STATE OF MICHIGAN

COURT OF APPEALS

AMERUS LEASING, INC.,

Plaintiff-Appellee,

v

STERLING WARREN PHARMACY, INC. d/b/a STERLING SAVMOR DRUGS and WAYNE CONTI,

Defendants-Appellants.

UNPUBLISHED
August 18, 1998

No. 203496
Macomb Circuit Court
LC No. 96-005765 CK

Before: Sawyer, P.J., and Kelly and Doctoroff, JJ.

PER CURIAM.

Defendants appeal as of right from the order of judgment granting plaintiff's motion for summary disposition and awarding $12,882.69 to plaintiff in an action brought to recover money owed pursuant to a purported lease agreement. We reverse in part and affirm in part.

Plaintiff and defendants entered into a "lease agreement," for a Vox Apothecary Display Board for use in defendants' pharmacy and drug store. Plaintiff brought suit against defendants for failure to make payments on the lease and moved for summary disposition pursuant to MCR 2.116(C)(7), (9) and (10). Defendants responded that plaintiff was not entitled to relief because the "lease agreement" was actually a usurious loan and security agreement. Defendants also moved for summary disposition pursuant to MCR 2.116(C)(8). The trial court granted plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(9) and (10) but denied defendants' motion.

Defendants first argue that the trial court erred in granting plaintiff's motion under MCR 2.116(C)(9) and (10) when plaintiff filed its motion for summary disposition pursuant to MCR 2.116(C)(7). Defendants believe that plaintiff mislabeled its motion for summary disposition and that the court was therefore precluded from granting summary disposition on different grounds. However, plaintiff brought its motion for summary disposition pursuant to MCR 2.116(C)(7), (9) and (10), and, therefore, defendants' claim that the trial court was precluded from granting summary disposition pursuant to MCR 2.116(C)(9) and (10) on this basis, is without merit.

Defendants also argue that the trial court erred in granting plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10) because the agreement was for the purchase of the display board and was a usurious loan; it was not a lease. Defendants additionally aver that the trial court improperly concluded that they failed to state a valid defense to plaintiff's claim pursuant to MCR 2.116(C)(9), because they were not limited to asserting the defenses under Article 2A of the Uniform Commercial Code.

This Court reviews the trial court's ruling regarding summary disposition de novo. A motion for summary disposition pursuant to MCR 2.116(C)(10) is reviewed to determine whether the pleadings or the uncontroverted documentary evidence establish that defendant is entitled to judgment as a matter of law. *Stamps v City of Taylor,* 218 Mich App 626, 636; 554 NW2d 603 (1996). A motion brought under MCR 2.116(C)(9) seeks a determination whether the opposing party has failed to state a valid defense to the claim asserted against it. *Nicita v Detroit (After Remand)*, 216 Mich App 746, 750; 550 NW2d 269 (1996). Only the pleadings may be considered when the motion is brought under MCR 2.116(C)(9). *Id.* The well-pleaded allegations are accepted as true, and the test is whether the defendant's defenses are so clearly untenable as a matter of law that no factual development could possibly deny a plaintiff's right to recovery. *Id.*

We first address defendants' argument that the agreement regarding the display board was actually a purchase agreement that involved a usurious loan and security agreement. Usury is, generally speaking, the receiving, securing, or taking of a greater sum or value for the loan or forbearance of money, goods, or things in action than is allowed by law. *People v Lee*, 447 Mich 552, 556; 526 NW2d 882 (1994). Usury is available as a defense only if the instant transaction is subject to the usury statute. *Paul v US Mutual Financial Corp*, 150 Mich App 773, 784; 389 NW2d 487 (1986).

MCL 438.32; MSA 19.15(2) states:

> Any seller or lender or his assigns who enters into any contract or agreement which does not comply with the provisions of this act or charges interest in excess of that allowed by this act is barred from the recovery of any interest, any official fees, delinquency or collection charge, attorney fees or court costs and the borrower or buyer shall be entitled to recover his attorney fees and court costs from the seller, lender or assigns.

Furthermore, at the time the parties entered into the transaction for the display board, MCL 438.61; MSA 19.15(71) read in relevant part:

> (1) As used in this act 'business entity' means: (a) A corporation, trust, estate, partnership, cooperative, or association.
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> (3) Notwithstanding the provisions of [MCL 438.31; MSA 19.15(1)], it is lawful in connection with an extension of credit to a business entity by any person other

> than a state or nationally chartered bank, insurance carrier, or finance subsidiary of a manufacturing corporation for the parties to agree in writing to any rate of interest not exceeding 15% per year.[1]

Thus, it is unlawful to charge a business entity more than 15% interest rate "in connection with an extension of credit." This Court has held that usury laws are applicable to a transaction that is a loan, but not to a sale. See *Boyd v Layher*, 170 Mich App 93, 96-97; 427 NW2d 593 (1988). Defendants assert that usury laws apply to a loan and security agreement. Because a security interest often accompanies a loan agreement and defendants are claiming that the agreement entered into with plaintiff was for a loan and security interest, we believe that the combination of both are subject to the usury laws.

The court must look beyond form to characterize the real nature of the transaction in order to determine whether the transaction falls within the usury statute. *Boyd, supra* at 97; *Paul, supra* at 780. The determination of whether a lease is actually intended as a security agreement is governed by MCL 440.1201(37); MSA 19.1201(37), which provides in pertinent part:

> (37) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (section 2401) is limited in effect to a reservation of a "security interest". . . . Whether a transaction creates a lease or security interest is determined by the facts of each case; however, a transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and any of the following:
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> (a) The original term of the lease is equal to or greater than the remaining economic life of the goods.
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> (b) The lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods.
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> (c) The lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.
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> (d) The lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.
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> A transaction does not create a security interest merely because it provides any of the following:

(a) The present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into.

(b) The lessee assumes risk of loss of the goods, or agrees to pay taxes, insurance, filing, recording, or registration fees, or service or maintenance costs with respect to the goods.

(c) The lessee has an option to renew the lease or to become the owner of the goods.

(d) The lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed.

(e) The lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.

The lease agreement between plaintiff and defendants states in relevant part:

4. NON-CANCELLABLE LEASE: This lease cannot be canceled by you.

* * *

7. OWNERSHIP AND QUITE ENJOYMENT: We are the owner of the equipment and have title to the equipment.

* * *

12. DEFAULT AND REMEDIES: If you do not pay rent when due or if you break any of your promises under this lease, . . . you will be in default. . . . We can also use any of the remedies available to us under the Uniform Commercial Code or any other law. . . . Although you agree we are not obligated to do so, if we decide to sell equipment, and we are able to sell the equipment for a price that exceeds the sum of (a) our cost of repossession and sale of the equipment and (b) the residual value of the equipment, present valued as calculated above, then we shall give you a credit for the amount of such excess.

* * *

14. REDELIVERY OF EQUIPMENT: In the event you do not decide to purchase the equipment according to the terms of any Purchase Option Letter that we have issued to you, then when this lease expires, or is terminated earlier, you shall disconnect, properly package for transportation, and return the equipment, freight paid,

> to us, in good repair, condition and working order, normal wear and tear expected, to a location designated by us. If upon expiration or termination, you do not immediately return the equipment to us, at our option (a) we will arrange for removal of the equipment and you agree to pay us an amount equal to two (2) payments, or (b) the equipment will continue to be held and leased by you for successive one-year periods at the same rental in this lease subject to the right of either party to terminate the lease upon twelve (12) months written notice, in which case you will immediately deliver the equipment to us as stated in this paragraph. Provided you have fulfilled all of your obligations to us under this lease, we will either refund your security deposit without interest to you or at your direction apply it towards the purchase of the equipment.
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> 18. UCC-ARTICLE 2A PROVISIONS: You agree that this lease is a "Finance Lease" under Article 2A of the Uniform Commercial Code, that is, you acknowledge that : (a) we did not select, manufacture or supply the equipment, but we did purchase the equipment for lease to you; and (b) we have given you the name of the supplier of the equipment you are leasing from us. The supplier is set forth in this lease or on the attached schedule. We hereby notify you that you may have rights under the supply contracts and that you may contact the supplier for a description of those rights or any warranties. [Lease Agreement; Appendix C.]

The lease states that it cannot be canceled. Thus, the consideration defendants were required to pay plaintiff was an obligation for the term of the lease that was not subject to termination by defendants. Consequently, pursuant to MCL 440.1201(37); MSA 12.1201(37), the transaction would be a security interest, instead of a lease, if any of the following four factors are present: (a) the original term of the lease is equal to or greater than the remaining economic life of the goods, (b) the lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods, (c) the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement, (d) the lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement. However, we cannot determine whether any of these factors are present in this case. Defendants do not assert that factors a, b or c are present, but claim that language allowing them to purchase the equipment at the end of the lease, indicates that the lease is actually a sale. Although the lease, under paragraph 14, appears to give defendants the option to purchase the equipment, it does not indicate the amount they must pay to do this. Hence, we cannot determine whether the lease provides an option to purchase for no additional or nominal consideration.

Defendants also claim that the language in the lease agreement requiring them to pay taxes and insurance on the equipment, as well as the language allowing plaintiff to give them credit for profit earned from the sale of the equipment in the event of a default, makes it a security agreement. However, defendants do not explain how those provisions make the transaction a sale rather than a lease. MCL

440.1201(37); MSA 12.1201(37) specifically states that a lessee's assumption of risk of loss or agreement to pay taxes or insurance does not, without more, create a security interest rather than a lease. Even though there was also a document titled "purchase order," that document merely provided a list of equipment without including any costs. There was no other document purporting to make the transaction a sale. Therefore, given the lack of information regarding the amount of the option to purchase at the end of the lease, we cannot determine whether the transaction was a loan and security agreement rather than a lease.

Moreover, we note that paragraph 18 states that the lease is a "finance lease" under Article 2A of the UCC. Although we found no Michigan cases differentiating a "finance lease" from a lease, the District Court for the Northern District of Illinois stated:

> In the simplest of terms, an operating lease is the short-term rental of equipment; a tax lease is an arrangement under which the finance company-lessor remains the owner of the equipment and derives any tax benefits such as depreciation; and a finance lease is one in which at the end of the lease term the lessee has the option to purchase the equipment for a nominal amount, generally $1. For obvious reasons, the purely nominal "purchase price" renders the finance lease the functional equivalent of a conditional sale of the equipment by lessor to lessee.
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> Finance leases and secured installment notes . . . are essentially identical in substance. Both are really loans of capital from a finance company to an equipment purchaser, with the lessor/creditor advancing the purchase price by paying the equipment seller and then recapturing the price (either with interest or with its economic equivalent in yield) from the lessee/debtor over a fixed period of time, at the end of which the lessor/creditor's security interest in the collateral is released to the lessee/debtor. [*ITT Industrial Credit Co v DS America*, 674 F Supp 1330, 1336 (ND Ill, ED, 1987).]

Therefore, the fact that the lease was termed a "finance lease" makes it more plausible that it was in the nature of a loan and security agreement and subject to the laws of usury.

However, the lease also stated that it was subject to Article 2A of the UCC. Under Article 2A, MCL 440.2973; MSA 19.2A523 provides in relevant part:

> (1) If a lessee . . . fails to make a payment when due or repudiates with respect to a part or the whole, then, with respect to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (section 2A510), the lessee is in default under the lease contract and the lessor may do any of the following:
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> * * *

(e) Dispose of the goods and recover damages (section 2A527), retain the goods and recover damages (section 2A528), or, in a proper case, recover rent (section 2A529).

(f) Exercise any other rights or pursue any other remedies provided in the lease contract.

MCL 440.2804(3); MSA 19.2A104(3) provides that "failure to comply with any applicable statute has only the effect specified in the statute." Further, MCL 440.2808; MSA 19.2A108 reads:

(1) If a court, as a matter of law, finds a lease contract or any clause of a lease contract to have been unconscionable at the time it was made, the court may refuse to enforce the lease contract, or it may enforce the remainder of the lease contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

* * *

(3) Before making a finding of unconscionability under subsection (1) or (2), the court, on its own motion or that of a party, shall afford the parties a reasonable opportunity to present evidence as to the setting, purpose, and effect of the lease contract or clause thereof, or of the conduct.

(4) In an action in which the lessee claims unconscionability with respect to a consumer lease, all of the following apply:

(a) If the court finds unconscionability under subsection (1) or (2), the court shall award reasonable attorney's fees to the lessee.

(b) If the court does not find unconscionability and the lessee claiming unconscionability has brought or maintained an action he or she knew to be groundless, the court shall award reasonable attorney's fees to the party against whom the claim is made.

(c) In determining attorney's fees, the amount of the recovery on behalf of the claimant under subsections (1) and (2) is not controlling.

Noting paragraph 18 of the lease, the trial court believed that MCL 440.2804(3); MSA 19.2A104(3) and MCL 440.2808; MSA 19.2A108 were the only two provisions under which defendants could claim a defense to plaintiff's complaint. Because it did not believe that defendants asserted either of those defenses, it granted summary disposition pursuant to MCR 2.116(C)(9). Defendants claim that asserting that the alleged lease agreement was actually a usurious loan and security agreement was a valid defense to plaintiff's claim for recovery of the balance of the lease

payments. Moreover, by making that assertion, defendants claim that they were impliedly arguing that the agreement was unconscionable, pursuant to MCL 440.2808; MSA 19.2A108. We agree. Although plaintiff, in its motion for summary disposition, indicated that it was seeking relief under Article 2A of the Uniform Commercial Code, defendants replied, in their answer to motion for summary disposition, that the purported lease agreement was actually a usurious loan and security agreement. Defendants made a plausible argument that the lease was actually a security agreement. Therefore, we believe that the trial court improperly determined that defendants were limited to asserting the defenses contained in MCL 440.2973; MSA 19.2A523 and MCL 440.2804(3); MSA 19.2A104(3), and therefore improperly granted summary disposition pursuant to MCR 2.116(C)(9).

We next address defendants' argument that the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(10). Defendants do not contest that they failed to make payments on the lease as required by the lease agreement. However, there was insufficient information presented on the issue of whether defendants could purchase the display board at the end of the lease term for no additional or nominal consideration. Therefore, we believe there was a genuine issue of material fact whether the lease agreement was actually a loan and security agreement and consequently whether plaintiff was entitled to collect the balance of its lease payments pursuant to the agreement. Therefore, the trial court erroneously granted plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10).

Similarly, the trial court properly denied defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) because plaintiff properly stated a claim upon which relief could be granted by asserting that defendants breached their lease agreement by failing to make payments.

Reversed in part and affirmed in part. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Michael J. Kelly
/s/ Martin M. Doctoroff

[1] Although there is no specific assertion that defendants are a business entity and subject to MCL 438.61; MSA 19.15(71), defendants are clearly a business entity and they imply that MCL 438.61; MSA 19.15(71) is applicable, because they argue that the legal interest rate is 15%.