STATE OF MICHIGAN

COURT OF APPEALS

CAPITOL NATIONAL BANK, Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED July 15, 2008
v	No. 275926 Court of Claims
DEPARTMENT OF TREASURY, Defendant/Counter-Plaintiff-Appellant.	LC No. 05-000129-MZ

CAPITOL NATIONAL BANK, Plaintiff/Counter-Defendant-Appellant,	
v	No. 275935 Court of Claims
DEPARTMENT OF TREASURY, Defendant/Counter-Plaintiff-Appellee.	LC No. 05-000129-MZ

Before: Sawyer, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

This case arises from a dispute over defendant's sale of assets belonging to plaintiff's debtor, Rivard-Matheson Interiors, Inc. (Rivard, Inc.), pursuant to a state tax lien. Following a bench trial, the Court of Claims entered a judgment of no cause of action against plaintiff on its claim that defendant failed to conduct the auction sale in a commercially reasonable manner. Earlier, the trial court dismissed defendant's counterclaim in which it sought a refund of the sale proceeds of approximately $55,000 that defendant had previously given to plaintiff. Plaintiff now appeals as of right in Docket No. 275935, and defendant appeals the dismissal of its counterclaim as of right in Docket No. 275926. We affirm the judgment of no cause of action with respect to plaintiff's claim, but reverse the order dismissing defendant's counterclaim and remand for further proceedings.

I. Background

In 1999, plaintiff, a banking corporation, filed a financing statement under Article 9 of the Uniform Commercial Code (UCC), MCL 440.9101 *et seq.,* to secure a loan to Rivard, Inc. The statement covered accounts, equipment, inventory, and other listed items. In 2000, a second loan was allegedly secured by the financing statement. In September 2003, defendant filed a notice of state tax lien against Rivard, Inc. In January 2005, defendant sold Rivard, Inc.,'s assets at auction to satisfy the tax lien.

In July 2005, plaintiff filed this action for conversion, alleging that defendant sold the assets below cost and failed to act in a commercially reasonable manner. Plaintiff sought an accounting and claimed entitlement to all auction proceeds, as well as damages based on the fair market value of the assets. After giving plaintiff the auction proceeds of $55,000, defendant filed a counterclaim for a refund of the auction proceeds on the ground that it now believed that it was not lawfully required to give the auction proceeds to plaintiff.

Both parties moved for summary disposition of defendant's counterclaim under MCR 2.116(C)(10). Plaintiff relied on MCL 440.9615(7), which governs the rights of a secured party who receives cash proceeds from a disposition of collateral, and, alternatively, argued that defendant either should be equitably estopped from obtaining a refund or waived its right to the auction proceeds by voluntarily conveying the proceeds to it. Plaintiff conceded that it had knowledge of the auction and that its loan officer attended the auction. Defendant argued in its motion that it was entitled to the auction proceeds pursuant to MCL 440.9610 and MCL 440.9615.

At a hearing on the motions, the trial court questioned defendant's attorney about whether defendant gave plaintiff formal notice of the auction, and defense counsel conceded that formal notice was not provided. The trial court thereafter dismissed defendant's counterclaim

> for a number of reasons, primarily because it does not appear to me that the junior lienholder in this case followed the procedure. Apparently it is the state's position that when some, through some mystery procedure the senior lienholder ferrets out that the junior lienholder is doing something, that then the obligation shifts to the senior lienholder to follow all of this and demand this and that. It is the junior lienholder's obligation to notify the appropriate parties of the proceedings and to make appropriate arrangements.

The case proceeded to trial on plaintiff's principal complaint, with the sole issue pursued by plaintiff at trial being whether the auction was conducted in a commercially reasonable manner under Article 9 of the UCC and, if not, the amount of damages to which it was entitled. The trial court determined that plaintiff failed to show that the auction sale was not conducted in a commercially reasonable manner and rendered a verdict of no cause of action in favor of defendant.

