintiff, as part of its settlement with other tenants, demanded that defendant vacate the suite 2715 premises and immediately remove all the collateral property. Defendant maintained that plaintiff threatened that if defendant did not remove the equipment, furniture and fixtures immediately, plaintiff would hire a contractor to remove and dispose of the items and charge defendant the contractor's charges. Defendant maintained that he had no opportunity to obtain value for any of the collateral, and rather than

> (…continued)
>
> 1995 lease based on a verdict and judgment "certain" to be upheld on appeal by the 6th Circuit of the United States Court of Appeals.
>
> The tenants under the 1995 lease found themselves unable to meet the lease obligations (not just Barr, as implied by Defendant's [sic plaintiff's] motion). CTA chose to require Barr to leave the space (which he did) and chose to negotiate a settlement with some of his co-tenants (with no notification or opportunity to participate for Barr). They now, again unconscionably, seek to have judgment against Barr for the entire amount of the unpaid rent.

incur the costs of removing the property, he gave everything away to those willing to remove it. Defendant maintained that plaintiff, by its actions, had not only abandoned any interest it had in the collateral, but forced him to dispose of valuable equipment, furniture and fixtures for nothing, and thus discharged the promissory note by cancellation, under MCL 440.3604, or impaired the value of the collateral, under MCL 440.3605. See ns 3 and 4, *infra.* Defendant argued that the value of the collateral exceeded $70,000, although plaintiff claimed the value exceeded $10,000, and that a question of fact existed as to the extent of the impairment of value of the collateral and the extent of the discharge of the promissory note. Defendant presented an affidavit in support of his supplemental response.

At the hearing on plaintiff's first motion for summary disposition, the court granted plaintiff summary disposition on the note, and denied summary disposition regarding the reminder of plaintiff's claim and defendant's counter-complaint.

After discovery closed, and after the case was mediated, plaintiff filed its second motion for summary disposition, under MCR 2.116(C)(10), arguing that defendant breached the 1995 lease agreement and owed plaintiff $21,663.41 therefor, that defendant also owed plaintiff $33,908.00 in demising costs under the lease, and that plaintiff was entitled to attorney fees and costs under the lease.

Defendant's response to plaintiff's second motion argued that plaintiff appeared to assume that defendant's counterclaim and demand for jury trial did not exist, when in fact, they did exist and created questions of fact.

The circuit court granted summary disposition on the breach of the 1995 lease count, but denied the motion as to demising costs. The court entered an order of final judgment in plaintiff's favor on the promissory note in the amount of $67,624.20, and on the 1995 lease in the amount of $21,663.41. The circuit court also ordered that judgment be entered in plaintiff's favor on defendant's counterclaim, and that defendant pay plaintiff's actual attorney fees and costs.

II

This Court reviews the circuit court's grant of summary disposition de novo. *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999). The circuit court considers affidavits, pleadings, depositions and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id.* at 120. "The reviewing court should evaluate a motion . . . under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion." *Id.* at 121.

A

Defendant argues that the circuit court erred in granting summary disposition on the promissory note by failing to consider or permit evidence that plaintiff discharged the promissory note by cancellation, or reduced the value of the note by impairment of the collateral. Defendant argues that the security agreement modified the promissory note under MCL

440.3117,[2] and that plaintiff destroyed the collateral set forth in the security agreement, and thus discharged the promissory note by cancellation under MCL 440.3604,[3] or impaired the collateral under MCL 440.3605(5).[4] We disagree.

By its plain language, MCL 440.3604 clearly does not apply, as plaintiff did not do any of the enumerated acts listed in the statute (see n 3, *supra*), and defendant cites only the statute as authority, without citation to any case. MCL 440.3605 does not apply because defendant is neither "an endorser or accommodation party having a right of recourse against the obligor," as

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[2] MCL 440.3117 provides:

> Subject to applicable law regarding exclusion of proof of contemporaneous or previous agreements, the obligation of a party to an instrument to pay the instrument may be modified, supplemented, or nullified by a separate agreement of the obligor and a person entitled to enforce the instrument, if the instrument is issued or the obligation is incurred in reliance on the agreement or as part of the same transaction giving rise to the agreement. To the extent an obligation is modified, supplemented, or nullified by an agreement under this section, the agreement is a defense to the obligation.

[3] MCL 440.3604 provides:

> (1) A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument (*i*) by an intentional voluntary act, such as surrender of the instrument to the party, destruction, mutilation, or cancellation of the instrument, cancellation or striking out of the party's signature, or the addition of words to the instrument indicating discharge, or (*ii*) by agreeing not to sue or otherwise renouncing rights against the party by a signed writing.
>
> (2) Cancellation or striking out of an endorsement pursuant to subsection (1) does not affect the status and rights of a party derived from the endorsement.

[4] MCL 440.3605 provides in pertinent part:

> (5) If the obligation of a party to pay an instrument is secured by an interest in collateral and a person entitled to enforce the instrument impairs the value of the interest in collateral, the obligation of an endorser or accommodation party having a right of recourse against the obligor is discharged to the extent of the impairment. The value of an interest in collateral is impaired to the extent (*i*) the value of the interest is reduced to an amount less than the amount of the right of recourse of the party asserting discharge, or (*ii*) the reduction in value of the interest causes an increase in the amount by which the amount of the right of recourse exceeds the value of the interest. The burden of proving impairment is on the party asserting discharge.

required under the statute. See MCL 440.3204(1)-(2) and MCL 440.3419,[5] which define "endorser" and "accommodation party," respectively.

Defendant also argues that the security agreement modified the promissory note, under MCL 440.3117. However, defendant cites no case nor does he explain how MCL 440.3117 obligates plaintiff to proceed against the collateral. Further, he presents only his conclusory assertion that he was forced to dispose of the collateral and, in effect, acknowledges in an affidavit that he made no attempt to obtain value for the collateral.[6] Thus, defendant's claim fails.

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[5] MCL 440.3204(1)-(2) provide:

> (1) "Endorsement" means a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is made on an instrument for the purpose of (*i*) negotiating the instrument, (*ii*) restricting payment of the instrument, or (*iii*) incurring endorser's liability on the instrument, but regardless of the signer, a signature and its accompanying words is an endorsement unless the accompanying words, terms of the instrument, place of the signature, or other circumstances unambiguously indicate that the signature was made for a purpose other than endorsement. For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument.
>
> (2) "Endorser" means a person who makes an endorsement.

MCL 440.3419 provides in pertinent part:

> (1) If an instrument is issued for value given for the benefit of a party to the instrument ("accommodated party") and another party to the instrument ("accommodation party") signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument, the instrument is signed by the accommodation party "for accommodation".

Defendant executed both the promissory note and security agreement as the maker, and was a direct beneficiary of the value given for both the promissory note and security agreement.

[6] In his affidavit in support of his supplemental response to plaintiff's motion for summary disposition, defendant stated:

> 5. CTA told me that if I did not remove and dispose of all of the equipment, furniture and fixtures immediately, CTA would hire a contractor to remove and dispose those items and charge me for the contractors [sic] charges.

(continued…)

B

Defendant's second argument is that the circuit court erred in granting plaintiff summary disposition for breach of the 1995 lease, when it failed to consider defendant's counterclaim and dismissed it.

Defendant's appellate brief states nothing regarding the substance of his counterclaim, and simply makes the general argument that the circuit court did not apply the proper standard in evaluating the summary disposition motion, and that plaintiff presented no allegations to contradict the counterclaim.

Defendant's counterclaim alleged inadequacy of the premises, but defendant presented no evidence below to support this claim. Defendant's counterclaim also claimed estoppel on the basis that plaintiff had charged him unconscionable rental rates since 1990. However, defendant cannot be heard to complain about rental rates under the circumstance that he entered into an agreement regarding the back rent he owed under the 1984 lease, and in 1995 entered into a second lease agreement that provided for a monthly rental rate. Lastly, the counter complaint repeated defendant's claim that plaintiff forfeited its right to enforce the security agreement by forcing defendant from the premises. As explained above, there was no legal support for this claim.

We conclude that defendant failed to present any evidence from which the circuit court could conclude that plaintiff had failed to provide fit premises, and failed to present any evidence to support that rental rates charged him were unconscionable, i.e., to support his estoppel claim. Defendant was required to come forward with evidence showing a genuine issue of material fact regarding his counterclaim, and failed to do so. *Maiden, supra.*

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Jessica R. Cooper

(…continued)

6. Beacuse [sic] there was no time to make any arrangement to obtain value for any of the collateral, and to continue my law practice at the same time, I was forced to give the collateral to those who would agree to come and remove it.