[Cite as *McCormick v. Credit Acceptance Corp.*, 2017-Ohio-5687.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Robin R. McCormick, et al.	Court of Appeals No. L-16-1111
Appellant	Trial Court No. CI0201502916
v.	
Credit Acceptance Corporation	**DECISION AND JUDGMENT**
Appellee	Decided: June 30, 2017

* * * * *

Robin R. McCormick, pro se.

James W. Sandy, for appellee.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal of the judgment of the Lucas County Court of Common Pleas, granting appellee's, Credit Acceptance Corp., motion for summary judgment. For the reasons that follow, we affirm.

I. Facts and Procedural Background

{¶ 2} The facts in this matter are not in dispute. On October 6, 2014, appellant, Robin McCormick, purchased a 2012 Chevrolet Traverse from Rose City Motors for $26,852.88. Notably, appellant signed the contract "without recourse." As indicated on the contract, the contract was immediately assigned to appellee. Pursuant to the contract, appellant was obligated to pay $643.04 per month for 72 months. Appellant has made none of the payments.

{¶ 3} On November 21, 2014, appellee repossessed the vehicle. Appellee then released the vehicle back to appellant after the parties agreed that appellant would pay $900 up front, and then $722.13 per month beginning in January 2015. Appellant again failed to make any of the monthly payments. Thus, on May 21, 2015, appellee repossessed the vehicle for a second time.

{¶ 4} On June 5, 2015, appellant filed her complaint against appellee. The complaint was amended on June 19, 2015, and stated two claims, one for replevin and one for conversion. Appellee filed its answer on August 5, 2015, in which it included counterclaims for breach of contract and for a declaratory judgment that it is entitled to sell the repossessed vehicle. Appellant filed her answer on September 3, 2015, asserting numerous affirmative defenses.

{¶ 5} At a subsequent pretrial conference, the trial court granted appellant leave to file a motion for leave to file an amended complaint on or before October 2, 2015. The trial court also set February 1, 2016, as the discovery cut-off date.

{¶ 6} On October 2, 2015, appellant filed a second amended complaint without requesting leave. In the second amended complaint, appellant asserted eleven additional claims, including anticipatory breach of contract, breach of implied warranty of merchantability, noncompliance with R.C. Chapters 1309 and 1317, rescission, violation of the Truth in Lending Act, and willful and wanton conduct. Thereafter, appellee moved to strike appellant's second amended complaint because it was filed without leave in contravention of both the trial court's order and Civ.R. 15(A). Appellant responded that she attempted to file a request for leave, but the clerk of courts advised her that a request for leave was unnecessary and refused to file it. The trial court set the matter for an evidentiary hearing, following which the trial court determined that appellant had failed to provide any evidence "beyond [her] hearsay-laden affidavit" demonstrating her inability to file a request for leave. Thus, the trial court granted appellee's motion to strike appellant's second amended complaint.

{¶ 7} On January 6, 2016, appellee moved for summary judgment on appellant's claims and on its counterclaims. Attached to its motion was an affidavit from Chelsea Hohf, an employee of appellee. Hohf authenticated the October 6, 2014 contract, the November 2014 and May 2015 notices of repossession, the December 2014 contract reinstatement letter, and a printout showing the current amount owed by appellant. Hohf also stated that appellant has failed to make any payments under the contract.

{¶ 8} On January 19, 2016, appellant filed a "Motion for Denial of [Appellee's] Motion for Summary Judgment, in which she argued that appellee has not overcome her affirmative defenses of waiver, failure of condition precedent, unjust enrichment,

moral/economic distress, failure of performance, unclean hands, failure to state a cause of action, breach of implied warranty of merchantability, violations of the Truth in Lending Act, and violations of the Retail Installment Act. Then, on February 22, 2016, following the completion of discovery, appellant filed a brief in opposition to appellee's motion for summary judgment. Attached to appellant's brief in opposition was her affidavit in which she made numerous legal conclusions such as "[Appellee] is in violation of Written and Implied warranties in relation to retail installment contract," "[Appellant] is entitled to possession of the vehicle," and "[Appellant] says any payments or down payments were made under economic duress." Appellant filed another affidavit on March 15, 2016, in which she included further blanket assertions and legal conclusions.

