COURT OF APPEALS
DECISION
DATED AND FILED

September 27, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP230 **Cir. Ct. No. 2011SC1331**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

SUMMIT CREDIT UNION,

PLAINTIFF-RESPONDENT,

V.

FREDERICK J. FURRER AND RACHEL K. FURRER,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Columbia County: W. ANDREW VOIGT, Judge. *Reversed*.

¶1 SHERMAN, J.[1] Frederick J. Furrer and his daughter, Rachel K. Furrer, appeal an order of replevin in favor of Summit Credit Union for the repossession of a 2003 Lexus automobile. The Furrers argue that Summit did

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

not establish that the Lexus secured a loan on which Frederick had defaulted. I agree and therefore reverse the order of replevin.

BACKGROUND

¶2 In 2004, Rachel Furrer purchased a 2003 Lexus. To finance the purchase, Rachel and Frederick, as co-borrowers, obtained a loan from Summit. It is undisputed that the Lexus was given as security for that loan, and that the balance of that loan was ultimately repaid in full.

¶3 In October 2009, Frederick wanted to purchase a different vehicle for Rachel and sought financing from Summit. It is undisputed that Summit agreed to loan Frederick $12,000, but that Frederick failed to make timely payments on the loan. Based on Frederick's default of the 2009 loan, Summit brought a replevin action in small claims court against both Frederick and Rachel to obtain the 2003 Lexus, which Summit claimed Rachel had pledged as security for Frederick's 2009 loan. In support of its claim, Summit attached a "credit and security agreement," which had been executed by Frederick on October 20, 2009. The "credit and security agreement" identified only Frederick as the "borrower" and indicated that it was "an open-end multi-featured credit plan" that allowed the borrower to "obtain credit advances in any manner authorized by [Summit]." The "credit and security agreement" further provided that as security, the borrower "pledge[d] …. all shares and dividends and, if any, all deposits and interest in all joint and individual accounts" the borrower had with Summit and that "[i]f a subaccount identifies a type of property (such as "New Cars") [the borrower] must give that type of property as security when you get an advance under that subaccount." Also attached to the complaint was an "Open-End Disbursement Receipt *Plus*." That document indicated that $12,000 had been "advanced" to

Frederick and that the 2003 Lexus had been offered as security. Neither Frederick nor Rachel's signature is on that document.

¶4 The Furrers contested the replevin action, and the matter was tried to the circuit court. At trial, Summit argued that the 2003 Lexus properly secured the 2009 loan to Frederick because the amount loaned at that time was advanced under the 2004 lending agreement between it and the Furrers, which Summit maintained was an open-ended credit plan which allowed either Rachel or Fredrick to borrow additional funds under that agreement using the 2003 Lexus as collateral.

¶5 Fredrick, who appeared *pro se* and without Rachel, conceded at trial that the 2009 loan was in default, but disputed whether the Lexus secured that loan. Frederick maintained that the 2009 advance was not secured by the Lexus because the vehicle was titled solely in Rachel's name and she was not a signatory to the 2009 loan. Frederick also appears to have disputed whether the 2004 lending agreement was an open-ended credit plan, claiming the 2004 loan had been fully paid and a "release was given."

¶6 Without making a determination as to the nature of the 2004 lending agreement, the circuit court determined that the 2003 Lexus was "appropriate security" for the 2009 loan, and that because Rachel did not appear at trial, it had "no choice under the circumstances" but to find against her by default. In accordance with its ruling, the court entered an order of replevin in favor of Summit. The Furrers appeal.

DISCUSSION

¶7 The Furrers contend that the evidence presented at trial was not sufficient to support the circuit court's determination that Summit secured its 2009 loan to Frederick with a security interest in the Lexus, which was titled solely in Rachel's name.

¶8 In a replevin action, i.e., a return of property, the plaintiff bears the burden of proving that he or she has a right of possession. *See* WIS. STAT. § 810.02; *see also* ***First Nat'l Bank of Glendale v. Sheriff of Milwaukee Cnty.***, 34 Wis. 2d 535, 538, 149 N.W.2d 548 (1967). To meet his or her burden, the plaintiff must prevail on the strength of his or her own right of possession, not on the weakness of the defendant's. ***Susenbrenner v. Mathews***, 48 Wis. 250, 254, 3 N.W. 599 (1879).

¶9 Summit claims a right of possession based on a security interest in the Lexus given to it by Rachel in 2004. To determine whether Summit is correct requires interpretation of the parties' loan agreements in 2004 and 2009, which is a subject this court reviews de novo. *See* ***Northern States Power Co. v. National Gas Co., Inc.***, 2000 WI App 30, ¶7, 232 Wis. 2d 541, 606 N.W.2d 613 (Ct. App. 1999).

¶10 A security interest is enforceable against a debtor only when: (1) the debtor has executed a security agreement that provides a description of the collateral; (2) value is given; and (3) the debtor has rights in the collateral or the power to transfer rights in the collateral to a third party. WIS. STAT. § 409.203(2); ***National Exchange Bank of Fond du Lac v. Mann***, 81 Wis. 2d 352, 357-58, 260 N.W.2d 716 (1978).

¶11 To support its claim that it has an enforceable security interest in the Lexus, Summit submitted to the circuit court: the "credit and security agreement," which was signed by Frederick in 2009; the "Open-End Disbursement Receipt *Plus*," which identified the Lexus as security for the 2009 loan, but was not signed by either Frederick or Rachel; a vehicle inquiry from the Wisconsin Department of Motor Vehicle dated September 9, 2001, which indicated that Summit was a lienholder on the Lexus; and notes from an employee of Summit who indicated that Summit has a lien against the Lexus. However, none of this evidence is proof that Summit had a perfected, attached security interest in the Lexus in 2009.

¶12 It is undisputed that Frederick did not have any rights in the Lexus, which was titled solely in Rachel's name. And, Summit did not assert before the circuit court and does not assert now that Frederick had the power to transfer rights to the Lexus when Frederick obtained the $12,000 loan from Summit in 2009. Thus, to establish that it has a security interest in the Lexus, Summit needed to show that Rachel signed an authenticated security agreement describing the Lexus. Summit, however, did not do so.

¶13 Summit argues that Rachel and Frederick executed a security agreement for the Lexus in 2004, which was an open-ended credit agreement allowing both Rachel and Frederick to borrow additional money from Summit using the Lexus as security. However, Summit did not present any evidence of the 2004 security agreement, any evidence that the money loaned to Frederick and Rachel in 2004 was advanced to them under an open-ended credit plan, or any evidence that the money advanced to Frederick in 2009 was advanced under the 2004 lending agreement and not a new agreement between Summit and Frederick. Simply stated, the evidence presented by Summit was insufficient to establish that the money loaned to Frederick in 2009 was advanced under an open-ended credit

agreement for which Rachel had given a security interest in her Lexus. Accordingly, I reverse the order of replevin.

By the Court.—Order reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.