NOT DESIGNATED FOR PUBLICATION

CRESCENT CITY DEALERSHIP, L.L.C., D/B/A CRESCENT CITY TOYOTA	*	**NO. 2002-CA-0102**
	*	**COURT OF APPEAL**
VERSUS	*	**FOURTH CIRCUIT**
CHRISTINE LEE DANIEL, A/K/A CHRISTINE LEE DIPILLA	*	**STATE OF LOUISIANA**
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APPEAL FROM
FIRST CITY COURT OF NEW ORLEANS
NO. 00-51079, SECTION "C"
HONORABLE SONJA M. SPEARS, JUDGE
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JUDGE MAX N. TOBIAS, JR.

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(COURT COMPOSED OF JUDGE JOAN BERNARD ARMSTRONG, JUDGE PATRICIA RIVET MURRAY, AND JUDGE MAX N. TOBIAS, JR.)

ARMSTRONG, J., CONCURS
MURRAY, J., CONCURRING WITH REASONS

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REVERSED AND REMANDED.

The issue in this appeal is whether the trial court correctly granted summary judgment in favor of the defendant, Christine Daniel (hereinafter, "Daniel"), and against the plaintiff, Crescent City Dealership, L.L.C., d/b/a Crescent City Toyota (hereinafter, "Crescent City"). Based upon our *de novo* review and finding that genuine issues of material fact exist, we reverse and remand.

Although both parties describe a multitude of facts not verifiable in the record on appeal, the following facts are generally not disputed. For several days Daniel and Crescent City discussed a "one-pay" lease of a 1999 Toyota Avalon automobile. On 25 March 1999, Daniel and Crescent City entered into a "one-pay" lease agreement for the vehicle; the lease was for a three-year term. Several days after the lease was signed, Crescent City claimed that Daniel owed more money under the lease. At some point during the negotiation of the lease, the parties contemplated a trade-in of a 1990 Dodge van presumably owed by Keith Dickison, a friend of Daniel. Various documents were signed reflecting that such was contemplated.

Daniel delivered to Crescent City a check for $2,500.00, which presumably would be returned to Daniel if the Dodge van and its title were delivered to Crescent City; if the van and title were not delivered, Crescent City presumably was to cash the check. At some point and in a manner not clearly established by the record, Daniel got the $2,500.00 check back, and the van, which previously had been placed in possession of Crescent City, was returned to the owner for want of any written agreement that the vehicle could be retained by Crescent City in connection with the lease to Daniel.

The written lease shows that a payment of $15,021.92 cash was due at delivery or lease signing, with the space in the lease for "trade-in allowance" or "rebate" marked as not applicable. Daniel's check, dated 26 March 1999 and payable to Crescent City, was for $11,813.00. Daniel twice noted on her check, "One pay lease-in full." Apparently, Crescent City was dissatisfied from the beginning, asserting errors in its preparation of the lease. They tried unsuccessfully to resolve the disagreements with Daniel and her attorney. Crescent City was unable to assign the lease to Toyota Motor Credit Corporation as it customarily did due to various errors in the lease. Crescent City unsuccessfully attempted to get Daniel to sign a new lease containing changes and corrections required by Toyota Motor Credit Corporation.

On 10 February 2000, Crescent City filed suit in First City Court of the City of New Orleans for breach of contract and for damages against Daniel, alleging that Daniel breached the agreement between the parties by failing to pay the full amount agreed upon for the one-pay lease. (Daniel answered and filed a reconventional demand, the allegations of which are not material to the issue at bar.) Specifically, Crescent City claimed that Daniel failed to tender the Dodge van, the trade-in that Crescent City claimed constituted a part of the lease price. Crescent City also alleged, *inter alia,* that the lease contained an error on the allowed mileage use, vitiating its consent to the lease, and that Daniel breached her obligations under the lease by failing to notify Crescent City of a change of address.

On 13 June 2000, Daniel filed a motion for summary judgment, arguing that she was entitled to judgment as a matter of law because the theories of recovery offered by Crescent City did not present valid causes of action against her based in fact or law. Specifically, she asserted that her documents showed that the total price of the lease was $11,813.00, which she paid upon delivery of the vehicle. She further asserted that the alleged error in the lease on the amount of allowed mileage was caused by Crescent City's neglect and did not vitiate its consent. Finally, she asserted that she did not breach the lease by failing to notify Crescent City of an address

change because Toyota Credit had not refused to accept the lease based on an address discrepancy.

After a hearing on 8 February 2001, the trial court granted the summary judgment motion by judgment dated 12 February 2001. In doing so, the trial court dismissed Crescent City's petition for breach of contract and for damages. Crescent City appeals.