II. Standard of Review

In general, we review questions of law de novo. *Cowles v Bank West*, 476 Mich 1, 13; 719 NW2d 94 (2006). A trial court's decision on a motion for summary disposition is also reviewed de novo. *Id.* at 13.

> A motion made under MCR 2.116(C)(10) tests the factual support for a claim, *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003), and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest on mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue on which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under this rule, a court must consider in the light most favorable to the nonmoving party the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). But such materials "shall only be considered to the extent that [they] would be admissible as evidence . . . ." MCR 2.116(G)(6); see also *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002). [*Campbell v Kovich*, 273 Mich App 227, 229-230; 731 NW2d 112 (2006).]

A trial court's findings of fact at a bench trial are reviewed under the clearly erroneous standard, giving regard "to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C).

> A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed. In contrast, we review a trial court's conclusions of law de novo. Furthermore, where the trial court's factual findings may have been influenced by an incorrect view of the law, an appellate court's review of those findings is not limited to clear error. [*Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000) (citations omitted).]

III. Docket No. 275926

Defendant challenges the trial court's dismissal of its counterclaim under MCR 2.116(C)(10) on the basis of a notice issue that was not raised in the parties' motions. Defendant argues that this amounted to "procedural injustice" because it did not have a fair opportunity to prepare for or address the notice issue.

When a court reviews a motion for summary disposition, MCR 2.116(I)(1) provides that [i]f the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay." Under this rule, a trial court has authority to sua sponte grant summary disposition, so long as one of the two conditions in the rule are satisfied. *Boulton v Fenton Twp,* 272 Mich App 456, 462-463; 726 NW2d 733 (2006).

In this case, defendant's claim of procedural injustice is, in essence, a claim of a due process error. Whether a party has been afforded due process is a question of law. *Reed v Reed,* 265 Mich App 131, 157; 693 NW2d 825 (2005). Due process is a flexible concept, the essence of which requires fundamental fairness. *Id.* at 159. The basic requirements of due process in a civil case include notice of the proceeding and a meaningful opportunity to be heard. *Id.* Where a court sua sponte considers an issue, due process can be satisfied by affording a party with an opportunity for rehearing. *Paschke v Retool Industries (On Rehearing),* 198 Mich App 702, 706; 499 NW2d 453 (1993), rev'd on other grounds 445 Mich 502 (1994).

Under MCR 2.119(F), a trial court has discretion to grant rehearing or reconsideration of a decision on a motion. "The rule allows the court considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties." *Kokx v Bylenga,* 241 Mich App 655, 659; 617 NW2d 368 (2000). The trial court may even give a party a second chance on a previously denied motion. *Id.* Further, under MCR 2.604(A), a trial court may revisit an order while proceedings are still pending to reflect a more correct determination of the parties' rights and liabilities *Hill v City of Warren,* 276 Mich App 299, 307; 740 NW2d 706 (2007). Additionally, in *Boulton, supra* at 463-464, this Court determined that any error by a court in sua sponte granting summary disposition without affording a party an adequate opportunity to brief an issue and present it to the court may be harmless under MCR 2.613(A), if the party fully briefed and presented the argument in a motion for reconsideration.

In this case, while the notice issue on which the trial court relied to dismiss defendant's counterclaim was considered sua sponte by the court, the issue of notice permeated the parties' respective motions. A central argument in defendant's brief in support of its motion was that plaintiff had notice of the auction, but did nothing to attempt to stop it or take possession of the assets. Plaintiff's motion similarly addressed the issue of notice, although some of plaintiff's allegations were not factually supported. Plaintiff alleged that Rivard, Inc., notified it of defendant's actions to collect deficient taxes and that this information caused corporate counsel to send a letter to defendant. Plaintiff alleged that it learned about the auction when an employee saw an advertisement on television, which led to a second letter being sent to defendant. The content of both letters indicated that plaintiff was giving defendant notice of its interest in the assets. In the second letter, plaintiff asserted its entitlement to any funds generated by any liquidation sale conducted by defendant.

