STATE OF MICHIGAN

COURT OF APPEALS

ELMA, INC.,

Plaintiff-Appellee,

v

WOLVERINE AUTO SUPPLY, INC. f/k/a TOP VALUE EXHAUST SYSTEMS, INC., and WILLIAM HARTSOCK, JR.,

Defendants-Appellants.

UNPUBLISHED
December 28, 2001

No. 225706
Wayne Circuit Court
LC No. 99-904129-CK

Before: Saad, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendants Wolverine Auto Supply, Inc., f/k/a Top Value Exhaust Systems, Inc. and William Hartsock, Jr.[1] appeal as of right from the February 11, 2000, order of the trial court granting plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(9) and (10), and entering judgment against defendant in the amount of $102,333.12. We affirm.

This appeal arises from defendant's default from the parties' October 1, 1996, security agreement. In October 1996 defendant purchased plaintiff's muffler business for a total purchase price of $125,000. Defendant paid plaintiff $31,250 at closing, and executed a promissory note agreeing to pay the balance in monthly installments. Plaintiff and defendant also entered into an agreement granting plaintiff a security interest in defendant's collateral as security for payment of the note. The security agreement specifically defined defendant's collateral as all of defendant's accounts, chattel paper, goods (including consumer goods and equipment), and inventory located at its business on Greenfield Road in Southfield, Michigan. According to the security agreement, defendant agreed to maintain the collateral at the business location on Greenfield Road, and also promised to not "lease or dispose of the collateral without the prior written consent of [plaintiff]." The agreement further provided that defendant would be held in default if it failed to pay when due any amount payable on the loan.

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[1] According to the record, William Hartsock, Jr. is president of Wolverine Auto Supply, Inc. For the purposes of clarity in our analysis of the issues, we will use the singular term "defendant" when referring to both Wolverine Auto Supply, Inc. and Hartsock.

Defendant initially honored the terms of the purchase and security agreements and the promissory note. However, plaintiff subsequently instituted the present action in Wayne Circuit Court on February 11, 1999, after defendant missed several monthly payments, alleging that defendant breached the terms of the security agreement by transferring the collateral to a third party, International Top Value Automotive, L.L.C. (hereinafter Top Value) without plaintiff's consent, and failing to pay the monthly installments as required by the promissory note.[2] It appears from the record that in October 1997 defendant sold the collateral in which plaintiff had a security interest to Top Value, along with other property and business assets for a total purchase price of $1 million, and sublet the leased premises owned by plaintiff to Top Value. In the lower court, defendant initially argued that this did not constitute a default under the terms of the security agreement because it merely assigned its rights under the agreement to Top Value. However, on appeal defendant does not dispute that it defaulted from the agreement. Rather, it solely challenges the amount of damages it is required to pay.

Top Value vacated the premises on Greenfield Road and plaintiff regained possession of the premises sometime during the autumn of 1998. As relevant to the instant appeal, plaintiff sold the Greenfield Road property to Ernest and Paula Fischer on March 17, 1999, by way of a land contract for $275,000. Notably, in a bill of sale also dated March 17, 1999, plaintiff sold the Fischers numerous items located on the business premises for $1. These items form the basis of the present appeal.

On appeal, defendant argues that the trial court erred in granting summary disposition on the issue of plaintiff's damages arising from defendant's breach of the security agreement. Specifically, defendant contends that it is entitled to a setoff in the amount of $45,000 because plaintiff sold collateral originally valued at $45,000 for $1 to the Fischers. Defendant also maintains that plaintiff failed to properly mitigate its damages.

This Court reviews de novo a trial court's grant of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999), our Supreme Court set forth the applicable standard of review for motions brought pursuant to MCR 2.116(C)(10).[3]

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[2] Plaintiff also filed a motion on February 11, 1999, to regain possession of the collateral pending final judgment. Attached to this motion was a copy of the financing statement filed with the Secretary of State reflecting plaintiff's security interest in the collateral. Specifically, a sheet attached to the financing statement indicated that plaintiff retained a security interest in "[a]ll property of [d]ebtor (including proceeds and products thereof)" located at the business location on Greenfield Road in Southfield.

[3] Although the trial court's February 11, 2000, order reflected that it was granting summary disposition pursuant to MCR 2.116(C)(9) and (10), because the trial court considered materials outside of the pleadings in granting summary disposition, we will review the motion as having been granted pursuant to MCR 2.116(C)(10). See MCR 2.116(G)(5) (only the pleadings may be considered when motion is brought pursuant to MCR 2.116(C)(9)). Likewise, because the trial

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> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Id.*]

As an initial matter, defendant correctly notes that at common law an aggrieved party is required to take reasonable steps to mitigate damages. *M & V Barocas v THC, Inc*, 216 Mich App 447, 449; 549 NW2d 86 (1996). As Justice Brickley, writing for the majority of the Court, opined in *Morris v Clawson Tank Co*, 459 Mich 256, 263; 587 NW2d 253 (1998), "[m]itigation of damages is a legal doctrine that seeks to minimize the economic harm arising from wrongdoing."

> "Where one person has committed a tort, breach of contract or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damage which could thus have been avoided." [*Id.* at 263-264, quoting *Shiffer v Gibraltar School Dist Bd of Ed*, 393 Mich 190, 197; 224 NW2d 255 (1974), in turn quoting McCormick, Damages, § 33, p 127.]

While at common law a plaintiff has a duty to mitigate his loss, "it is the defendant who bears the burden of proving a failure to mitigate." *Lawrence v Will Darrah & Associates, Inc*, 445 Mich 1, 15; 516 NW2d 43 (1994).

However, although a security agreement is clearly implicated in the present case, in its briefs on appeal defendant has failed to directly reference the applicability of Article 9 of Michigan's Uniform Commercial Code (UCC), MCL 440.1101 *et seq*.[4] Article 9 of the UCC applies to "any transaction . . . which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper or accounts." MCL 440.9102(1)(a). Relevant to the instant appeal are the provisions in Article 9 relating to default. Specifically, MCL 440.9501(1) provides in pertinent part:

> When a debtor is in default under a security agreement, 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. He may reduce his claim

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court granted damages in the context of ruling on the (C)(10) motion, this Court may review defendant's argument with regard to damages to discern whether factual disputes existed to warrant trial. *First Public Corp v Parfet*, 246 Mich App 182, 192; 631 NW2d 785 (2001).

[4] Throughout this opinion we will refer to the pertinent provisions of Article 9 in effect at the time plaintiff filed the complaint in February 1999. However, the Legislature has repealed and amended the provisions of Article 9, effective July 1, 2001. See 2000 PA 348.

to judgment, foreclose, or otherwise enforce the security interest by any available judicial procedure.

Further, MCL 440.9503 provides in pertinent part:

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without a breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties.

Article 9 also provides that once a secured party retakes possession of the collateral, it may sell, lease or otherwise dispose of the collateral. MCL 440.9504(1). In the instant case, plaintiff retook possession of the collateral and sold it to Ernest and Paula Fischer after Top Value vacated the premises. The UCC further provides that once collateral is sold, the proceeds must be applied to satisfy the indebtedness "secured by the security interest under which the disposition is made . . . ." MCL 440.9504(1)(b). Likewise, 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." MCL 440.9504(2); *Roan v Murray*, 219 Mich App 562, 568; 556 NW2d 893 (1996); *Emmons v Easter*, 62 Mich App 226, 239; 233 NW2d 239 (1975). Pursuant to MCL 440.9504(3), the sale or disposition of collateral must be "commercially reasonable." *Michigan National Bank v Marston*, 29 Mich App 99, 108; 185 NW2d 47 (1970). Additionally, unless the collateral is "perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market" the debtor is entitled to reasonable notice of a private sale. MCL 440.9504(3).[5]

This Court has ruled that where the secured party's disposition or sale of the collateral was commercially unreasonable, any resultant damages inuring to the debtor may be set off against the amounts owed by the debtor to the secured party under the terms of the security agreement. *Jones v Morgan*, 58 Mich App 455, 460; 228 NW2d 419 (1975); see also *Citizens National Bank of Cheyboygan v Mayes*, 133 Mich App 808, 811; 350 NW2d 809 (1984). "Setoff is a legal or equitable remedy that may occur when two entities that owe money to each other apply their mutual debts against each other." *Walker v Farmers Ins Exchange*, 226 Mich App 75, 79; 572 NW2d 17 (1997). In general, absent a statutory provision expressly authorizing a setoff, setoff is a matter reserved to equity. *Id.* Likewise, Article 9 provides that where the secured party does not comply with the provisions of the UCC relating to disposition of collateral, a debtor has the right to recover losses incurred as a result of the secured party's conduct. MCL 440.9507(1).

In the instant case, although defendant challenges plaintiff's decision to sell the collateral at issue to the Fischers for $1 as part of the land contract transaction, defendant does not assert

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[5] In *Darrah, supra* at 15 n 18, our Supreme Court recognized that under the UCC, a plaintiff also has the duty to mitigate damages.

that the sale was not commercially reasonable as required by the provisions of the UCC. Further, although defendant asserts that it only became aware of the sale after its attorney drove by the location on Greenfield Road following the sale, it does not challenge plaintiff's failure to notify it of the sale pursuant to MCL 440.9504(3). Rather, defendant repeatedly accuses plaintiff of attempting to "doubledip," and maintains that it is entitled to setoff.

However, although defendant steadfastly maintains that it is entitled to setoff, the terms of the security agreement expressly provide that by signing the agreement defendant has waived this claim. "Except as otherwise provided by [the UCC] a security agreement is effective according to its terms between the parties." MCL 440.9201; *Gorham v Denham*, 77 Mich App 264, 269; 258 NW2d 196 (1977). This Court has previously recognized that where an agreement contains appropriate language, any right to setoff may possibly be waived.[6] See, e.g., *Hansman v Imlay City State Bank*, 121 Mich App 424, 429; 328 NW2d 653 (1982). In the present case, in defining the term "Note," the security agreement clearly provides:

> The Promissory Note executed (or to be executed) in connection with the Loan by Secured Party to Debtor in the principal amount of Ninety-Three Thousand Seven Hundred Fifty Dollars ($93,750) which debtor acknowledges and confirms is unconditionally owing to Secured Party *without any setoff, counterclaim, or deduction of any kind (all of which Debtor agrees not to assert and all of which are waived by Debtor)*. [Emphasis supplied.]

In any event, were we to conclude that defendant did not waive its right to setoff, we agree with the trial court that summary disposition was appropriate, though for different reasons.[7] After reviewing the record in the light most favorable to defendant, we are not persuaded by defendant's claims that there are factual disputes sufficient to warrant trial or an evidentiary hearing regarding damages. Significantly, defendant has failed to proffer any evidence concerning the value of the collateral to substantiate its contention that plaintiff incurred a "windfall" when it sold these assets to the Fischers.

The only record evidence regarding the specific condition of the assets is the deposition testimony of Ernest Fischer. In his October 12, 1999, deposition, Fischer testified that he purchased the actual property on Greenfield Road, and the fixtures attached to the building, including light fixtures, a furnace, a compressor and some hoists. In response to defendant's attorney's queries, Fischer testified that there was a broken cash register present on the premises, but that there was not any computer equipment in the building. Although there was some inventory in the building when Fischer took possession, he indicated that it "ended up in the dumpster." Fischer clearly indicated that he purchased only the building itself from Eleanor

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[6] In contrast, Article 9 clearly provides that certain rights and obligations imposed by the UCC may not be waived, such as the duty of the secured party to account to the debtor for any surplus arising from the disposition of collateral. MCL 440.9501(3).

[7] This Court may properly affirm the decision of the trial court where it reached the correct result, albeit for a different reason. *Washburn v Michailoff*, 240 Mich App 669, 678 n 6; 613 NW2d 405 (2000).

Mahler,[8] and that he did not buy the business an as ongoing concern. According to Fischer, although there were some old chairs and desks in the building when he took possession, they were not usable, and ended up in the dumpster.

Moreover, in its September 9, 1999, answers to defendant's interrogatories, plaintiff indicated the following:

> [W]hen Elma, Inc. took possession of 30799 Greenfield, Southfield, Michigan, there was no business left to sell. Specifically but not limited to there was no inventory, no sign, no equipment, no tools, there was virtually none of the equipment, inventory or other items sold to Defendant Wolverine [and held as collateral].

Summary disposition was appropriate because defendant failed to offer sufficient evidence to prove that plaintiff sold the collateral at its original value which may have entitled defendant to setoff. The only evidence defendant has proffered is the March 17, 1999, bill of sale listing several assets that the Fischers purchased for $1. However, other than Ernest Fischer's deposition testimony, there is no evidence in the record concerning the condition or value of these assets at the time they were sold to the Fischers. Likewise, other than mere assertions, defendant has failed to meet its burden of establishing that plaintiff did not take reasonable steps to mitigate its damages.

In its second and related issue on appeal, defendant contends that summary disposition was prematurely granted because discovery on the issue of the value of the collateral was incomplete. Specifically, defendant argues that with further discovery it could have presented the testimony of witnesses regarding the condition and value of the collateral after Top Value left the premises. However, as our Supreme Court has recently recognized, the mere promise to provide evidence with the potential to create a factual dispute is insufficient to withstand summary disposition under MCR 2.116(C)(10). *Maiden, supra* at 121. Rather, "the reviewing court should evaluate a motion under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion." *Id.* The record is devoid of substantively admissible evidence supporting defendant's claim that plaintiff sold the collateral for its full value and incurred a windfall.

Likewise, we reject defendant's assertion that summary disposition was granted prematurely. "A trial court's decision to grant or deny discovery is reviewed by the Court of Appeals for an abuse of discretion." *Koster v June's Trucking, Inc*, 244 Mich App 162, 166; 625 NW2d 82 (2000); see also *Lantz v Southfield City Clerk*, 245 Mich App 621, 629; 628 NW2d 583 (2001). After a review of the record as a whole, we are not persuaded that the trial court abused its discretion in granting summary disposition when it did. After the first summary disposition hearing in December 1999, the trial court granted defendant's motion to compel production of documents relating to the March 1999 sale, and further agreed to delay entering judgment against defendant to allow it the opportunity to review these documents. Two months later, in February 2000, the trial court ultimately granted summary disposition with regard to

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[8] Mahler is the president of Elma, Inc.

damages. At this time, defendant had failed to proffer substantively admissible evidence relating to the value of the collateral. Because the trial court took great pains to accommodate defendant, and defendant failed to take advantage of extended opportunities to pursue discovery, we are satisfied that the trial court properly granted summary disposition.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Peter D. O'Connell