STATE OF MICHIGAN

COURT OF APPEALS

TERRY PRICE,

Plaintiff-Appellant,

v

MONROE BANK & TRUST, TAYLOR BULLDOZING & EXCAVATING, INC., and YODERS & FREY, INC.,

Defendants-Appellees.

UNPUBLISHED
November 8, 2002

No. 227118
Monroe Circuit Court
LC No. 97-006437-CZ

Before: Whitbeck, C.J., and Sawyer and Kelly, JJ.

PER CURIAM.

Plaintiff appeals from an order of the circuit court granting summary disposition to defendants. We affirm.

Plaintiff owned a small construction business, Price Contracting. Plaintiff borrowed money from defendant Monroe Bank & Trust, securing the loan with a pledge of the business assets, as well as with a second mortgage on his personal residence and a first mortgage against a vacant parcel of commercial real estate. Plaintiff's wife, Vicki Price, was also a guarantor on the loans.

Plaintiff experienced financial difficulties in his business and by 1995 was in default on the bank loans. Ultimately, plaintiff voluntarily surrendered the collateral to the bank for liquidation and also filed bankruptcy.[1]

The business assets were eventually disposed of, but did not bring enough money to satisfy plaintiff's indebtedness and in 1997 the bank foreclosed on the real estate. Plaintiff filed the instant action in April 1997, alleging that defendants had acted improperly in the sale of the collateral. Plaintiff also unsuccessfully sought a stay to the foreclosure on the real estate mortgages. The trial court ultimately granted summary disposition in favor defendants on plaintiff's various claims.

[1] According to plaintiff, Mrs. Price did not join in the bankruptcy. Plaintiff did, however, institute divorce proceedings in late 1995.

Plaintiff's claims generally center on whether the collateral was disposed of in a commercially reasonable manner under Michigan's version of the Uniform Commercial Code. See MCL 440.9504; 440.9507. The property falls into three different disposition categories: property sold at auction, property sold at private sale, and property that was lost or stolen.

Plaintiff first argues that the trial court erred in determining that the notification requirements were met with respect to the property sold at auction. We disagree. MCL 440.9504(3) provides that, with certain exceptions, "reasonable notification of the time and place of any public sale . . . shall be sent by the secured party to the debtor . . . ." Plaintiff argues that the bank only sent notice to plaintiff's bankruptcy attorney and that that was insufficient to comply with the statute. Plaintiff also complains that the notice was inadequate in that it failed to specify that the auction was a "farm auction" and that it grossly overstated the outstanding balance on the loans (i.e., the amount which plaintiff could have paid the bank to avoid the sale and secure the return of the property).

With respect to the notice to the attorney, we are not persuaded that this was improper. If the representation by the attorney was for a matter wholly unrelated to the foreclosure, perhaps it could be said that it is unreasonable to send notice to the attorney. But, we do not think it unreasonable for a creditor to send a notice through the debtor's bankruptcy attorney. Furthermore, plaintiff acknowledges that his attorney advised him of the receipt of the notice. Moreover, plaintiff does not dispute that he was actually in attendance at the sale. In light of these facts, we do not find that notice to the attorney was insufficient.[2]

Plaintiff devotes more time to the argument that the substance of the notice was inadequate. In support of its position, plaintiff relies upon this Court's opinion in *Honor State Bank v Timber Wolf Construction Co*, 151 Mich App 681; 391 NW2d 442 (1986), and *Wilmington Trust Co v Conner*, 415 A2d 773 (Del, 1980), a Delaware case analyzed in *Honor Bank*. However, this argument overlooks the fact that MCL 440.9504(3) only requires that there be "reasonable notification of the time and place of any public sale . . . ." Thus, even if we accept plaintiff's argument that the notice failed to state that the auction was a "farm" auction and that it overstated the amount required for redemption, plaintiff points to no provision in the statute which requires that the notice contain such information. To the extent that the decision in *Honor Bank* implies such a requirement, then that opinion improperly adds a requirement not to be found in the statute.