Because both parties presented arguments regarding notice, and there was evidence regarding this matter, neither party should have been surprised by the trial court's inquiry at the motion hearing regarding the adequacy of notice. Indeed, defendant's attorney never claimed at the hearing that it did not have an adequate opportunity to address the notice issue. Although he indicated that an interlocutory appeal might be considered, no appeal was ever filed.

Because defendant had the opportunity to move for rehearing or reconsideration under MCR 2.119(F), and because the instant appeal affords defendant an opportunity for full review of the trial court's decision, we conclude that defendant's claim of procedural injustice fails as a matter of law. The basic requirements of notice and a meaningful opportunity to be heard have been satisfied. *Reed, supra* at 157.

Turning to the merits of the trial court's decision, we first address defendant's argument that plaintiff should be deemed to have waived any claim of a notice deficiency under Article 9 of the UCC by failing to plead a lack of notice as an affirmative defense to its counterclaim. Although defendant failed to properly preserve this issue for appeal by presenting it to the trial court, we shall consider it because a question of law has been presented. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002).

We agree that affirmative defenses must be pleaded by a party, but do not find this dispositive of whether appellate relief is warranted because a trial court may permit an amendment to affirmative defenses pursuant to MCR 2.111(F)(1) and MCR 2.118, and we will not disturb a trial court's order unless refusal to take this action appears inconsistent with substantial justice. MCR 2.613(A). Even when a trial court bases a summary disposition order on a wrong reason, we will not reverse if the right result was reached. *Gleason v Dep't of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003). Nonetheless, while we are not persuaded that a notice deficiency under the UCC would be an affirmative defense to defendant's counterclaim, there is merit to defendant's argument that the pleadings were insufficient to properly raise the notice issue that served as the basis for the trial court's summary disposition ruling and that appellate relief is warranted.

In general, an affirmative defense has been described as a "defense that does not controvert a plaintiff's prima facie case, but that otherwise denies relief to the plaintiff." *Stanke v State Farm Mut Automobile Ins Co*, 200 Mich App 307, 312; 503 NW2d 758 (1993). Stated otherwise, it accepts the plaintiff's allegations as true and even admits the establishment of a prima facie case, but denies a right to recovery based on some reason not disclosed in the plaintiff's pleading. *Id*. Therefore, in order to evaluate whether notice would be an affirmative defense, we must first consider the elements of defendant's prima facie case.

In this case, defendant has not adequately briefed the elements of its prima facie case. Although defendant relies on two provisions in Article 9 of the UCC, MCL 440.9610 and MCL 440.9615, the essence of its counterclaim was that its voluntary action in giving the auction proceeds to plaintiff was based on a mistake of law. Defendant's counterclaim alleges that "despite Treasury having paid over the auction proceedings, the Plaintiff, Counter-Defendant had no right to the proceeds of the auction and said proceeds should not have been paid over to the Plaintiff, Counter-Defendant." Treating defendant's reliance on the UCC as an effort to allege a statutory cause of action, we are guided by the following rules of statutory construction:

> The fundamental rule and primary goal of statutory construction is to effectuate the Legislature's intent. To accomplish this task, we start by reviewing the text of the statute, and, if it is unambiguous, we will enforce the statute as written because the Legislature is presumed to have intended the meaning expressed. Whenever possible, every word of a statute should be given meaning.

> And no word should be treated as surplusage or made nugatory. [*Apsey v Mem Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007) (citations omitted).]

The UCC is liberally construed and applied to promote its purposes and policies. MCL 440.1102; *Shurlow v Bonthuis*, 456 Mich 730, 737; 576 NW2d 159 (1998). Where the UCC's provisions are ambiguous, comments of the National Conference of Commissioners and American Law Institute, which accompany the statutory provisions, may be considered to determine legislative intent. *Gladych v New Family Homes, Inc*, 468 Mich 594, 601 n 4; 664 NW2d 705 (2003). A statute is ambiguous if its provisions irreconcilably conflict or are equally susceptible to more than one meaning. *Fluor Enterprises v Dep't of Treasury*, 477 Mich 170, 177-178 n 3; 730 NW2d 722 (2007).

