STATE OF MICHIGAN

COURT OF APPEALS

INDEPENDENT BANK-WEST MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED October 12, 2010
v	No. 292224 Bay Circuit Court
BAY AUTO AUCTION, L.L.C., Defendant-Appellee.	LC No. 08-003328-CK

Before: O'CONNELL, P.J., and BANDSTRA and MARKEY, JJ.

PER CURIAM.

Plaintiff appeals by right from the trial court's summary disposition in favor of defendant under MCR 2.116(C)(10). We affirm.

This dispute arose from a business relationship between plaintiff and defendant, in which defendant provided auction services to plaintiff for collateral repossessed from plaintiff's debtors. Defendant's services are described in a Remarketing Proposal, which defendant sent to plaintiff in 2005. Sometime in 2006, plaintiff requested that defendant provide plaintiff's debtors with notification letters related to the auctions. Plaintiff provided defendant with a sample letter; defendant made some changes to the sample letter. Subsequently, defendant sent notification letters to plaintiff's debtors, with copies to plaintiff's account collectors.

In October 2006, defendant sent a notification letter to one of plaintiff's debtors. The letter informed the debtor that her repossessed collateral (a motor home) would be sold at a "dealer only" sale. The letter also informed the debtor that the sale would be held on November 14, 2006, and that the debtor could redeem the collateral by paying the full amount owed before the sale date. The motor home was included in the sale defendant held on November 14, but plaintiff rejected the bid. The motor home was included in a second sale held on December 12, 2006, and this time plaintiff accepted a bid. Defendant did not provide notice of the second sale to plaintiff's debtor, and plaintiff had not requested that defendant do so.

The sale proceeds left a deficiency of approximately $27,000 on the debt. Plaintiff sued the debtor to recover the deficiency and later settled the suit. Thereafter, plaintiff commenced this action against defendant, asserting breach of contract and breach of fiduciary duty. Plaintiff alleged that defendant's failure to send a legally sufficient notice to the debtor had precluded plaintiff from recovering the deficiency from the debtor.

For the purposes of this appeal, the parties do not dispute that the Remarketing Proposal is an enforceable contract. Further, the parties agree that under MCL 440.9611 and 440.9614, plaintiff has a general duty to notify debtors that collateral will be sold. The parties also agree, for the purposes of this appeal, that the notification letter sent to the debtor in this case was insufficient with regard to notice of the second sale. We accept these matters for the purposes of this appeal only.

The issues for this Court are whether the Remarketing Proposal required defendant to send all statutorily required letters of notification, and if not, whether defendant had any other legally enforceable duty to send the letters.[1] The trial court concluded that neither the Remarketing Proposal nor the parties' course of dealing imposed a duty upon defendant to send notification letters. We review de novo the trial court's summary disposition order. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). When deciding such a motion, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the opposing party. *Id.*

In our review, we apply the contract interpretation rules this Court explained in *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997):

> Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate. If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous. The language of a contract should be given its ordinary and plain meaning. [Citations omitted.]

Plaintiff argues the Remarketing Proposal ("the Proposal") contemplated that defendant would handle all notification letters. We disagree. The language of the Proposal clearly outlined the services to be performed by defendant, and nothing in the Proposal stated that defendant would provide notification letters to plaintiff's debtors. Moreover, the record indicates that after plaintiff accepted the Proposal, plaintiff specifically requested defendant to begin providing notification letters. Plaintiff's request demonstrates that the provision of notification letters was not part of the Proposal.

[1] Defendant argues that because it had no statutory obligation to send the letters of notification, it cannot be held liable to plaintiff for failure to send such a letter. This argument is unavailing, because plaintiff alleges the duty here arises from a contract or a related legal theory, not from the statute. Cf. *Gillom v Ralph Thayer Automotive Livonia, Inc*, 444 F Supp 2d 763, 774 (ED Mich, 2006) (Defendant, who was not a secured creditor, had no statutory duty to send notification letter).

Plaintiff also argues that the Proposal's use of the term "Administration Fee" was ambiguous, and that the trial court erred both by failing to find a factual issue regarding the term and by failing to construe the term in plaintiff's favor. Plaintiff's argument fails, because the term is not ambiguous. Although the Proposal does not define the term, the lack of definition does not render the term ambiguous. *Vanguard Ins Co v Racine*, 224 Mich App 229, 232-233; 568 NW2d 156 (1997). A term is ambiguous only if it can be understood in different ways. *Id*. at 233. Here, the administration fee appears on the Proposal's fee schedule among a list of fees for other services, including "title application," "wash & vac," and "salvage cleanup." The administration fee and a storage fee are both designated as "redemption fees." Plainly, the fee schedule is designed solely to list the costs for services, not to describe specific services. To find an ambiguity in the fee schedule would be akin to inventing symbolic meaning in a price list.

Plaintiff next argues that because plaintiff relied on defendant to send the notification letters, defendant should be estopped from arguing that it had no contractual obligation to send the letters. "The elements of a promissory estoppel claim consist of (1) a promise (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee and (3) that, in fact, produced reliance or forbearance of that nature (4) in circumstances requiring enforcement of the promise if injustice is to be avoided." *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 41; 761 NW2d 151 (2008).

Here, plaintiff has not demonstrated the existence of the first two factors. The record contains no proof of a promise by defendant to send the statutorily required notification letters. Rather, the undisputed facts indicate that plaintiff gave defendant a sample letter, that defendant made changes, and that defendant sent copies of the letters to plaintiff. Under these circumstances, any promise by defendant consisted only of a promise to send the initial notification letter to the debtor, without any guarantee that the letter met any statutory requirements.

Plaintiff argues that the affidavit of Roberta Dulek raises a question of fact as to whether defendant promised to send legally sufficient notices. We disagree. The affidavit indicates that defendant "understood" that it was obligated to send the legally required notices based upon "conversations between the parties." The affidavit fails to indicate who was involved in these conversations. In addition, Dulek's opinion concerning defendant's purported understanding is conclusory. Conclusory opinions do not create genuine issues of material fact. See *SSC Assoc Ltd Partnership v Gen Retirement Sys of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991). At best, the affidavit confirms the undisputed fact that defendant sent notification letters to plaintiff's debtors. The affidavit does not, however, establish that defendant promised to send *legally sufficient* letters, i.e., letters that complied with MCL 440.9611 and 440.9614.

Even if defendant is deemed to have promised to provide legally sufficient notification letters, plaintiff has failed to establish the second element of promissory estoppel. Plaintiff provided no evidence to suggest that defendant knew or should have known plaintiff had delegated to defendant the statutory duty to send legally sufficient notices. Plaintiff argues there is a question of fact on this issue, and maintains that the trial court mistakenly found plaintiff had approved the changes defendant made in the sample letter. We conclude that this fact is immaterial. Regardless of whether plaintiff approved the changes in the sample letter, the record contains nothing to indicate that plaintiff notified defendant the letters must comply with the

statutes, or that plaintiff informed defendant of statutory requirements. Accordingly, the record does not indicate that defendant could reasonably have expected plaintiff's purported delegation of the statutory duty.

Last, plaintiff argues that once defendant accepted the obligation to send notification letters, defendant had an enforceable duty to comply with the applicable statutory notice requirements. According to plaintiff, the parties modified the Proposal through their conduct, and the modification delegated to defendant the duty to send legally sufficient notification letters. To prevail on this argument, plaintiff had the burden of submitting clear and convincing evidence that the parties mutually agreed to modify the Proposal. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 364-365; 666 NW2d 251 (2003). Plaintiff failed to meet this burden. Nothing in the record demonstrates that defendant agreed to or accepted the statutory notification duty.

In sum, plaintiff offers several unsupported theories as to why defendant could or should have sent a different notification letter to the debtor in this case. None of these theories are related to any legally binding duty upon defendant. Because plaintiff did not identify a legally enforceable duty to support its claims, defendant was entitled to summary disposition as a matter of law.

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Jane E. Markey