As the Supreme Court instructs in *Roberts v Mecosta Co General Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002):

> An anchoring rule of jurisprudence, and the foremost rule of statutory construction, is that courts are to effect the intent of the Legislature. *People v Wager*, 460 Mich 118, 123, n 7; 594 NW2d 487 (1999). To do so, we begin with an examination of the language of the statute. *Wickens v Oakwood Healthcare System*, 465 Mich 53, 60; 631 NW2d 686 (2001). If the statute's language is clear

[2] The argument that notice to plaintiff's bankruptcy attorney was inadequate to constitute notice to plaintiff's wife may well be a compelling argument. However, Vicki Price is not a party to this lawsuit. Therefore, the adequacy of the notice to her is of no concern to this case.

> and unambiguous, then we assume that the Legislature intended its plain meaning and the statute is enforced as written. *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001). A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999).

Thus, in the absence of a statutory requirement, we lack the authority to impose one on defendant. *Roberts, supra* at 66. Accordingly, the bank was not obligated to include anything in the notice beyond the time and place of the auction and, because it is undisputed that the notice did contain that information, there is no viable argument that the notice was substantively invalid.

Plaintiff's second argument is that the trial court erred in concluding that there was no genuine issue of material fact regarding whether the auction was conducted in a commercially reasonable manner. While it is true that, where there are contested issues of fact, the issue of commercial reasonableness is an issue to be decided by the trier of fact, *Jones v Morgan*, 58 Mich App 455, 458; 228 NW2d 419 (1975), plaintiff fails to identify what those contested issues of fact are regarding the sale at auction. At best, plaintiff's brief on appeal suggests that it was unreasonable to sell the construction equipment at a "farm" auction rather that at the Ohio "construction equipment" auction recommended by the appraiser.[3] Plaintiff, however, fails to point to any evidence to suggest that the sale at a "farm" auction was commercially unreasonable.

MCL 440.9507(2) grants wide discretion to the creditor in selecting the method of disposing of collateral:

> The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner.

Plaintiff directs our attention to no evidence which he could have offered to the trier of fact to support the proposition that the sale of construction equipment at a "farm" auction is commercially unreasonable. That is, perhaps there would be a genuine issue of material fact on this issue if plaintiff were to offer an affidavit or deposition from an expert who would opine at trial that the sale of construction equipment at an auction identified as a "farm" auction is not in conformity with reasonable practices. However, plaintiff points to no such evidence in his brief and, therefore, we conclude that plaintiff has failed to demonstrate the existence of a genuine

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[3] Plaintiff's brief on this issue also mentions the issues of the private sales and the lost or stolen property. However, we will deal with the reasonableness of those dispositions in later issues.

issue of material fact regarding whether the sale was conducted in a commercially unreasonable manner.

Next, plaintiff argues that the trial court's October 27, 1997, decision on the first motion for summary disposition engaged in improper fact-finding. However, while plaintiff identifies a number of facts that the trial court allegedly found regarding whether notice of the auction was reasonable, plaintiff does not demonstrate how any of these facts were in dispute. That is, plaintiff's argument goes beyond the basic principle that, under an MCR 2.116(C)(10) motion, the trial court should resolve any factual dispute in favor of the non-moving party, to suggest that the trial court cannot even consider facts not in dispute to determine whether a genuine issue of material fact exists. Plaintiff's focus on the trial court's consideration of undisputed facts is misplaced; rather, plaintiff's focus should be on whether, in light of those undisputed facts, the trial court correctly concluded that there was no genuine issue of material fact regarding whether the notice of the sale was adequate. And that issue was dealt with earlier in this opinion.