Here, defendant has not established that the UCC provides it with a cause of action for a refund, let alone a refund based on a mistake of law. Indeed, while not raised by the parties, we question whether defendant is a secured party at all for purposes of Article 9, so as to be subject to the rights and duties in MCL 440.9610 and MCL 440.9615. The scope of Article 9 is not unlimited. MCL 440.9102(1)(sss) defines a "secured party" as one or more of the following:

> (i) A person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding.
>
> (ii) A person that holds an agricultural lien.
>
> (iii) A consignor.
>
> (iv) A person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold.
>
> (v) A trustee, indenture trustee, agent, collateral agent, or other representative in whose favor a security interest or agricultural lien is created or provided for.
>
> (vi) A person that holds a security interest arising under section 2401, 2505, 2711(3), 2A508(5), 4210, or 5118.

Further, MCL 440.9109 provides:

> (1) Except as otherwise provided in subsections (3) and (4), this article applies to all of the following:
>
> (a) A transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract.
>
> (b) An agricultural lien.
>
> (c) A sale of accounts, chattel paper, payment intangibles, or promissory notes.

(d) A consignment.

(e) A security interest arising under section 2401, 2505, 2711(3), or 2A508(5), as provided in section 9110.

(f) A security interest arising under section 4210 or 5118.

(2) The application of this article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this article does not apply.

(3) This article does not apply to the extent that 1 or more of the following apply:

* * *

(b) Another statute of this state expressly governs the creation, perfection, priority, or enforcement of a security interest created by this state or a governmental unit of this state.

In considering a former version of this statute,[1] our Supreme Court found that the purpose of Article 9 was to bring consensual security interests in personal property and fixtures within the scope of its coverage. *Shurlow*, *supra* at 737-738. A state tax lien is not consensual in nature. Defendant is authorized under MCL 205.25 to pursue assets of delinquent taxpayers. See *Dep't of Treasury v Comerica Bank*, 201 Mich App 318, 323; 506 NW2d 283 (1993). Defendant's priority rights and tax lien are governed by MCL 205.29.

But assuming for purposes of review that defendant is a secured party whose tax lien is subject to Article 9, neither MCL 440.9610 nor MCL 440.9615 provides a cause of action for a refund. MCL 440.9610(1) authorizes a secured party to dispose of collateral. MCL 440.9615 contains priority rules for applying cash proceeds from a disposition, as well as liability for certain deficiencies or surplusages related to a disposition, which are not at issue in this appeal. Other statutory provisions address who is entitled to notice, the timeliness of notice, and the content of any notice provided. The general remedy for a secured party's failure to proceed in accordance with the article is contained in MCL 440.9625, which provides in part:

(1) If it is established that a secured party is not proceeding in accordance with this article, a court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions.

(2) Subject to subsections (3), (4), and (6), a person is liable for damages in the amount of any loss caused by a failure to comply with this article. Loss

[1] Article 9 of the UCC was substantially amended by 2000 PA 348, effective July 1, 2001. *In re Moukalled Estate*, 269 Mich App 708, 714; 714 NW2d 400 (2006).

caused by a failure to comply may include loss resulting from the debtor's inability to obtain, or increased costs of, alternative financing.

(3) Except as otherwise provided in section 9628, both of the following apply:

(a) A person that, at the time of the failure, was a debtor, was an obligor, or held a security interest in or other lien on the collateral may recover damages under subsection (2) for its loss.