In *Shelton v. Standard/700 Associates*, 2001-0587 (La. 10/16/01), 798 So.2d 60, 64-65, the Supreme Court reiterated the appropriate standards applicable to summary judgment proceedings:

> Appellate courts review summary judgments de novo. Doerr v. Mobil Oil Corp., 2000-0947 (La. 12/19/00), 774 So.2d 119, 136. It is well established that a summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. LSA- C.C.P. art. 966(B). However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion for summary judgment does not require him to negate all essential elements of the adverse party's claim, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim. LSA-C.C.P. art. 966(C)(2). Thereafter, if the adverse party fails to produce factual support sufficient to establish that she will be able to satisfy her evidentiary burden of proof at trial, there is no genuine issue of material fact. LSA-C.C.P. art. 966(C)(2).

In support of her motion for summary judgment, Daniel submitted

several documents: a statement of uncontested facts; her own affidavit; the one-pay lease agreement at issue; a copy of the cancelled check she used to pay Crescent City; a memo from the general manager of Crescent City reflecting the $11,813.00, which differed from the amount shown on the lease and was equal to the amount of Daniel's check given at delivery; a letter from Daniel's attorney acknowledging the manager's memo; a copy of a "corrected" lease which Daniel refused to sign; a letter from Crescent City to Daniel at her New Orleans address; a letter from Toyota Motor Credit Corporation detailing the corrections it required on the lease; and an unsigned copy of a purchase agreement for Daniel's leased Toyota.

In opposition to summary judgment, Crescent City also submitted several documents, including affidavits from its general counsel, a salesman, and its former general manager; a statement of uncontested material facts; various partially completed documents relating to a trade-in of a Dodge van, some signed by Keith Dickison; two different credit applications for Daniel; portions of Daniel's deposition; and a lease agreement between Daniel and Lakeside Toyota for another Toyota Avalon.

Because the parties present entirely different factual scenarios, we find genuine issues of material fact in dispute.

In its first assignment of error, Crescent City argues that the trial court

erred in concluding that Daniel was entitled to summary judgment dismissing its claim for $2,500.00, representing the trade-in value of the Dodge van that Daniel refused to deliver. Crescent City claims that it presented evidence of Daniel's intent to trade-in a vehicle, which at least presented a genuine issue of material fact. Crescent City further asserts that the trial court improperly rejected its evidence without having evaluated witness credibility through live testimony. We agree.

After reviewing Crescent City's evidence, we find that the parties contemplated the trade-in of a vehicle at some point in the days before the lease was actually executed; the ultimate agreement between the parties, as evidenced by the lease itself, did not note the trade-in of a vehicle. The record indicates that the parties disputed the amount due under the lease before and after the lease was signed. We find that two items of evidence submitted by Daniel show that the dispute was never totally resolved: (1) the restrictive notations on the check given by Daniel for the lease payment and negotiated by Crescent City, and (2) the handwritten and signed memo on Crescent City Toyota/Kia stationary faxed by J.D. Deutschmann, Crescent City's general manager, on 8 April 1999, stating:

> To: whom it may concern
> Re: C. L. Daniel
> Avalon Vin Number 4T1BF18B2XU329557
> 1 Pay 36 month lease - $11813.00.
> Transaction completed.

> 1 Pay lease paid-out at $11813.00 for 36 months.
> (signed) J. D. Deutschmann
> J. D. Deutschmann
> Please call me upon receipt.

The restrictive notations on the front and back of Daniel's $11,813.00 check reading "One-pay lease – in Full" are not restrictive indorsements[1] as a matter of law. An "indorsement" is defined by La. R.S. 10:3-204 as a signature by an indorser for purposes of transfer, restricting payment of the instrument, or incurring the indorser's liability. A "restrictive indorsement," according to La. R.S. 10-3:206, refers to instructions regarding how and to whom payment may be made.[2] Daniel's notations were an attempt to extinguish her obligations to Crescent City or to limit her liability not on the instrument (i.e., the check) but the underlying obligation under the lease. It is apparent from the attachments to the memoranda in support of and opposition to the motion for summary judgment that the memo was sent as part of negotiations and as part of a potential compromise between the parties. But what the compromise was between the parties is not established by the record. La. C.C. art. 3071 defines a "compromise" as:

> [A]n agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent, in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing.

Article 3071 further requires that a compromise "must be reduced into writing or recited in open court and capable of being transcribed from the record of the proceedings."

The affidavits submitted present conflicting explanations of what the faxed memo was meant to accomplish. Daniel contends it was intended to resolve the dispute in its entirety and that Crescent City would accept the $11,813.00 for the lease. Crescent City maintains that the Daniel's attorney never called as instructed in the memo and only sent in response an unsigned letter that was silent with respect to the demands upon Daniel to execute a new lease. We cannot ascertain what, if anything, Crescent City gave as its part in the compromise, and we do not find that any formal written agreement was entered into between the parties respecting what the $11,813.00 represented. Therefore, a genuine issue of material fact exists.

