STATE OF MICHIGAN

COURT OF APPEALS

SAMUEL FODALE, Plaintiff-Appellant, V WASTE MANAGEMENT OF MICHIGAN, INC., Defendant-Appellee.	FOR PUBLICATION May 2, 2006 9:05 a.m. No. 253446 Oakland Circuit Court LC No. 2002-040945-CK Official Reported Version

Before: Saad, P.J., and Zahra and Schuette, JJ.

PER CURIAM.

Plaintiff Samuel Fodale appeals as of right the trial court's grant of summary disposition in favor of defendant Waste Management of Michigan, Inc., on his claims of violation of Article 9 of the Uniform Commercial Code (UCC), breach of contract, and unjust enrichment. We affirm.

I. Facts

This case arises from a series of interrelated agreements between the parties and their predecessors in interest. In 1983, defendant[1] and Eagle Valley, Ltd., of which plaintiff was a shareholder, entered into an agreement (1983 assignment) whereby Eagle Valley, Ltd., assigned all its rights in a proposed landfill to defendant; in return, defendant assigned to Eagle Valley, Ltd., a right to 50 percent of the landfill's future profits. In 1984, Eagle Valley, Ltd., entered a redemption agreement (1984 redemption agreement) whereby it assigned all its assets and liabilities to its shareholders in proportion to their shares of ownership. Plaintiff was entitled to ten percent of the assets of Eagle Valley, Ltd., under this agreement, and thus was entitled to five percent of defendant's total profits from the Eagle Valley Landfill pursuant to the 1983 Assignment.

[1] Plaintiff and Eagle Valley, Ltd., originally contracted with Waste Management Systems, which is a predecessor of defendant Waste Management of Michigan.

In 1987, defendant loaned $250,000 to plaintiff. The loan agreement had three parts: an agreement (1987 agreement), a note (1987 note), and a collateral assignment (1987 collateral assignment) (collectively, the 1987 loan agreements). The 1987 loan agreements gave defendant two options for recovering on the loan in the event of plaintiff's default. First, the 1987 loan agreements provided that, if plaintiff defaulted, defendant received an option to buy plaintiff's interest in the 1984 redemption agreement[2] for $350,000, less the amount plaintiff owed defendant at the time of default; in the event defendant exercised this option, plaintiff's remaining obligations to defendant would be satisfied. Second, the 1987 collateral assignment offered plaintiff's "interest" in Eagle Valley Landfill *itself* as collateral.

Between December 1987 and August 1992, plaintiff failed to pay on the loan six times, but the parties were able to amend the agreement, each time increasing the amount plaintiff owed defendant.[3] On July 30, 1998, apparently after many attempts to contact plaintiff about a seventh default, defendant notified plaintiff by letter that it was exercising its option to purchase his "interest" in Eagle Valley and that this satisfied plaintiff's obligations under the note to defendant.

In 2002, plaintiff sued defendant, claiming (1) violation of Article 9 of the UCC, MCL 440.9601 *et seq.*; (2) breach of contract (breach of implied covenant of good faith and fair dealing); and (3) unjust enrichment. The trial court granted summary disposition in favor of defendant pursuant to MCR 2.116(C)(8) and (10) on all three counts. This appeal ensued. Before evaluating plaintiff's assignments of error, this Court requested supplementary briefs to determine whether Article 9 of the UCC (secured transactions) controlled the parties' agreement.

II. Standard of Review

A trial court's decision granting summary disposition is reviewed de novo to determine whether the prevailing party was entitled to judgment as a matter of law. *Allen v Keating*, 205 Mich App 560, 562; 517 NW2d 830 (1994). When reviewing a motion under MCR 2.116(C)(10), the Court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). A question of fact exists when reasonable minds could differ regarding the conclusions to be drawn from the evidence. *Glittenberg v Doughboy Recreational Industries* (*On Rehearing*), 441 Mich 379, 398-399; 491 NW2d 208 (1992).

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[2] Until this Court requested supplementary briefs regarding the applicability of Article 9, the parties loosely referred to plaintiff's interest as his "interest in the landfill." Greater precision is required for this analysis, however: plaintiff's actual interest, as discussed at greater length later in this opinion was actually in profits from the landfill that were owed plaintiff by defendant.

[3] No other changes were made to the agreement; all the "amended agreements" contain the same option and collateral assignment provisions.