{¶ 9} Also on February 22, 2016, appellant moved for leave to file a supplemental answer to appellee's counterclaims, in which appellant sought to include additional claims similar to those raised in her stricken second amended complaint.

{¶ 10} On April 25, 2016, after further responses and replies to the above motions, the trial court entered its judgment denying appellant's motion for leave to file a supplemental answer, and awarding summary judgment in favor of appellee on appellant's claims and appellee's counterclaims.

II. Assignments of Error

{¶ 11} Appellant has timely appealed the trial court's April 25, 2016 judgment entry, and now asserts two assignments of error for our review:

I. The court of common pleas erred in its judgment entry in finding that appellant had waived and was not entitled to assert its contract defenses and or counterclaim against appellee, as assignee.

II. The court of common pleas erred in its judgment entry in not finding in favor of appellant on its contract defenses.

III. Analysis

{¶ 12} In her first assignment of error, appellant appears to challenge the trial court's denial of her February 22, 2016 motion for leave to file a supplemental answer to appellee's counterclaims.

{¶ 13} We begin by noting that although appellant frames her request as seeking to file a supplemental answer under Civ.R. 15(E), we find that appellant's request is in fact governed by Civ.R. 15(A). Civ.R. 15(E) provides that "[u]pon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." Appellant argues that appellee's admission that the October 6, 2014 contract is not a negotiable instrument is a new occurrence. Appellant is incorrect. First, the record does not indicate that appellee has ever taken the opposite position that the October 6, 2014 contract is a negotiable instrument. Second, appellee's positioning as to the legal classification of a document is not a new event or occurrence. In this case, the transaction being litigated by the parties has remained the same since the filing of appellant's initial complaint. Thus, appellant's motion for leave to change her answer falls under Civ.R. 15(A), which

provides, "A party may amend its pleading once as a matter of course within twenty-eight days after serving it * * *. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court shall freely give leave when justice so requires."

{¶ 14} "A trial court's denial of a Civ.R. 15(A) motion to amend will not be disturbed absent an abuse of discretion." *Johannsen v. Ward*, 6th Dist. Huron No. H-09-028, 2010-Ohio-4203, ¶ 77, citing *Darby v. A-Best Products Co.*, 102 Ohio St.3d 410, 2004-Ohio-3720, 811 N.E.2d 1117, ¶ 12. An abuse of discretion connotes that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 15} Here, we find that the trial court did not act unreasonably, arbitrarily, or unconscionably. Well after appellee had moved for summary judgment, appellant attempted to add additional claims and defenses, despite the trial court having already stricken her second amended complaint because she failed to request leave to amend. In denying her February 22, 2016 motion, the trial court reasoned that "[l]itigation would be eternal if a party was free to re-posit and re-argue matters decided upon earlier in the case," and that allowing appellant to amend her pleading at this stage would be prejudicial to appellee. Indeed, Ohio courts have held that "an attempt to amend a complaint following the filing of a motion for summary judgment raises the specter of prejudice." *Trustees of Ohio Carpenters' Pension Fund v. U.S. Bank Natl. Assoc.*, 189 Ohio App.3d 260, 2010-Ohio-911, 938 N.E.2d 61, ¶ 25 (8th Dist.), quoting *Brown v. FirstEnergy Corp.*, 159 Ohio App.3d 696, 2005-Ohio-712, 825 N.E.2d 206, ¶ 6 (9th

Dist.). Therefore, we hold that the trial court did not abuse its discretion in denying appellant's motion to supplement her answer to appellee's counterclaims.

{¶ 16} Accordingly, appellant's first assignment of error is not well-taken.

{¶ 17} In her second assignment of error, appellant appears to challenge the trial court's grant of summary judgment to appellee. We review the grant of a motion for summary judgment de novo, applying the same standard as the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989); *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Under Civ.R. 56(C), summary judgment is appropriate where (1) no genuine issue as to any material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

{¶ 18} The trial court awarded summary judgment in favor of appellee on its counterclaims for breach of contract and declaratory judgment. "To support a breach of contract claim, a plaintiff must present evidence of 'the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff.'" *Booth v. Copeco, Inc.*, 6th Dist. Lucas No. L-16-1227, 2017-Ohio-2897, ¶ 17, quoting *Kucan v. General Am. Life Ins. Co.*, 10th Dist. Franklin No. 01AP-1099, 2002-Ohio-4290, ¶ 8. Here, the undisputed evidence is that a contract was entered into for the sale of the 2012 Chevrolet Traverse, and the Traverse was delivered to appellant.