In its second assignment of error, Crescent City argues that the trial court erred in concluding that Daniel was entitled to summary judgment on the issue of the erroneous inclusion of a lease provision allowing Daniel 45,000 miles per year on her leased vehicle. The pertinent provision in the lease, which was prepared by Crescent City, states: "You may be charged for excessive wear based on our standards for normal use and for mileage in excess of ________miles per year at the rate of ten (10) cents per mile."

Typed in the blank is “36000,” and handwritten in the blank is “45000.” The parties agree that the handwritten number was initialed by Daniel and Crescent City’s salesperson. Crescent City claims that because the industry standard for allowed mileage is 12,000 or 15,000 miles per year, both the typed and handwritten numbers were erroneous and operated inequitably to its detriment. In support of its position, Crescent City submits documentation that may, depending upon the credibility of Daniel and other witnesses, establish that Daniel knew and understood that the mileage allowance covered the full three-year lease term, not an allowance for each year.

Consent to an obligation may be vitiated by error, fraud, or duress. La. C.C. art. 1948. Crescent City claims that its consent was vitiated by its own error as to the allowed mileage provision. La. C.C. art. 1949 provides that “error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party.” Unilateral error does not vitiate consent if the cause of the error was the complaining party’s inexcusable neglect in discovering the error. *Scott v. Bank of Coushatta*, 512 So.2d 356 (La. 1987).

Having considered the evidence submitted and the arguments made by

both parties, we find that if error existed in this regard, the error was clearly apparent to Crescent City and may, depending upon Daniel's credibility, have been apparent to Daniel. We acknowledge, however, that any error is primarily attributable to Crescent City's inexcusable neglect in discovering the error as the preparer of the lease and by initially the specific provision. In her summary judgment motion, Daniel raised material evidence of the absence of factual support for Crescent City's claim of error sufficient to vitiate its consent. She established that she desired a higher allowable mileage limit, and she communicated this desire to Crescent City. But whether her intent was to obtain a 45,000 miles per year allowance or 45,000 miles for the entire three-year term of the lease presents a genuine issue of material fact.

Daniel's participation in an earlier lease with another car dealer in the previous year is in large part irrelevant; however, we note the arguments of counsel for Crescent City that Daniel disputes whether she signed certain documents that Crescent City had accumulated in its files during negotiations for the one-pay lease. At the very least, those documents, as well as those from her prior lease transaction at another dealership, are relevant to show that Daniel signs her name in different ways or, by implication, that she uses different ways of signing her name as a tactic for

obtaining an edge in negotiations in the event a dispute arises. Therefore, the issue of Daniel's credibility is relevant and creates a genuine issue of material fact that precludes the granting of a summary judgment. We do, however, find the case cited by Crescent City, *Twin City Pontiac, Inc. v. Pickett*, 588 So.2d 1125 (La. App. 2 Cir. 1991), is distinguished from the circumstances in this case, not the least of which is that the alleged "error" in this case was detectible, noted, and initialed by Crescent City.

In its final assignment of error, Crescent City argues that the trial court erred in concluding that Daniel had not breached the lease by failing to notify them of her change in address and by removing the leased vehicle from the state of Louisiana for over thirty days.[3] In its petition, Crescent City contends that Daniel moved without providing written notice and that it did not know where the vehicle was garaged, which prevented it from assigning the lease to Toyota Motor Credit Corporation.

We find that Crescent City's latter claim has no merit. According to a letter of 26 August 1999 from Toyota Motor Credit Corporation to Crescent City, Daniel's address and the exact location of the vehicle were not among the many problems preventing the assignment of the lease. And, although the lease does require the lessee to notify the lessor of an address change, the record indicates that Crescent City was aware of and contacted Daniel at her

New Orleans address although her address stated in the lease is in Carencro, Louisiana. Notably, Daniel's New Orleans address was shown on the $11,813.00 check that she gave to Crescent City.

Issues as to Daniel's address or the location of the vehicle were not primary in the summary judgment proceeding. Because Crescent City bears the burden at trial of proving that Daniel breached the lease, Daniel, at the summary judgment proceeding, needed to show the absence of factual support for the allegation of a breach of the contract. She did this by showing that the address Crescent City claimed was "new" was actually an address she had before the lease was signed. The record before us establishes that Daniel spends substantial amounts of time in the Virginia-Maryland area. Her driver's license is issued by the state of Virginia and shows a Virginia address. The record before us raises, but does not establish, whether Daniel has kept the car at an address other than that shown in the lease for more than thirty days without advising Crescent City of that fact. Therefore, a genuine issue of material facts exists in that regard.

Furthermore, even if we were to find that Daniel breached the lease with regard to either her address or the location of the vehicle, our reading of the lease is that Crescent City would not be entitled to the specific damages they pray for in the petition.

Following our *de novo* review in the instant case, we find that the trial court erred when it granted summary judgment in favor of Daniel. Accordingly, the judgment of the trial court is reversed and the matter remanded for trial.

REVERSED AND REMANDED.