

RENDERED: AUGUST 26, 2011; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2010-CA-000766-MR

C&M GIANT TIRE, LLC

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE FREDERIC J. COWAN, JUDGE  
ACTION NO. 08-CI-013040

RUDD EQUIPMENT COMPANY, INC.

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: TAYLOR, CHIEF JUDGE; MOORE AND WINE, JUDGES.

TAYLOR, CHIEF JUDGE: C&M Giant Tire, LLC, (C&M) brings this appeal from an August 6, 2009, Opinion and Order of the Jefferson Circuit Court dismissing its complaint against Rudd Equipment Company, LLC. We reverse and remand.

Rudd Equipment Company, LLC, (Rudd) operated a construction and mining equipment sales company in Louisville, Kentucky. Rudd contacted C&M in June 2008 and expressed interest in purchasing twenty-four “giant” tires. In August 2008, Rudd agreed to purchase the twenty-four tires from C&M for a total purchase price of \$840,000, which was \$35,000 per tire. C&M delivered the tires to Rudd in three shipments during August and September of 2008; however, Rudd failed to pay C&M for the tires. C&M subsequently issued invoices to Rudd for payment of the tires to no avail. C&M eventually retook possession of the tires from Rudd’s premises.

On December 9, 2008, C&M filed a complaint in the Jefferson Circuit Court against Rudd alleging entitlement to damages under breach of contract, in accordance with the Uniform Commercial Code (U.C.C.), *quantum meruit*, unjust enrichment, and breach of duty of good faith and fair dealing. Rudd did not file an answer but rather filed a motion to dismiss for failure to state a claim under Kentucky Rules of Civil Procedure (CR) 12.02. By Opinion and Order entered August 6, 2009, the circuit court granted Rudd’s motion and dismissed C&M’s complaint in its entirety under CR 12.02. This appeal follows.

C&M contends the circuit court erred by dismissing its complaint against Rudd. For reasons hereafter stated, we agree.

To begin, the circuit court rendered an order dismissing C&M’s complaint ostensibly pursuant to CR 12.02. Under CR 12.02, a court may dismiss an action for failure to state a claim upon which relief could be granted only if the

“pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim.” *Pari-Mutuel Clerks’ Union of Ky. v. Ky. Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). When ruling upon a CR 12.02 motion, matters outside the pleadings may not be considered; however, if matters outside the pleading are considered, the motion must be viewed as a motion for summary judgment under CR 56. *Ferguson v. Oates*, 314 S.W.2d 518 (Ky. 1958).

In this case, the circuit court clearly considered matters outside of the pleadings when it ruled upon Rudd’s CR 12.02 motion and dismissed C&M’s complaint. As matters extraneous to the pleadings were considered, our review shall proceed under the summary judgment standard pursuant to CR 56.

Thereunder, summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). When reviewing summary judgment, all facts and inferences are to be viewed in a light most favorable to the nonmoving party. *Id.*

Viewing the facts most favorable to C&M, it appears that C&M and Rudd entered into a contract for the sale of goods. Under the contract, C&M procured twenty-four giant tires for Rudd and delivered twenty-four “conforming” tires to Rudd. In return, Rudd promised to pay \$840,000 under its contract with C&M. Rudd breached its duty and failed to pay for the tires. C&M thereafter retook possession of the tires with Rudd’s acquiescence. C&M cannot readily resell the tires due to the tires’ uniqueness.

Considering the above facts, we are of the opinion that C&M demonstrated a *prima facie* case for relief under the U.C.C. Once C&M delivered the conforming goods (tires) and Rudd accepted same, Rudd had a duty to pay C&M the contract price per the U.C.C. and its failure to do so was violative of the U.C.C. *See* KRS 355.2-301; KRS 355.2-507; KRS 355.2-606; KRS 355.2-607. Thus, the circuit court erred by summarily dismissing C&M's claim for relief under the U.C.C. Upon remand, the circuit court shall hold an evidentiary hearing and make findings of fact to determine C&M's entitlement to sundry remedies available under the U.C.C., including those set forth in KRS 355.2-702 and KRS 355.2-703.

Additionally, in its August 6, 2009, order dismissing the complaint, the circuit court primarily focused upon C&M's act of retaking possession of the tires from Rudd and viewed same as a "self-help repossession or reclamation" of the tires. The circuit court concluded that C&M's resort to such "self-help repossession" barred it from recovery under the U.C.C. In so concluding, the circuit court committed error as material issues of fact exist. Specifically, the facts are unclear as to how C&M retook possession of the tires and as to the exact terms of the sales contract between the parties. In particular, it is ambiguous as to whether Rudd implicitly or explicitly acquiesced to C&M's possession of the tires<sup>1</sup>

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<sup>1</sup> If so, it may be argued that Rudd Equipment Company, Inc., improperly revoked its acceptance of the tires. Kentucky Revised Statutes (KRS) 355.2-608; KRS 355.2-703.

and when payment was due under the sales contract.<sup>2</sup> Thus, material issues of fact preclude entry of summary judgment.

Further, in its order dismissing the complaint, the circuit court did not address C&M's *quantum meruit* claim. Upon remand, the circuit court shall specifically address C&M's entitlement to pursue this claim. In so doing, we remind the circuit court that the provisions of the U.C.C. are viewed as "plenary" and exclusive except where the legislature has otherwise indicated. *Lincoln Bank & Trust Co. v. Queenan*, 344 S.W.2d 383 (Ky. 1961); *see also* 4 Robert W. Keats, *Kentucky Practice – Methods of Practice* § 2.2 (4<sup>th</sup> ed. 2010). And, the U.C.C. specifically instructs that "[u]nless displaced by the particular provisions of the Uniform Commercial Code, the principles of the law and equity, . . . supplement its provisions." KRS 355.1-103.

Accordingly, we hold that the circuit court erroneously rendered summary judgment dismissing C&M's complaint. Upon remand, the circuit shall determine C&M's entitlement to relief under the U.C.C. for its breach of contract claim and shall address C&M's entitlement to relief upon *quantum meruit*.

For the foregoing reasons, the Opinion and Order of the Jefferson Circuit Court is reversed and this case is remanded for proceedings consistent with this opinion.

ALL CONCUR.

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<sup>2</sup> Depending upon payment terms, the sale may have been upon cash or credit per the Uniform Commercial Code. See KRS 355.2-702.

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