Questions of statutory interpretation are also reviewed de novo. *Heinz v Chicago Rd Investment Co*, 216 Mich App 289, 295; 549 NW2d 47 (1996). Questions involving the proper interpretation of a contract or the legal effect of a contractual clause are likewise reviewed de novo. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

III. Applicability of the Uniform Commercial Code

Threshold issues regarding the applicability of the UCC must be addressed before this Court considers plaintiff's assignments of error regarding waiver of UCC debtor's rights, as well as his actions for breach of contract and unjust enrichment, which depend on the applicability of the UCC.

A. Controlling Version of Article 9

Plaintiff argues that the trial court erred in dismissing his claims based on Article 9 of the UCC, MCL 440.9101 *et seq*., governing secured transactions. While both parties refer to part six of Article 9, MCL 440.9601 *et seq*., that part did not become effective until July 1, 2001, nearly three years after defendant's challenged purchase of plaintiff's collateral occurred. Before July 2001, defaults were governed by part five of Article 9, 1978 PA 369; MCL 440.9501 *et seq*.[4] Those sections were in effect in 1987, when the parties' contract was executed, and in 1998, when the contested transaction took place. Therefore, the former part five controls this case. We occasionally refer to current provisions in our analysis because the pertinent provisions of the former UCC and the current UCC are similar in substance, if not organization.

B. Subject Matter of the Collateral

At oral argument, this Court asked the parties to file supplemental briefs to answer whether former Article 9 of the UCC applies to the 1987 loan agreements. Plaintiff answered that Article 9 applies. We agree.

As an initial matter, the parties and the trial court misidentified the pertinent collateral in the 1987 loan agreements when determining whether Article 9 applied to the transaction. While they both argue that plaintiff's interest in the 1984 redemption agreement was the pertinent collateral, *the option to purchase* plaintiff's interest in the 1984 redemption agreement was also collateral. Indeed, because defendant actually disposed of this latter collateral,[5] this option, rather than the collateral specified in the 1987 collateral assignment, is the salient collateral when determining whether the 1987 loan agreements fall within the scope of Article 9.

Throughout the litigation, the parties have referred to the 1987 loan agreements as one document, although it actually has three complexly interacting components: the 1987 agreement, the 1987 note, and the 1987 collateral assignment. Though the provisions may be located in

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[4] Part five of Article 9 now governs financing statements.

[5] See part I, subsection C of our analysis.

particular components, their location is not as important as their substance when the 1987 loan agreements documents are read as a whole. See *Brown v Yousif*, 445 Mich 222, 231; 517 NW2d 727 (1994). Although the 1987 collateral agreement, if read in isolation, seems to give plaintiff's interest in the 1984 redemption agreement as the sole security for the loan, the 1987 loan agreements, when read as a whole, actually give defendant additional collateral: an option to buy plaintiff's interest in the 1984 redemption agreement at a fixed price. Paragraph 4 of the 1987 agreement states:

> As further consideration and inducement for the loan . . . [plaintiff] hereby agrees that if he should default . . . [defendant] may elect, *as full satisfaction of the Note*, to purchase his entire right, title and interest in and to the Agreement for $350,000.00 less the unpaid balance of the Note and any interest then due thereunder. . . . [Emphasis added.]

Although not labeled as such, this clause effectively operates as a collateral assignment, and this Court has ruled that Article 9 applies to any transaction—regardless of form—that is intended to create a security interest in personal property. *Yamaha Motor Corp, USA v Tri-City Motors & Sports, Inc*, 171 Mich App 260, 276-277; 429 NW2d 871 (1988) (even when an original security interest fell under Article 2 of UCC, it could evolve into an Article 9 interest); *Nickell v Lambrecht*, 29 Mich App 191, 194; 185 NW2d 155 (1970) (despite the form of a lease, the agreement was a conditional sale and a secured transaction). When parties create a security interest, they intend to empower the secured party to recover at least part of the debtor's obligations. The parties created the Paragraph 4 option with precisely this intent: to provide a means by which defendant might recover plaintiff's obligations should he default.

Not only did the option fulfill the purpose of collateral, it also functioned as collateral. Typically, collateral remains in the possession of the debtor;[6] only the condition precedent of the debtor's default forces relinquishing possession so that the secured party may dispose of the collateral. Both plaintiff's interest in the 1984 Redemption Agreement and the option created by Paragraph 4 of the 1987 agreement followed this rule: plaintiff's default was a condition precedent to defendant's ability to access them in an effort to satisfy plaintiff's outstanding debt. Moreover, once plaintiff defaulted under the 1987 agreement, defendant could have disposed of the option by exercising or alienating it.[7] This ability to purchase or alienate is similar to the rights afforded defendant in the 1987 collateral assignment, as it invokes the rights given a

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[6] Unless, of course, the collateral is placed in consignment. Consignments have special rules and circumstances in addition to those of a traditional secured transaction. No consignment was involved in this case.

[7] Again, substance trumps form: although it is not readily apparent that the option could be sold just like the collateral described in the 1987 collateral assignment, it indeed could through the assignment of defendant's interests under the 1987 loan agreements. ("This Agreement shall be binding on the executors, heirs, representatives and successors and assigns of the parties hereto.").

secured party by the UCC in the event of a default. Accordingly, the pertinent collateral in this case is not the collateral named in the 1987 collateral assignment; rather, it is the option created in Paragraph 4 of the 1987 agreement.

Of course, even if the parties intended for the option to serve as collateral, to be covered by Article 9 of the UCC it must fall under one of the accepted categories of collateral outlined in former Article 9's scope provision, MCL 440.9102, 1979 version. The scope of Article 9 is broad: except for transactions that are specifically excluded by other sections of the code, the 1979 version of Article 9 applied to "any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures . . . ."[8] MCL 440.9102, 1979 version; see also current MCL 440.9109.

While Michigan Courts have not ruled on whether an option constitutes personal property, the Michigan Supreme Court has ruled that "'[p]ersonal property' connotes intangible as well as tangible personal property and must include choses in action." *Royal Oak Twp v City of Berkley*, 309 Mich 572, 580; 16 NW2d 83 (1944). Options, like choses in action, are intangible property interests. See Black's Law Dictionary (8th ed) (defining "personal property" as "[a]ny movable or intangible thing that is subject to ownership and not classified as real property"). Further, other authorities have recognized options as intangible personal property in various contexts.[9] See *In re Buckner*, 224 BR 760, 762 (ED Mo, 1998) (bankruptcy proceeding); *Estate of Nowell*, 607 SW2d 792, 795 (Mo App, 1980) (will contest); *Lawrence v O'Connell*, 141 F Supp 316, 321 (D RI, 1956) (tax dispute). Moreover, a ruling that an option is not collateral that would bring an agreement within the purview of Article 9 would give future contracting parties an enormous go-around to avoid the debtor protections of Article 9, which is exactly the phenomenon against which the UCC's scope provisions protect. Finally, options are not excluded from Article 9 pursuant to the 1979 version of MCL 440.9104. In conclusion, Article 9 applies to the 1987 loan agreements.[10]

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[8] Indeed, as discussed above the Michigan Supreme Court has ruled that even transactions explicitly excluded by the UCC can be brought within this article's scope if the parties so intend. *Shurlow v Bonthuis*, 456 Mich 730, 734-738; 576 NW2d 159 (1998).

[9] "When uniform laws such as the UCC have been adopted by several states, the courts of one state may refer to decisions from another state and may construe the statutes in accordance with the construction given by that state. If there is no harmony of construction among the various states, the forum court will adopt the construction which seems most reasonable." *Yamaha Motor Corp, USA*, *supra* at 270, citing 2A Sutherland, Statutory Constr (4th ed), § 52.05, p 546.

[10] Alternatively, it may be established that the parties brought the 1987 loan agreements within the scope of Article 9 through their intent. Our Supreme Court has ruled that the Legislature intended Article 9 to be of general applicability, covering all types of security interests in personal property, regardless of their form. *Brown, supra* at 231. Thus, provisions regarding the article's scope have normally been construed in favor of inclusion. *Shurlow, supra* at 735-737. This Court examines the intent of the parties entering into a transaction, rather than the form of their agreement. *Id.* at 735 n 10. Indeed, when the parties have so agreed, our Supreme Court

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C. Applicability of Article 9, Part 5

Defendant argues that, even if Article 9 of the UCC applies generally, part 5, which governs a debtor's rights during the disposition of the collateral, does not apply for the reason that defendant never disposed of the collateral. We disagree.

The UCC does not define the term, "disposition." *Silverberg v Colantuno*, 991 P2d 280, 288 (Colo App, 1998). However, both the former MCL 440.9504(1) and the current MCL 440.9610(1) state that after default a secured party "may *sell*, lease, license, *or otherwise dispose of* any or all of the collateral . . . ." (Emphasis added.) Additionally, both the current § 9610(3) and the former § 9504(3), which require commercially reasonable *disposition* of collateral, address a secured party's purchase of the debtor's collateral at a private sale. These provisions clearly indicate that a purchase by the secured party is a disposition within the meaning of Article 9.[11]

Although there are no published Michigan cases specifically addressing the meaning of "disposition" in this context, in *Silverberg*, *supra* at 289, the Colorado Court of Appeals

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has been willing to apply Article 9 to agreements despite express exemptions in the scope provision. *Id.* at 735 (bringing an agreement within the scope of Article 9 despite the express statutory exclusion of a landlord's liens).

In this case, the parties invoked the UCC and sought to define "commercially reasonable notice" for the purpose of a UCC analysis in the 1987 collateral assignment:

> Upon occurrence of a default . . . [defendant] shall then have the rights, options, duties and remedies of a secured party under the Uniform Commercial Code of Michigan. . . . . Any requirement of the Code for reasonable notice to [plaintiff] shall be met if such notice is mailed, postage prepaid, to [plaintiff], at [his] address . . . .

Throughout the document, the parties used the terminology and concepts of Article 9, including "disposition," "deficiency," "priority of creditors," and "security." After reading the 1987 loan agreements, it is not surprising that the parties presumed that Article 9 was applicable until the Court raised the issue. Moreover, given that defendant sought the protections afforded secured parties by the UCC, it is counterintuitive not to obligate it to follow the corresponding debtor protection provisions. To borrow a phrase from another context, the parties to the agreement should have to "take the bitter with the sweet." *Arnett v Kennedy*, 416 US 134, 154; 94 S Ct 1633; 40 L Ed 2d 15 (1974) (opinion by Rehnquist, J.) (within the context of due process).

[11] Although the 1999 version of § 9615(6) is inapplicable to this case, it also contemplates that the creditor may *dispose* of collateral by purchasing it (and may thereby become liable for the difference between the purchase price and the fair market value of a collateral). As plaintiff observes, § 9615(6) would be rendered meaningless if a contractually agreed purchase in the event of default were not considered a disposition.

persuasively concluded that "an examination of the default provisions of Article 9 of the UCC leads us to conclude that 'disposition' upon default was intended to refer to a transfer of some portion of the *creditor's* interest in the collateral *and* a transfer of the *debtor's* interest." (Emphasis in original.)[12] The court added:

> [The] application of the ejusdem generis principle of statutory construction supports the same result. The words "otherwise dispose" follow "sell" and "lease." The latter two terms contemplate a disposition terminating, altering, suspending, or transferring the rights of possession and ownership that both a debtor and a secured party enjoy. Hence, a "disposition" must mean a similar transaction. [*Id.*]

In this case, although defendant did not transfer its rights in the collateral to a third party, it terminated and transferred to itself all of *plaintiff's* rights in the collateral. Thus, although *Silverberg* is not binding on this Court, it supports the conclusion that terminating the debtor's rights in the collateral is a disposition even if the transfer is to the secured party.

When defendant exercised the option to buy plaintiff's interest in the 1984 redemption agreement, it "disposed" of the collateral within the meaning of Article 9. For these reasons, we conclude that the trial court erred in finding that there was no disposition in this case. Now that we have established that the former Article 9 and part 5 apply, we turn to the question whether plaintiff waived any of his debtor's rights under part 5.

IV. Plaintiff's Postdefault Debtor's Rights

Plaintiff's first count argues that the provision allowing defendant to purchase plaintiff's collateral for $350,000, less any outstanding balance owed under the parties' promissory note, was an unlawful predefault waiver of rights under MCL 440.9502, specifically an invalid waiver of (A) the right to notice of disposition, (B) to a commercially reasonable disposition of the collateral, and (C) to the payment of a surplus.

To protect debtors, the former MCL 440.9501(1) provided that, after default, "a secured party has the rights and remedies provided in this part and except as limited by subsection (3) those provided in the security agreement." Former subsection 3 read in pertinent part:

> To the extent that they give rights to the debtor and impose duties on the secured party, the rules stated in subsections referred to below may not be waived or varied except as provided with respect to compulsory disposition of collateral (section 9504(3) and section 9505) and with respect to redemption of collateral (section 9506) but the parties may by agreement determine the standards by

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[12] See also Black's Law Dictionary (8th ed) ("[D]isposition" is defined as "[t]he act of transferring something to another's care or possession, esp. by deed or will; the relinquishing of property . . . .").

which the fulfillment of these rights and duties is to be measured if such standards are not manifestly unreasonable:

(a) subsection (2) of section 9502 and subsection (2) of section 9504 insofar as they require accounting for surplus proceeds of collateral;

(b) subsection (3) of section 9504 and subsection (1) of section 9505 which deal with disposition of collateral;

(c) subsection of section 9505 which deals with acceptance of collateral as discharge of obligation;[13]

(d) section 9506 which deals with redemption of collateral; and

(e) subsection (1) of section 9507 which deals with the secured party's liability for failure to comply with this part. [MCL 440.9501(3), 1979 version.]

Therefore, that version of MCL 440.9501(3) prohibited a waiver of the right to notice of disposition, a commercially reasonable disposition, and an accounting of any surplus. These alleged waivers are discussed more fully below.

A. Notice of Disposition

Under former § 9501(3)(b), defaulting debtors had a right to a notice of disposition of the collateral, which may not have been waived except by a writing signed after default pursuant to former § 9501(3)(b).[14] In this case, the collateral—the option to purchase a right to profits under the 1984 redemption agreement—was not "perishable," did not "threaten[] to decline speedily in value," and was not "of a type customarily sold on a recognized market." MCL 440.9504(3), 1979 version. Moreover, plaintiff did not sign a statement renouncing his right to receive notification of disposition after he defaulted. Rather, defendant sent plaintiff a letter stating that, "effective immediately," it was invoking its contractual right to exercise its option to purchase plaintiff's interest in the 1984 redemption agreement. Although defendant argues that the letter could be considered "reasonable notification of the time after which any private sale . . . is to be made," such an interpretation would render the nonwaiveable protections of this requirement

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[13] An exception that will prove particularly important in our analysis in part IV(E).

[14] The 1979 version of MCL 440.9504(3) stated, in pertinent part:

> Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of the sale.

meaningless. Consequently, if defendant indeed disposed of the collateral as described in the contract, it violated plaintiff's right to a notice of disposition pursuant to MCL 440.9504(3), 1979 version.

B. Commercially Reasonable Disposition of Collateral

The former § 9504(3)[15] also provided:

> Disposition of the collateral may be by public or private proceedings and may be made by way of 1 or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place, and terms must be commercially reasonable. . . . The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at a private sale.

As discussed above, the former § 9501(3)(b) prohibited the waiver of these rights.[16] Unlike the current statute,[17] the antiwaiver provision of former § 9501 did not separately address whether a secured party could purchase collateral at a private sale. Thus, under former Article 9, a debtor could not waive the requirement that a creditor could only purchase collateral at a private sale if it "is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations . . . . " See e.g., *Pennsylvania House, Inc v Juneau's Pennsylvania House, Inc*, 791 F Supp 160, 162 (ED Tex, 1992); *Cooper Investments v Conger*, 775 P2d 76, 80 (Colo App, 1989); *Mercantile Bank & Trust v Cunov*, 749 SW2d 545, 548 (Tex App, 1988).

In this case, the 1987 loan agreements provided that if plaintiff defaulted on the loan and failed to cure the default within ten days, defendant "may elect, as full satisfaction of the Note, to purchase his entire right, title and interest in and to [plaintiff's interest in the 1984 redemption agreement] for $350,000.00 less the unpaid balance of the Note and any interest then due thereunder." The contract did not include a provision for a public sale with meaningful

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[15] The current provision, MCL 440.9610, contains clarifying language that is in accord with case law interpreting former § 9504. See, e.g., *Bank of America v Lallana*, 19 Cal 4th 203; 77 Cal Rptr 2d 910 (1998); *Liberty Nat'l Bank of Fremont v Greiner*, 62 Ohio App 2d 125; 405 NE2d 317 (1978).

[16] An exception to that section pertained to compulsory disposition of the collateral in cases involving consumer goods.

[17] Current § 9610(3) states, "A secured party may purchase collateral either at a public disposition, or at a private disposition only if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations."

opportunity for competitive bidding. Thus, we conclude that the contract purported to allow defendant to purchase plaintiff's collateral at a private sale.

It is undisputed that plaintiff's interest in the 1984 redemption agreement was not of "a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations." Therefore, it was not the type of collateral that a secured party was permitted to purchase at a private sale, even with the debtor's consent. We conclude that the provision permitting defendant to purchase plaintiff's collateral at a private sale constituted a waiver of the requirement of a commercially reasonable disposition under former § 9501(b) and, hence, was unlawful. Additionally, if defendant indeed purchased the collateral at a private sale, this purchase was commercially unreasonable and violated former § 9504(3). See, e.g., *Munao v Lagattuta*, 294 Ill App 3d 976, 981-982; 691 NE2d 818 (1998); *Carlton Mfg v Bauer*, 207 Ga App 850, 851-854; 429 SE2d 329 (1993); *Cooper Investments*, *supra* at 80-81; *Mercantile Bank & Trust*, *supra* at 548.

C. Payment of Surplus

Former § 9504(2), concerning a secured party's right to dispose of collateral after a default, provided:

> If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency *only if the security agreement so provides.* [MCL 440.9504(2), 1979 version.][18]

In this case, plaintiff alleges that the collateral was worth substantially more than the contract price paid by defendant. However, the 1987 loan agreements did not provide plaintiff with the right to a surplus. Consequently, plaintiff does not have a claim for a surplus under the 1979 version of MCL 440.9504(2).

D. Right to Redeem Collateral

Former § 9506 allowed the debtor to redeem the collateral at any time before the secured party has collected, disposed of, or accepted the collateral as satisfaction of the debt. MCL

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[18] Similarly, former § 9502(2), concerning a secured party's attempt to collect from its debtor's accounts receivable, provided, in pertinent part:

> If the security agreement secures an indebtedness, the secured party must account to the debtor for any surplus, and unless otherwise agreed, the debtor is liable for any deficiency. But, if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides. [MCL 440.9502(2), 1979 version.]

440.9506, 1979 version.[19] The debtor could, however, waive the right to redeem under a written agreement entered after default.[20] In this case, the parties' contract does not address the interval, if any, between plaintiff's default and the effective date of defendant's decision to purchase the collateral. Therefore, the provision does not constitute an unlawful predefault waiver of plaintiff's right to redeem the collateral.

However, defendant's July 30, 1998, letter stated that defendant was exercising its right to purchase the collateral "effective immediately." It is undisputed that there was no interval between defendant's alleged proposal to dispose of the collateral or accept it in satisfaction of the debt, and the time it actually accepted or disposed of the collateral after plaintiff's alleged failure to object. In other words, because defendant's letter made defendant's election to purchase the collateral "effective immediately," plaintiff never had an opportunity to redeem the collateral as required by former § 9506—regardless of whether the purchase was an acceptance or a disposition. Defendant's subsequent letter, dated October 8, 1998, offered to "consider reconveyance" of the collateral to plaintiff under certain conditions. However, it did not and could not offer plaintiff an opportunity to redeem the collateral in accordance with the former § 9506, because defendant had already disposed of or accepted the collateral.

In *Howard v Lud*, 119 Mich App 55, 63-64; 325 NW2d 623 (1982), this Court held that redemption was unavailable to a debtor who failed to tender full performance under former § 9506 after being notified of the secured party's intention to retain his shares of stock in satisfaction of the debt. However, the decision does not address the secured party's claim that it provided the required notice, but that the plaintiff failed to timely redeem. *Id*. at 63. Thus, the case is distinguishable. We conclude that, if defendant indeed *purchased* plaintiff's collateral "effective immediately," it violated former § 9506.[21]

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[19] Former § 9506 read in full:

> At any time before the secured party has disposed of collateral or entered into a contract for its disposition under section 9504 or before the obligation has been discharged under 9505(2) the debtor . . . may unless otherwise agreed in writing after default redeem the collateral by tendering fulfillment of all obligations secured by the collateral as well as expenses reasonably incurred by the secured party in retaking, holding and preparing the collateral for disposition, in arranging for the sale, and to the extent provided in the agreement and not prohibited by law, his reasonable attorney's fees and legal expenses.

[20] Again, this is much in accord with the current statute, MCL 440.9623.

[21] Because the language of the statute is clear, there is no need to review *Lewis Broadcasting Corp v Phoenix Broadcasting Partners*, 232 Ga App 94; 502 SE2d 254 (1998), cited by plaintiff, for guidance. Nevertheless, we note that *Lewis* held that a contractual provision allowing a secured party to purchase the debtor's collateral was an unlawful predefault waiver of the debtor's right to redeem. *Id*. at 95-96. While a similar conclusion might be warranted in this case, it is not necessary to a complete resolution of the issues.

E. Acceptance of Collateral in Satisfaction of Debt

Regardless of the potential violations of plaintiff's rights discussed above, defendant argues that it accepted plaintiff's collateral as payment of plaintiff's obligation. Former § 9505(2) provided:

> In any other case involving consumer goods[22] or any other collateral a secured party in possession may, after default, propose to retain the collateral in satisfaction of the obligation. Written notice of such proposal shall be sent to the debtor if he has not signed after default a statement renouncing or modifying his rights under this subsection. In the case of consumer goods, no other notice need be given. In other cases notice shall be sent to any other secured party . . . written notice of a claim of an interest in the collateral. *If the secured party receives objection in writing from a person entitled to receive notification within 21 days after the notice was sent, the secured party must dispose of the collateral under section 9504. In the absence of such written objection the secured party may retain the collateral in satisfaction of the debtor's obligation.* [MCL 440.9505(2), 1979 version (emphasis added).]

Under former § 9501(3)(c), the provisions of former § 9505(2) could not be waived except by a writing signed after default.[23] Indeed, because plaintiff did not sign a postdefault waiver of rights, a written proposal was required.

In this case, defendant sent plaintiff a letter stating that defendant was exercising its option to purchase plaintiff's interest in the 1984 redemption agreement "effective immediately." Under the terms of the letter, plaintiff's debts were forgiven in total, despite the fact that, under the terms of the 1987 loan agreements, defendant could have sought a deficiency judgment against plaintiff. This leads us to conclude that, rather than selling the collateral at a "private sale," as plaintiff alleges, defendant was proposing that it accept the collateral in satisfaction of plaintiff's debt.

While the July 30, 1998, letter did not use tentative terms to describe defendant's intent with regard to the collateral, it clearly expressed defendant's intent to "retain the collateral in satisfaction of the obligation."[24] Plaintiff failed to "object[] in writing . . . within 21 days after

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[22] The "any other case" refers to the 1979 version of MCL 440.9505(1) and is any case other than a purchase money security interest in which the debtor has paid 60 percent of the cash price.

[23] Except as they pertain to the compulsory disposition of the collateral in certain cases involving consumer goods. See the 1979 version of MCL 440.9501(3); see also MCL 440.9624(2); MCL 440.9620(5).

[24] The use of the word "proposal" in § 9505(2) raises an interesting question of statutory construction. "Propose" is defined as follows:

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the notice was sent." Under the plain terms of former § 9501(3)(c), plaintiff allowed defendant to accept his interest in the 1984 redemption agreement in satisfaction of his debts. The failure of plaintiff to exercise his express statutory rights under § 9505(2) is fatal to all the plaintiff's other assignments of error.

F. Conclusion

We conclude that the trial court erred in finding that the 1987 loan agreements had not violated several of plaintiff's postdefault rights. The contractual provision allowing defendant to purchase the collateral at a private sale was an unlawful waiver of the right to a commercially reasonable disposition of the collateral under the 1979 version of MCL 440.9501(3)(b). Further, the authorization under the 1987 loan agreements for the defendant's purchase of the collateral at a private sale was commercially unreasonable and, therefore, violated the 1979 version of MCL 440.9504(3). Finally, because the disposition or alleged acceptance became "effective immediately," it violated plaintiff's right to redeem the collateral under the 1979 version of MCL 440.9506.

Plaintiff's victory on the above issues is pyrrhic: while it gives this Court an opportunity to clarify debtors' postdefault rights, plaintiff ultimately foreclosed any claims based on these violations when he acquiesced to defendant's proposal to accept the collateral in satisfaction of plaintiff's debt. In regard to his right to be informed of the disposition under § 9501, plaintiff necessarily knew the means of disposition if he was informed of and acquiesced to defendant accepting the collateral in satisfaction of his debt. Indeed, if, as here, a defaulting debtor fails to object to the secured party's proposal to accept the collateral in satisfaction of the debt, there necessarily will be no sale, whether public or private. Rather, by allowing acceptance of the collateral, the defaulting debtor waives his or her right to *any* sale under § 9504. Finally,

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(…continued)

> [*Propose*:] 1. to offer for consideration, acceptance, or action . . . . 2. to offer (a toast). 3. to suggest. 4. to nominate . . . . 5. to plan; intend. 6. to make an offer, esp. of marriage. 7. to form or consider a purpose or design . . . . [*Random House Webster's College Dictionary* (2d ed).]

All these definitions of "propose" indicate that a proposal is something tentative, whether subject to approval by another party or change by its maker. Defendant's July 30, 1998, letter was written in mandatory, rather than tentative, terms. Defendant expressed an intent to take the collateral "effective immediately."

We conclude that the mandatory nature of defendant's notice of his intent to retain the collateral did not render this notice ineffectual under § 9505(2). The statute refers to the communication under § 9505(2) as a "notice." See MCL 440.9505(2) ("In the case of consumer goods, no other *notice* need be given." [Emphasis added.]). Moreover, under the plain terms of the statute, once the secured party communicates its intent to accept the collateral in satisfaction of the debt, the burden shifts to the defaulting debtor to "object[] in writing . . . within 21 days after the notice was sent." Plaintiff clearly had notice of defendant's intention to retain the collateral and plaintiff failed to invoke his rights under § 9505(2).

plaintiff's failure to object to defendant's notice of his intent to accept the collateral pursuant to § 9505(2) necessarily meant that plaintiff did not intend to redeem the collateral under § 9506. Although defendant violated plaintiff's postdefault rights, plaintiff necessarily waived them when he did not object to defendant's notice of his intent to accept the collateral in satisfaction of plaintiff's debt. Therefore, we uphold the trial court's ruling, because it reached the right result on plaintiff's Article 9 claims, albeit for the wrong reason. *In re People v Jory*, 443 Mich 403, 425; 505 NW2d 228 (1993).

V. Breach of Contract

Plaintiff argues that the trial court erred in dismissing his claim for breach of the contractual duties of good faith and fair dealing. We disagree.

Since 1964, the UCC has imposed an obligation of good faith on contracting parties. The applicable version of the UCC in this case was no different, explicitly providing that "[e]very contract or duty within this act imposes an obligation of good faith in its performance or enforcement." MCL 440.1203. Moreover, the parties could not waive this obligation:

> The effect of provisions of this act may be varied by agreement, except as otherwise provided in this act and except that *the obligations of good faith, diligence, reasonableness and care prescribed by this act may not be disclaimed by agreement* but the parties may by agreement determine the standards by which the performance of such obligations is [sic] to be measured if such standards are not manifestly unreasonable. [MCL 440.1102(3) (emphasis added).]

Given the plain language of the statute, we conclude that, unlike cases involving an implied common-law duty of good faith and fair dealing, MCL 440.1203 did not become inoperable in the face of an express contractual provision and that the trial court erred in so concluding. Compare *Eastway & Blevins Agency v Citizens Ins Co of America*, 206 Mich App 299, 302-303; 520 NW2d 640 (1994).

In this case, plaintiff argues that defendant violated its duty of good faith and fair dealing by disposing of the collateral in a commercially unreasonable manner. It is unclear whether plaintiff bases this claim on the implied duty of good faith and fair dealing or on the UCC. However, Michigan does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 476; 666 NW2d 271 (2003). Therefore, to the extent that plaintiff was relying on the common law, dismissal of this claim was appropriate.

Further, to the extent that plaintiff relies on the UCC, he fails to cite any authority in support of the proposition that, absent any factual evidence of bad faith, the mere breach of a UCC provision can support a claim for violation of § 1203. Compare *Gen Motors Corp v Dep't of Treasury*, 466 Mich 231, 240; 644 NW2d 734 (2002) (Under the UCC, if the plaintiff failed to "consider complaints under the goodwill adjustment policy in good faith, it can be sued."). Therefore, we deem that claim abandoned. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471; 628 NW2d 577 (2001).

In dismissing plaintiff's claim for violation of defendant's duty of good faith, the trial court reached the right result, albeit for the wrong reason. *In re People v Jory*, *supra* at 425. As a result, we affirm.

VI. Unjust Enrichment

Lastly, plaintiff argues that the trial court erred in dismissing his claim for unjust enrichment. We disagree.

Although the trial court indicated that it was dismissing this claim under MCR 2.116(C)(8), it looked beyond the pleadings when considering this claim; therefore, the claim is properly considered under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

"In order to sustain a claim of unjust enrichment, plaintiff must establish (1) the receipt of a benefit by defendant from plaintiff, and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant." *Belle Isle Grill*, *supra* at 478. "If this is established, the law will imply a contract in order to prevent unjust enrichment." *Id.* However, "a contract will be implied only if there is no express contract covering the same subject matter." *Id.* Conversely, where there are questions of fact concerning the existence and terms of the contract, a claim for unjust enrichment can be maintained. *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 329-330; 657 NW2d 759 (2002).

In this case, an express contract, the 1987 loan agreements, governs the parties' loan. This alone would foreclose plaintiff's unjust enrichment claim. *Belle Isle Grill*, *supra* at 478. Moreover, the doctrine of unjust enrichment is equitable. *Kammer Asphalt Paving Co, Inc v East China Twp Schools*, 443 Mich 176, 185; 504 NW2d 635 (1993). Plaintiff's case is not equitable. Before plaintiff filed suit, he had failed to pay on the loan six times between December 1987 and August 1992, and had allegedly refused to reply to correspondence from defendant requesting that he refinance for a seventh time. Worse still, plaintiff, a sophisticated businessman, slept on the rights afforded him by the UCC when he failed to object to defendant's proposal to accept the collateral in satisfaction of his debt.

Affirmed.

/s/ Brian K. Zahra
/s/ Bill Schuette