Unless displaced by a particular provision, the provisions of the UCC are also supplemented by principles of law and equity, as provided in MCL 440.1103. But because defendant does not identify any basis for its counterclaim other than the UCC, we shall limit our review to the UCC. Regardless of whether defendant has a cognizable claim under some provision of the UCC, we conclude that it has not substantiated its position that a notice deficiency should be treated as an affirmative defense. To the extent that the trial court's concern was whether defendant provided proper notice to plaintiff, we hold, based on the general remedy prescribed in MCL 440.9625, that the notice issue is more accurately characterized as either a claim that plaintiff should have pleaded in its own complaint, or as a counterclaim to defendant's claim for a refund of the $55,000.

But this distinction is of no moment to defendant's specific argument that plaintiff should have pleaded a notice deficiency because a trial court can treat a counterclaim designated as a defense, or a defense designated as a counterclaim, "as if the designation had been proper and issue an appropriate order." MCR 2.110(C)(3). Even a counterclaim in an answer, but not designated as such, can be treated as if it were properly pleaded, with the party ordered to amend the pleading. MCR 2.110(C)(2). And when parties move for summary disposition under MCR 2.116(C)(10), as in this case, "the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." MCR 2.116(I)(5).

Ultimately, the purpose of pleadings is to give a party notice of the nature of a claim or defense sufficient for the opposing party to take a responsive position. *Stanke*, *supra* at 317. In this case, plaintiff's complaint, answer to the counterclaim, and affirmative defenses do not satisfy this standard with respect to any claim of deficient statutory notice, and plaintiff's pleadings were insufficient to raise the notice issue that served as the basis for the trial court's summary disposition decision.

Although we do not fully agree with defendant's argument on appeal, we find merit to its position that the trial court failed to adequately consider the effect of plaintiff's actual notice of the auction sale on its entitlement to the sale proceeds. The trial court's dismissal of defendant's counterclaim, in effect, dispensed with any need for plaintiff to show a loss caused by a statutory notice deficiency. The trial court contravened MCR 2.116(I)(1) because the proofs did not show that there was no genuine issue of material fact regarding plaintiff's entitlement to the proceeds because of the unpleaded notice deficiency.

Both parties argue, however, that they were entitled to judgment on other grounds that were raised in their respective motions, but not decided by the trial court. A party should not be

penalized for a trial court's failure to rule on an issue that was properly raised in the proceedings. See *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

Even assuming that the UCC applies to a state tax lien, defendant has not shown that either MCL 440.9610 or MCL 440.9615 provides a cause of action for a refund of the $55,000 that it voluntarily paid to plaintiff. Even MCL 440.9615(7), while prescribing rights of a secured party that receives cash proceeds of a disposition, does not purport to create a cause of action for a refund. Although we find no ambiguity in these statutes that requires judicial construction, we agree with the committee comment 5 to MCL 440.9610, which recognizes that MCL 440.9615(7) protects a junior secured party from a claim by a senior concerning cash proceeds. In other words, it provides a defense when a junior secured party is sued for the cash proceeds under some type of theory. But it does not create a cause of action for a refund.

Plaintiff relies on principles of waiver and equitable estoppel as alternative grounds for affirming the trial court's decision. An appellee may urge alternative grounds for affirmance without filing a cross appeal so long as a more favorable decision is not obtained. *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994); see also *City of Riverview v Sibley Limestone*, 270 Mich App 627, 633 n 4; 716 NW2d 615 (2006) (appellee arguing alternative grounds for affirmance must present the issue to the trial court to properly preserve it for appeal).

A waiver has been defined as "the intentional relinquishment of a known right." *Bailey v Jones*, 243 Mich 159, 162; 219 NW2d 629 (1928). "[A] waiver may be shown by express declarations or by declarations that manifest the parties' intent and purpose." *Sweebe v Sweebe*, 474 Mich 151, 157; 712 NW2d 708 (2006). In some instances, a waiver may be implied by a course of conduct. *Burton v Reed City Hosp Corp*, 471 Mich 745, 760; 691 NW2d 424 (2005) (Kelly, J., dissenting). But the party must have actual or constructive knowledge of the facts that would create the right. *Id.*, citing 28 Am Jur 2d, Estoppel and Waiver, § 202; see also *Marquette Co Savings Bank v Koivisto*, 162 Mich 554, 558-559; 127 NW 680 (1910). Waiver is a factual matter to be shown by evidence. *Klas v Pearce Hardware & Furniture Co*, 202 Mich 334, 339; 168 NW 425 (1918). Equitable estoppel differs from waiver, inasmuch as it requires detrimental reliance. *Marquette Co Savings Bank, supra* at 558-559.

> Equitable estoppel arises where one party has knowingly concealed or falsely represented a material fact, while inducing another's reasonable reliance on that misapprehension, under circumstances where the relying party would suffer prejudice if the representing or concealing party were subsequently to assume a contrary position. [*Adams v Detroit*, 232 Mich App 701, 708; 591 NW2d 67 (1998).]

Although it is undisputed that defendant voluntarily gave the auction proceeds to plaintiff, plaintiff has not cited any admissible evidence regarding the circumstances of the payment or any declarations made at the time of transfer to support its claim of waiver. Further, plaintiff has failed to cite admissible evidence demonstrating that defendant should be estopped from seeking a refund of the $55,000 in auction proceeds. Under MCR 2.116(G)(6), a motion for summary disposition under MCR 2.116(C)(10) must be supported by admissible evidence. This Court will not search the record for factual support for a party's claim. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 388; 689 NW2d 145 (2004). Therefore, we find no basis for affirmance on either alternative ground. *Campbell, supra* at 229-230.

In sum, we hold that the trial court erred as a matter of law to the extent that it found that plaintiff was entitled to the $55,000 in auction proceeds solely on the basis of defendant's failure to follow statutory procedure. Because plaintiff has not demonstrated any alternative ground for affirmance and defendant has not demonstrated that it was entitled to a refund of the auction proceeds as a matter of law, we reverse the trial court's order dismissing defendant's counterclaim and remand for further proceedings regarding the counterclaim. Inasmuch as defendant has not clearly established a statutory basis for its refund action, we remand without prejudice to defendant moving to amend its counterclaim pursuant to MCR 2.116(I)(5) to state a legally cognizable cause of action in law or equity.

IV. Docket No. 275935

Plaintiff challenges the trial court's verdict of no cause of action, following a bench trial, with respect to its claim that defendant failed to conduct the auction sale of Rivard, Inc.,'s assets in a commercially reasonable fashion.[2] Plaintiff argues that defendant had the burden of proving under MCL 440.9627(1) that it acted in a commercially reasonable manner and that defendant failed to sustain its burden.

Although a party is not required to take exception to a trial court's findings or decision at a bench trial, MCR 2.517(A)(7), we conclude that plaintiff failed to preserve any claim regarding the proper burden of proof by not timely and specifically presenting this issue to the trial court. Indeed, the record indicates that the trial was conducted in a manner indicative of plaintiff having the burden of proof, with plaintiff presenting witnesses in support of its position that the auction was not conducted in a commercially reasonable manner, and defendant presenting its witnesses after its motion for involuntary dismissal for lack of sufficient proof was denied. "A party is not allowed to assign as error on appeal something which his or her own counsel deemed proper at trial since to do so would permit the party to harbor error as an appellate parachute." *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989). "Error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence." *Phinney v Verbrugge*, 222 Mich App 513, 537; 564 NW2d 532 (1997).

But even if we were to consider this legal issue, we would reject it on the merits. Even assuming that defendant was a secured party whose state tax lien is subject to Article 9 of the UCC, neither statute on which plaintiff relies, MCL 440.9610(2) and MCL 440.9627, provides a senior secured party with a cause of action. MCL 440.9610(2) requires that the disposition of collateral be commercially reasonable. MCL 440.9627 contains several rules applicable to the determination of commercial reasonableness.