Furthermore, appellant has breached the contract by failing to make payments in accordance with the contract terms, resulting in damages to appellee as assignee of the contract.

{¶ 19} In opposition, appellant presents numerous theories as to why summary judgment is not appropriate. The underlying basis of appellant's arguments is that she is not obligated to pay anything for the Traverse because she signed the contract "without recourse." Appellant appears to be attempting to invoke R.C. 1303.55(B), which states "If an indorsement states that it is made 'without recourse' or otherwise disclaims liability of the indorser, the indorser is not liable under division (A) of this section to pay the instrument." However, the sales contract at issue in this case is governed by R.C. Chapter 1317 Retail Installment Sales, not R.C. Chapter 1303 Commercial Paper. Moreover, even if the contract was commercial paper under R.C. Chapter 1303, R.C. 1303.24(A)(1) provides that an "indorsement" is a signature, "other than that of a signer as maker, drawer, or acceptor." "Regardless of the intent of the signer, a signature and its accompanying words is an 'indorsement' 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 indorsement." R.C. 1303.24(A)(2). Here, the contract unambiguously indicates that appellant was signing as the buyer, not as an indorser. Thus, R.C. 1303.55(B) does not apply, and the obvious result is that appellant is obligated to pay for the vehicle that she purchased.

{¶ 20} Appellant also presents convoluted arguments that summary judgment is not appropriate because, inter alia, appellee failed to comply with appellant's request for

an accounting and correction of collateral pursuant to R.C. 1309.210, and because appellee allegedly misrepresented warranties in violation of the Magnuson-Moss Warranty Act. As to the former, R.C. 1309.625 provides the remedies for failure to comply with R.C. 1309.210, and the remedies do not include obviation of a payment obligation under a contract. As to the latter, while a defense to a retail installment contract is recognized under R.C. 1317.032(A)(4) where "the subject of the consumer transaction did not conform to any express or implied warranty made by the seller," appellant has at no time alleged that the Traverse did not conform to an express or implied warranty. In fact, the contract expressly disclaimed all warranties in text that was bolded, in all caps, and inside a box on page four of the contract. Therefore, we hold that appellant has not established a legitimate defense to appellee's counterclaim for breach of contract, and summary judgment in favor of appellee on the counterclaim is appropriate.[1]

{¶ 21} Furthermore, pursuant to the terms of the contract, upon default appellee has a right to "take (repossess) the Vehicle from [appellant]," sell it, and apply the proceeds to the amount owed. Thus, appellee is rightfully in possession of the vehicle, and the trial court did not err when it granted a declaratory judgment that appellee could sell the vehicle at auction. In addition, for the same reason, appellant's claims for replevin and conversion must fail because both claims require that appellee be in wrongful possession of the vehicle. *See Schneider v. Schneider*, 178 Ohio App.3d 264, 2008-Ohio-4495, 897 N.E.2d 706, ¶ 14 (9th Dist.) ("Replevin is an action whereby the

[1] We have examined the remainder of appellant's appellate brief, which borders on being incoherent, and have found no other meritorious defenses.

owner or person entitled to repossession of goods or chattels may recover those goods or chattels from one who * * * wrongfully detains [them]." (Internal quotations omitted.)); *Peirce v. Szymanski*, 6th Dist. Lucas No. L-11-1298, 2013-Ohio-205, ¶ 19 ("To prevail on a conversion claim, a plaintiff must demonstrate: (1) the plaintiff's ownership or right to possession of the property at the time of the conversion; (2) defendant's conversion by a wrongful act or disposition of the plaintiff's property right; and (3) damages.").

{¶ 22} Accordingly, we hold that the trial court did not err in awarding summary judgment to appellee on all the claims and counterclaims. Appellant's second assignment of error is not well-taken.

IV. Conclusion

{¶ 23} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, P.J. _____
CONCUR.
JUDGE