Plaintiff next argues that the second motion for summary disposition was fatally defective under MCR 2.116(G)(4) and MCR 2.119(A)(1) in that defendants failed to identify the controlling principles of law in each count of the complaint for which defendants alleged that there was no genuine issue of material law. However, our concern on appeal is whether the trial court correctly granted that relief, not with whether the trial court should have been dissatisfied with the briefs presented to it.

Plaintiff's fifth argument on appeal is that defendants abused the mediation process by filing their second motions for summary disposition before the close of the period for accepting or rejecting the mediation evaluation. We disagree. The only authority plaintiff advances for the proposition that a motion for summary disposition may not be filed during the mediation acceptance/rejection period is MCR 2.403(L)(2), which provides that there "may be no disclosure of a party's acceptance or rejection of the [mediation] panel's evaluation until the expiration of the" response period. Plaintiff theorizes that filing a summary disposition motion during the response period "suggests" that the mediation was rejected. We do not accept plaintiff's logic on this point.

We fail to see how the filing of a motion for summary disposition necessarily means that a defendant rejected mediation. The two actions, accepting mediation and moving for summary disposition, are not inherently contradictory. That is, while a defendant may believe that a case should be dismissed on a summary disposition motion, it may nevertheless desire to accept mediation if that motion fails. For example, the mediation evaluation may be sufficiently low that a defendant would be willing to accept that amount rather than take on the risks that are inherent with going to trial. Thus, while a defendant would rather pay nothing (i.e., win a summary disposition motion), absent that it might be willing to pay the mediation evaluation rather than run the risk of paying even more following an adverse jury verdict. For that matter, there is an incentive to the defendant to accept evaluation even if it believes the evaluation accurately represents what the jury would award because a rejection exposes the defendant to paying mediation sanctions.

Plaintiff also argues that there would be no justification for a defendant to accept the mediation evaluation if there truly were no genuine issues of material fact. That is true in the abstract, but not as a practical matter. The defendant's incentive to accept mediation is lacking

only if the defendant knows, with absolute certainty, that the trial court will agree that there is no genuine issue of material fact and will grant summary disposition and that that decision will be upheld on appeal. Obviously, no such certainty ever exists. Therefore, a defendant must factor into its decision to accept or reject mediation the prospects of winning (and defending on appeal) a grant of summary disposition as well as the prospects of prevailing at trial.

Plaintiff also argues that defendants' "manipulation" of the mediation process by filing the motion for summary disposition, thus suggesting that it had rejected mediation, impacted plaintiff's decision regarding mediation. Plaintiff, however, fails to present any compelling reason why it would or, for that matter, that it did in this case. Plaintiff obviously rejected the mediation evaluation himself, having been assessed mediation sanctions. Assuming, as plaintiff suggests, that the summary disposition motion signaled defendants' rejection of mediation, then why would plaintiff have also rejected? "Knowing" that defendants rejected, plaintiff could have safely accepted mediation. The "knowledge" of defendants' rejection assures plaintiff that he would not be bound by the evaluation, yet give plaintiff the potential advantage of having accepted the evaluation and being eligible to receive mediation sanctions. Thus, logically, it made sense for plaintiff to have rejected mediation only if plaintiff was contemplating the possibility that defendants would accept. Plaintiff would contemplate such a possibility only if he had already accepted the mediation evaluation before learning of the motion for summary disposition (in which case there was no affect on plaintiff's decision making) or if he realized that the motion does not, in fact, suggest a rejection.

Furthermore, we fail to see the advantage to a defendant to manipulate a plaintiff into accepting a mediation evaluation that the defendant intends to reject; such a tactic opens the defendant up to the possibility of mediation sanctions following an adverse jury verdict with no clear benefit to the defendant. There would be an advantage to a defendant to manipulate a plaintiff into rejecting a mediation evaluation so that the defendant may either safely reject as well and limit the potential for mediation sanctions or else safely accept and set itself up to receive mediation sanctions. But, as discussed above, we fail to see how a defendant signaling that it is rejecting the mediation evaluation would prompt a plaintiff into also rejecting.