Although one of the rules, MCL 440.9627(1), refers to the secured party's burden to establish commercial reasonableness, when construing a statute, consideration must be given to

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[2] Although plaintiff's complaint also alleged that defendant's conduct amounted to conversion, plaintiff did not pursue a conversion theory at trial, nor does it do so on appeal. Thus, any claim for conversion has been abandoned. Cf. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999); *People v Riley*, 88 Mich App 727, 731; 279 NW2d 303 (1979).

both the plain meaning of critical words and phrases and their placement in the statutory scheme. *Sweatt v Dep't of Corrections*, 468 Mich 172, 179; 661 NW2d 201 (2003). Article 9 of the UCC specifies when there is an intent that a burden be imposed on a party. This can be seen from MCL 440.9626(1), which imposes a burden on the secured party to prove compliance with statutory requirements for a disposition when a debtor or secondary obligor places compliance in issue in an action arising from a non-consumer transaction in which the amount of a deficiency or surplus is in issue.

The instant case does not involve a deficiency or surplus, and plaintiff has not identified any other statutory provision applicable to its cause of action that imposes the burden or proof on defendant to prove commercial reasonableness. Assuming that plaintiff predicates its action on the general provision for damages in MCL 440.9625(2) and, hence, would be required to prove a loss caused by defendant's failure to comply with Article 9, we find no reason why the traditional standard imposing the burden of proof on a plaintiff would not be applicable. See MCL 440.1103 (unless displaced by particular provision of the UCC, principles of law and equity supplement its provisions); *Widmayer v Leonard*, 422 Mich 280, 290; 373 NW2d 538 (1985) (although the burden of going forward with evidence at a trial can shift, the burden of persuasion generally remains with the plaintiff in a civil case).

In sum, plaintiff inappropriately relies on MCL 440.9627(1) in a vacuum to argue that defendant had the burden of proving the commercial reasonableness of the auction. Even assuming that the UCC applies to defendant's state tax lien, plaintiff has not demonstrated that defendant had the burden to prove that the auction was conducted in a commercially reasonable manner.

Examining plaintiff's challenge to the trial court's findings in this context, and assuming for purposes of our review that the UCC applies and that plaintiff was proceeding under MCL 440.9625(2), we find no basis for reversal. *Walters*, *supra* at 456. Under MCL 440.9625(2), plaintiff was required to prove a loss caused by defendant's violation of the commercial reasonableness requirement for dispositions of collateral. Plaintiff has not demonstrated anything about Victoria Matheson's testimony, the warrant officer's manual, or the other proofs to show that the trial court clearly erred in finding no cause of action. It was within the province of the trial court, as the trier of fact, to weigh the evidence and believe or disbelieve any testimony. *Gorelick v Dep't of State Hwys*, 127 Mich App 324, 333; 339 NW2d 635 (1983).

Next, plaintiff argues that the trial court contravened MCR 2.118(C)(2) by allowing defendant to introduce evidence regarding plaintiff's failure to stop the auction. Plaintiff asserts that defendant should have pleaded this matter as an affirmative defense to its complaint. Because a bench trial was conducted, however, the material issue is whether the trial court misused the evidence in arriving at its verdict of no cause of action. "Unlike a jury, a judge is presumed to possess an understanding of the law, which allows him to understand the difference between admissible and inadmissible evidence or statements of counsel." *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992). Plaintiff's failure to address this necessary issue precludes further review. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

In passing, evidence regarding plaintiff's own conduct was probative of the full circumstances under which the auction was conducted. We find nothing to indicate that the trial

court treated the evidence as an affirmative defense to plaintiff's claim that defendant did not conduct a commercially reasonable auction. The trial court's decision, made after rejecting plaintiff's position regarding the warrant officer's manual and finding Matheson's testimony to have little relevance, is indicative of a finding that plaintiff did not satisfy its burden of proof.

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra