

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000750-MR

JOHNNY MILLER

APPELLANT

v. APPEAL FROM OHIO CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 05-CI-00089

MARK ZEMBRYCKI

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * **

BEFORE: DIXON AND KELLER, JUDGES; GRAVES,¹ SENIOR JUDGE.

KELLER, JUDGE: Johnny Miller has appealed from the order of the Ohio Circuit Court granting Mark Zembrycki's motion for summary judgment and awarding damages to Zembrycki, as well as from the order denying his motion to reconsider. Having determined that the circuit court improperly entered a summary judgment and awarded damages, we reverse and remand.

¹ Senior Judge John W. Graves, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

In July 2002, Zembrycki purchased a 1992 Ford Pickup truck. In order to pay for the truck, Zembrycki obtained a personal loan from Bank One. The record does not disclose the original amount of the loan. On March 16, 2003, Zembrycki and Miller entered into an oral and written contract whereby Miller would purchase the truck from Zembrycki. The handwritten agreement read as follows:

3-16-03

I Johnny Miller will make a payment of 215.00 per month to Mark Zembrycki by the 22nd of each month for the purchase of a 92' [sic] Ford Pick Up [sic] Truck. I Johnny Miller will continue to make the payments on the Truck until it is payed [sic] off or a loan of the lump sum can be made. By signing below both partys [sic] agree.

Johnny Miller (signed)
3-16-03

Mark Zembrycki (signed)
3-16-03

There is no dispute that Miller began making payments pursuant to the agreement.

Zembrycki retained the title to the truck.

On May 21, 2004, Miller and Zembrycki signed the following document regarding the purchase of the truck:

To Whom It May Concern:

In March of 2003 I Johnny Miller agreed to pay Mark Zembrycki the amount of \$215.00 per month. As of today May 21st 2004 I Johnny Miller have paid Mark Zembrycki the total of \$3440.00. The payment went towards a 1992 Ford F150 Pick up [sic] truck vin [sic] #1FTEX15HXNKB66155.

The following statement above is true, and both parties have agreed to the terms and conditions above.

Mark Zembrycki (signed)

Johnny Miller (signed)

. . . CELL #

The date is May 21st 2004 of [sic] both parties that has [sic] signed above.

Shortly thereafter, Miller sent the first of two letters to Zembrycki regarding the truck purchase. The first letter was undated, but appears to have been written sometime after June 22, 2004. It reads as follows:

Mark,

I am writing this letter to inform you that the truck payment that you received on June 22nd 2004 was the last truck payment that I am going to make. As of June 22nd 2004 you have received \$4000 dollars [sic] from me (Johnny Miller) on the Ford F150 truck. The NADA book value on the truck is \$1800. It was to my understanding that the total for the truck was \$3900. I (Johnny Miller) have paid enough for the truck at this point. I would like the title to the truck so I can put it [in] my name. You have signed papers saying to the effect that I have paid you this much [sic] amount of money. I (Johnny Miller) think it is the right thing to do. I don't want any hard feeling [sic] toward the truck or each other on this matter. If you have any question [sic] please feel free to call me on this matter.

Thank you,

Johnny Miller (signed)
Johnny Miller

Miller sent a second letter to Zembrycki dated September 10, 2004:

Mark,

I spoke to you on 9/5/04 about the F-150 [sic] Ford truck. You said that you did not know what you where [sic] going to do about the problem that you and I have about the truck. I have paid for the truck[.] I have giving [sic] you a total of \$4085.00. I was not sure if you said \$3700.00 or

\$3900.00 so that's why I paid you the above total. When I spoke to you on the phone on 9/5/04 you told me that you did tell me \$3900.00 for the truck. I know that you have a high interest [rate] on the truck but that is not my problem. I would like the title to the truck or you can give me my money back and I will give you the truck back. I have talked to two attorneys about this and they told me that I have two ways that I can go with this problem.

1. I can go to the county attorneys [sic] office and file criminal charges for thief [sic] by deception because you sold me a truck that you still owed the bank on.
2. I can go and file charges against you in small claims court.

I am giving you the time limited [sic] of 9/24/04. After that time I will do 1 or [sic] the 2 choices above. The right thing to do is get me the title to the truck because I have paid for the truck and you and I can get this matter behind us. Please if you have any questions please call me

Thank You

Johnny Miller (signed)
Johnny Miller

Zembrycki did not transfer title of the truck to Miller or return the money Miller had paid him for the truck. Sometime later, Zembrycki retook possession of the truck without Miller's permission and has never returned it to Miller.

On March 1, 2005, Miller filed a Verified Complaint with the Ohio Circuit Court seeking repayment of the \$4,000 he paid to Zembrycki for the truck, as well as an additional \$700 he spent on repairs. In his complaint, Miller stated that the parties had agreed that the purchase price of the truck was \$3,900 and that he was to make monthly payments of \$215 to Zembrycki until paid in full. In his Answer, Zembrycki stated that

the last payment was made on June 22, 2004, and that he had no knowledge concerning the \$700 Miller spent on repairs. In the prayer for relief, Zembrycki requested that the complaint be dismissed with prejudice, that Miller pay all reasonable costs and attorney fees incurred in defending the suit, and for all other relief for which he may appear to be entitled. Zembrycki did not file a counterclaim against Miller.

Following the filing of Zembrycki's response to Miller's interrogatories and request for production of documents, both parties filed motions for summary judgment. Both argued that no genuine issues of material fact existed and that summary judgment was appropriate as a matter of law. In his motion, Miller relied upon Zembrycki's admission that they had entered into an agreement, that Miller made monthly payments equaling \$4000, and that Zembrycki took possession of the truck without paying any money to Miller. Based on these admissions, Miller asserted that he was entitled to a summary judgment and an award of \$4,700. On the other hand, Zembrycki asserted that the written agreement required Miller to make the remaining monthly loan payments on the truck. He argued that Miller breached the agreement when he ceased making payments in June 2004, leaving an unpaid balance on the loan of \$4,518.81. Counsel for the parties made similar arguments before the circuit court during a hearing on the motions.

On January 26, 2006, the circuit court entered an order granting Zembrycki's motion for summary judgment:

The Defendant having moved for Summary Judgment and a hearing having been held on said motion on December

22, 2005, and the Court having heard the arguments of counsel and being otherwise sufficiently advised does hereby find there are no genuine issues of material fact and Defendant is entitled to judgment as a matter of law.

IT IS THEREFORE ORDERED AND ADJUDGED that the Defendant is granted a judgment against the Plaintiff in the amount of Four Thousand Five Hundred Eighteen Dollars and Eighty-One Cents (\$4,518.81) plus interest.

IT IS FURTHER ORDERED AND ADJUDGED that each party shall bear his own costs and attorney's fees.

THIS IS A FINAL AND APPEALABLE ORDER and there is no just cause to delay its entry or execution.

Miller filed a motion to reconsider the order, arguing that Zembrycki had only sought a dismissal of the action against him and attorney's fees, not an award for the remaining balance due on the loan, as Zembrycki had retaken possession of the truck. The circuit court denied the motion to reconsider in an order entered March 9, 2006. This appeal followed.

The standard of review applicable in an appeal from a summary judgment is set forth in *Lewis v. B&R Corporation*, 56 S.W.3d 432, 436 (Ky.App. 2001):

The standard of review on appeal when a trial court grants a motion for summary judgment is “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present “at

least some affirmative evidence showing that there is a genuine issue of material fact for trial.” The trial court “must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists.” While the Court in *Steelvest[, Inc. v. Scansteel Service Center, Inc.]*, 807 S.W.2d 476, 480 (Ky. 1991),] used the word “impossible” in describing the strict standard for summary judgment, the Supreme Court later stated that that word was “used in a practical sense, not in an absolute sense.” Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court’s decision and will review the issue *de novo*. (citations in footnotes omitted).

With this standard in mind, we shall review the circuit court's decision.

At the outset, we note that the circuit court did not rule on Miller's motion for summary judgment, although we shall infer that the circuit court implicitly denied it via its ruling. However, based upon our review of the record, we hold that summary judgment was inappropriate in either case, as a genuine issue of material fact remains. It is clear that a dispute remains as to what the agreement between the parties entailed. Miller believed that there was an agreed upon purchase of price of \$3,900, and that he was entitled to a transfer of the title once he had paid that amount. On the other hand, Zembrycki believed that Miller was to continue to make payments until the loan amount was repaid. For this reason, the entry of summary judgment was inappropriate. We need not address any further legal issues that may arise concerning the interpretation of the written agreement.

Furthermore, the circuit court erred in awarding Zembrycki the remainder of the loan amount due. As Miller pointed out, Zembrycki never filed a counterclaim

pursuant to CR 13 seeking any type of damages. Zembrycki only informed the circuit court of the remaining balance due on the loan to dispute Miller's assertion that he had completed paying for the truck. At no time did Zembrycki seek an award; he simply sought a dismissal of Miller's claim and payment of his attorney's fees. Zembrycki is certainly not entitled to an award of damages as the case now stands.

For the foregoing reasons, the summary judgment of the Ohio Circuit Court is reversed, and this matter is remanded for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

Leigh A. Jackson
Owensboro, Kentucky

BRIEF FOR APPELLEE:

Laura R. Eaton
Hartford, Kentucky