Accordingly, plaintiff's argument of manipulation fails.

Plaintiff's sixth issue is that the trial court erred in concluding as a matter of law that the sale of the collateral was done in a commercially reasonable manner. To the extent that plaintiff in this issue again argues that the auction was not conducted in a commercially reasonable manner, we have disposed of that issue above. However, the issue of the commercial reasonableness of the private sales bears closer scrutiny. Some of the collateral was privately sold by the bank to preferred bank customers, including some to Taylor Bulldozing, the company which the bank had hired to transport, store and repair the equipment following its repossession, and to a company known as Jack's Lawn Service. The concern with the sale to Jack's Lawn Service is that the bank officer handling this matter, Rick Kinsey, was also employed by Jack's Lawn Service to plow snow after normal banking business hours.

With respect to the sales to the preferred bank customers, we fail to find a genuine issue of material fact. While plaintiff objects on appeal that the trial court improperly engaged in fact-finding that the equipment was sold at its appraised value, plaintiff does not, in fact, demonstrate that there is an actual dispute over whether the private sales were made at the appraised value.

As discussed above, the Uniform Commercial Code grants considerable discretion to the creditor in terms of selecting the means of disposing of collateral and a private sale is clearly contemplated by the UCC. See MCL 440.9504(3) and MCL 440.9507(2). Further, the mere fact that a better price could have been obtained by a sale at a different time or by a different method is not sufficient to establish that the sale was commercially unreasonable. MCL 440.9507(2). Indeed, MCL 440.9507(2) explicitly provides that a sale is done in a commercially reasonable manner if the collateral was sold in conformity with reasonable commercial practices.

For plaintiff to prevail, he must show one of the following: (1) that selling property at its appraised value is not in conformity with reasonable commercial practices, (2) that the property was sold at less than its appraised value (and that it was not a reasonable commercial practice to do so under the circumstances), (3) that the appraisal itself was the product of collusion, or (4) that the bank declined to sell to a non-preferred customer who offered a higher price in order to give an advantage to a preferred customer. Plaintiff makes no showing on any of these points. We fail to see how it matters whether the property was sold to preferred customers, so long as the sale occurred at market value (i.e., at the same price that would have been obtained from a non-preferred customer). Although plaintiff suggests that he had procured some buyers who would have paid more, plaintiff concedes that he brought those buyers to the bank's attention only after the property had been sold. While Kinsey's sale to the business he moonlighted for is somewhat troubling, ultimately plaintiff makes no showing that Kinsey arranged the sale at a favorable price, i.e., below appraised value, or that Kinsey had manipulated the appraisal so as to be able to give his employer an unreasonable deal.

Plaintiff could also prevail upon a showing that defendant's notice of the proposed private sales was inadequate. While plaintiff does argue this on appeal, plaintiff did not argue it below. Accordingly, the issue is not preserved for appellate review. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471-472; 628 NW2d 577 (2001).

Plaintiff next argues that the trial court erred in concluding there was no genuine issue of material fact because there were individuals who would have bought the equipment for more than the appraised value and the bank unreasonably refused to negotiate with those potential buyers because the bank had already committed to sell equipment to other preferred bank customers and that witnesses could have offered an opinion on the value of the equipment which differed from the appraisal.

With respect to whether plaintiff had witnesses which could have offered a different opinion of the value of the collateral, that is insufficient to establish a genuine issue of material fact. That is, it is insufficient that plaintiff alleges the existence of a witness. Rather, plaintiff must come forth with actual evidence, i.e., an affidavit or deposition from those potential witnesses that actually disputes Yoder's appraisal. Further, plaintiff would have to show that this hypothetical differing appraisal established that it was commercially unreasonable for the bank to have relied on the Yoder appraisal. That is, the mere fact that a different appraiser would have set a different value does not by itself establish that it was unreasonable for the bank to have relied upon the Yoder appraisal. It may well be that the difference in such appraisals would not have been meaningful. It is impossible to say because plaintiff fails to provide such a competing

appraisal. Simply put, a mere allegation is insufficient to establish a genuine issue of material fact.[4] *Rose v Nat'l Auction Group*, 466 Mich 453, 470; 646 NW2d 455 (2002).

Next, plaintiff argues that the trial court erred in failing to render any determination that plaintiff was entitled to a full and complete accounting under the Uniform Commercial Code. We disagree. The provision plaintiff refers to, MCL 440.9504(2), only requires an accounting of a surplus. Because there was no surplus, no accounting is required under that provision.

Plaintiff's ninth issue is that the trial court erred in determining that there was no genuine issue of material fact regarding the bank's foreclosure of the real estate mortgages to collect the deficiency which remained following the sale of the personalty. However, plaintiff's argument presupposes that he prevails on one or more of the other issues related to the sale of the collateral. Because plaintiff has not so prevailed, a deficiency does exist and, therefore, the foreclosures were proper and this issue is moot.

Similarly, plaintiff's tenth issue is moot. Plaintiff argues that absent a deficiency, there could be no interest and late charges. Because plaintiff has not been able to prevail on the issues which would do away with the deficiency, he must also lose on this issue.

Plaintiff next argues that the trial court erred in finding no genuine issue of material fact on plaintiff's claim that defendants were negligent in failing to quickly repossess the collateral. This issue apparently addresses the property that was lost or stolen. We agree with the trial court that plaintiff was responsible for the protection of his property until the bank actually repossessed it. Plaintiff provides no authority for the proposition that the bank was obligated to take possession quickly after plaintiff agreed to surrender the collateral.[5]

Plaintiff's twelfth issue is that the trial court committed harmless error rather than palpable error by considering plaintiff's mediation statement and exhibits that plaintiff had attached to his response to defendant Yoder's motion for summary disposition, which the trial court initially denied. On reconsideration, the trial court agreed that it should not have considered the mediation statement and, further, without that statement, plaintiff had failed to establish a genuine issue of material fact. Accordingly, on reconsideration, the trial court granted summary disposition. Plaintiff argues that, because the error of considering the mediation statement was harmless, rather than palpable, the trial court should have denied summary disposition. The issue, however, is not whether the initial error in considering the mediation materials was harmless or palpable, but, once the trial court recognized it should not have considered it, whether there was sufficient evidence to establish a genuine issue of material

[4] Similarly, plaintiff also alleges that at least some of the property sold below its appraised value. However, plaintiff points to no evidence to establish this fact, much less that it was unreasonable to do so.

[5] There is a copy of a police report in the lower court file regarding a laser that was stolen after being surrendered to the bank. However, it is not clear from plaintiff's brief whether plaintiff objects that he did not receive appropriate credit for this item; indeed, plaintiff's brief appears to focus solely on the property which came up missing before the bank took possession of it. Additionally, as the trial court noted, the obligation is on the debtor to insure collateral, even when the collateral is in the possession of the creditor. MCL 440.9207.

fact. The trial court concluded that there was not a genuine issue of material fact and plaintiff presents nothing in this issue to show that the trial court was mistaken on this point.

Finally, plaintiff argues the trial court should have exercised its discretion and denied mediation sanctions to defendants because they filed the motion for summary disposition during the mediation acceptance/rejection period. As discussed above, we fail to see how such a tactic is improper and, therefore, we fail to see why the trial court should have granted plaintiff relief on this basis.

In sum, although plaintiff has at various points in this litigation alluded to having box loads of evidence and what witnesses could testify to if called upon, ultimately plaintiff has not provided either the trial court or this Court with that evidence. Accordingly, the trial court did not err in concluding that plaintiff failed to establish the existence of a genuine issue of material fact and in granting summary disposition in favor of defendants.

Affirmed. Defendants may tax costs.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly