STATE OF MICHIGAN

COURT OF APPEALS

SUDICON, INC.,

Plaintiff-Appellee,

v

ALLIANCE NETWORK, INC., and TERRY S. HANS,

Defendants-Appellants.

UNPUBLISHED
February 23, 2001

No. 216231
Kent Circuit Court
LC No. 98-008681-CK

Before: Talbot, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Defendants appeal as of right from an order of the Kent Circuit Court that granted summary disposition to plaintiff pursuant to MCR 2.116(C)(10). Plaintiff had filed a claim against defendants for claim and delivery and recovery of a debt under an equipment lease agreement. We affirm.

Plaintiff leased robotics equipment to defendant Alliance Network under the terms of an equipment lease agreement. That agreement contained a provision stating that the lease was to be governed by the laws of New York. The same provision provided that defendant Alliance agreed to submit to the jurisdiction of the courts of the State of New York.

I

Defendants first argue that, in light of this express provision, the trial court did not have personal jurisdiction over defendants. "The defense of lack of jurisdiction over the person or property is waived unless made in the first responsive pleading or by motion first filed." *Van Pembrook v Zero Mfg Co*, 146 Mich App 87, 95; 380 NW2d 60 (1985). Defendants did not raise the lack of personal jurisdiction in their answer; therefore, this issue is waived.

II

Defendants next argue that the trial court erred when it returned possession of the leased equipment to plaintiff and awarded plaintiff money damages representing the full value of the equipment. We disagree.

Because defendants failed to preserve this issue in the lower court proceedings, we review this issue for plain error. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999).

Under § 2-A-523 of the Uniform Commercial Code as adopted in both New York and Michigan:

> (1) If a lessee wrongfully rejects or revokes acceptance of goods or 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 2-A-510), the lessee is in default under the lease contract and the lessor may do any of the following:
>
> (a) cancel the lease contract (Section 2-A-505 (1));
>
> (b) proceed respecting goods not identified to the lease contract (Section 2-A-524)
>
> (c) withhold delivery of the goods and take possession of goods previously delivered (Section 2-A-525);
>
> (d) stop delivery of the goods by any bailee (Section 2-A-526);
>
> (e) dispose of the goods and recover damages (Section 2-A-527), or retain the goods and recover damages (Section 2-A-528), or in a proper case recover rent (Section 2-A-529);
>
> (f) *exercise any other rights or pursue any other remedies provided in the lease contract*. [Emphasis added. MCL 440.2973; MSA 19.2A523, NY UCC § 2-A-523 (McKinney 2000).]

Thus, where, as here, a lessee fails to pay the rent due under an equipment lease agreement, the lessor is free to pursue remedies provided in the lease contract.

Paragraph 17 of the lease provides, in pertinent part:

> 17. **Remedies.** If an Event of Default occurs Lessor may, at its sole option, at any time: . . . b) declare immediately due and payable and recover as liquidated damages for the loss of a bargain and not as a penalty, an amount equal to all accrued and unpaid Lease Payments, all remaining Lease Payments in this Lease Term, the Final Purchase Option Price, late charges and interest, and any other amounts payable hereunder . . . e) require Lessee to deliver the Equipment at Lessee's expense to a location designated by Lessor . . . All remedies of Lessor hereunder are cumulative, are in addition to any other remedies provided for by law, and may, to the extent permitted by law, be exercised concurrently or separately. The exercise of any one remedy will not be deemed to be an election of such remedy or to preclude the exercise of any other remedy.

Both New York law and Michigan law interpret unambiguous contract terms as written according them their plain meaning. *Tigue v Commercial Life Ins Co*, 219 AD2d 820, 821; 631 NYS2d 974; *Bomarko, Inc v Rapistan Corp*, 207 Mich App 649, 671; 525 NW2d 518 (1994). Thus, we accord the terms of this lease agreement their plain meaning. The plain meaning of paragraph 17 indicates that plaintiff could replevy the property and seek money damages equal to the full value of the property in the event of default. Thus, because both parties agreed to these cumulative remedies in paragraph 17 of the lease agreement, we hold that the trial court did not commit plain error when it awarded plaintiff the full value of the leased property as well as its possession.

Affirmed.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Jane E. Markey