STATE OF MICHIGAN

COURT OF APPEALS

GENERAL MOTORS CORPORATION,

Plaintiff-Appellant,

v

AUTOMOTIVE SERVICES, INC., and JAMES MATTISON,

Defendants-Appellees.

and

PONTIAC HISTORIC SERVICES.

Defendant.

UNPUBLISHED
August 7, 2008

No. 275702
Oakland Circuit Court
LC No. 2004-059382-PD

Before: Servitto, P.J., and Hoekstra and Markey, JJ.

HOEKSTRA, J., *(concurring in part and dissenting in part).*

I respectfully dissent from sections II. B. and III. A. of the majority opinion, but in all other respects agree with the majority opinion.

In section II. B., the majority addresses plaintiff's claim that the trial court's grant of partial involuntary dismissal was erroneous because sufficient evidence was presented to identify the materials in defendant's possession that it was seeking to have returned. Unlike the majority, I would find this claim to be without merit.

The materials that the trial court found survived the involuntary dismissal motion were items that were specifically described by witnesses and which the witnesses agreed were owned by plaintiff before the parties executed the contract in 1990. With regard to the other materials, the witnesses referred to them in general terms, such as press kits and manufacturing information. However, the witnesses admitted that the materials in the vault in 1990 were not catalogued or indexed. In addition, no witness specifically identified what materials were in the vault in 1990 and, regarding subsequently obtained materials, no witness specifically stated from where defendants acquired the materials. Under these circumstances, plaintiff failed to identify the materials it sought with sufficient specificity to enable the trial court to determine which materials were originally in the vault and which were subsequently added, either by plaintiff or

defendants, and, with respect to subsequently added materials, which were obtained directly from plaintiff.

Plaintiff asserts that two witnesses testified that they could determine when and by whom the materials were obtained if they went through the physical files. However, this testimony was insufficient to satisfy plaintiff's burden. Plaintiff was required to present affirmative evidence identifying the materials it sought, not present evidence that it might be possible to classify the materials in the future.

I also would find unavailing plaintiff's argument that the trial court improperly placed the burden on it to specifically identify the materials in the collection. Relying on *Wellock v Cowan*, 246 Mich 45; 224 NW 413 (1929), and *Kert v Endelman*, 202 Mich 289; 168 NW 423 (1918), plaintiff asserts that defendants, as the comminglers, had the burden of showing what materials they added. In both *Wellock* and *Kert*, however, the defendants recognized that the plaintiffs owned a portion of the whole lot. Here, defendants have denied any claim of ownership by plaintiff to the disputed materials.

Accordingly, in my opinion, the trial court did not err in dismissing plaintiff's claims with regard to the materials in defendants' possession that could not be identified with specificity.

In section III. A., the majority holds that the trial court clearly erred in awarding the "vault materials" to defendant. Again, I disagree.

The trial court found that the evidence established a lack of intent by plaintiff to retain ownership of the vault materials. It found that Edward Lechtzin, who had the apparent authority to award the vault materials to defendants pursuant to the parties' contract, gave them to defendants. Although plaintiff argues that the evidence did not support a finding that the materials were gifted to defendants, the trial court did not find that there was a gift. Rather, it found that the materials were given to defendants as part of the consideration for the contract.

In making its finding, the trial court focused on four pieces of evidence. It found that Lechtzin's statement, "Here are the documents you can have," as testified to by defendant James Mattison, reflected the transfer of ownership. Plaintiff argues that the trial court's interpretation of this statement is clearly erroneous, particularly in light of Lechtzin's testimony that he never intended to transfer ownership of the vault materials. However, the trial court also found Lechtzin's testimony not credible. In reviewing the trial court's findings, this Court defers to the trial court's opportunity "to judge the credibility of the witnesses who appeared before it." MCR 2.613(C); *Bracco v Michigan Technological Univ*, 231 Mich App 578, 585; 588 NW2d 467 (1998). Although Lechtzin's statement, standing alone, could be subject to varying interpretations, when considered in conjunction with the other evidence of plaintiff's intent, discussed *infra*, I conclude that the trial court's interpretation is not clearly erroneous.

The trial court also stated that Reginald Harris's testimony indicated that "protection of the documents was not the goal of the agreement, thus evidencing an intent to relinquish ownership." Plaintiff contends that the trial court's finding is clearly erroneous because Harris did not testify that protection of historical documents was not "a" goal and because he stated that he believed that the materials always belonged to plaintiff. Harris introduced Lechtzin to

Mattison and participated in the contract negotiations. Harris testified that preservation was not "the primary goal" of the contract. Although he did not testify that it was or was not "a" goal, he stated that plaintiff did not have a formal retention policy, he was aware that plaintiff had destroyed historic materials in the years just before the contract was executed, and that the vault was a "junky, cluttered[] place." Even if Harris's testimony was not particularly helpful in determining the specific question of ownership, it was probative of the circumstances surrounding the parties' agreement and those circumstances indicated that plaintiff's continued retention of the materials was not a primary objective of the agreement.

The trial court also found that the discrepancy between the parties' contract and a March 1991 memo authored by Lechtzin, along with the use of the term "supplied" in the parties' contract, was indicative of plaintiff's lack of intent to retain ownership of the materials. The parties' contract was silent on the issue of ownership, while Lechtzin's memo specifically mentioned retention of ownership in reference to a different subject matter.[1] Lechtzin explained that this was because the two documents covered different situations. Plaintiff essentially argues that because Lechtzin's explanation was reasonable, the trial court's finding was therefore clearly erroneous. Giving due regard to the trial court's finding that Lechtzin's testimony was not credible, MCR 2.613(C), I would conclude that the discrepancy is significant and that the trial court's finding was not clearly erroneous.

Plaintiff argues that the trial court's finding that the use of the term "supplied" in the contract indicates a lack of intent by plaintiff to retain ownership of the documents is clearly erroneous because the dictionary does not equate "supply" with "give." "Supply" is defined as "to furnish or provide (a person, establishment, etc.) with what is lacking or requisite." *Random House Webster's College Dictionary* (1992). "Furnish" is defined as "to supply (a house, room, etc.) with necessary appliances, esp. furniture," while "provide" is defined as "to make available; furnish" and "to supply or equip." *Id.* These definitions do not directly speak to ownership. "Give," on the other hand, is defined as "to present voluntarily and without expecting compensation; bestow." *Id.*[2] See also Black's Law Dictionary (8th ed), which defines "give" as "[t]o voluntarily transfer (property) to another without compensation."

As the term "give" is used legally, however, the materials were not given to defendants because there was consideration in the form of defendants' duties under the contract. Additionally, the contract uses the term "supply" in paragraph 4, which states that defendants will "[s]upply to the customer the following package . . . ." Paragraph 5 states that a customer will be charged a fee of $25 for the package. Thus, use of the term "supplied" in paragraph 6 to indicate a transfer of ownership for consideration is internally consistent. Moreover, paragraphs 3 and 7 provide that defendants will only have "access" to certain materials containing VIN

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[1] The March 1991 memo referred to a project involving a Pontiac-area museum for which Lechtzin suggested that "we may want to donate – *but retain ownership* should the project go belly up – some of our vehicles" (emphasis added).

[2] "Bestow" is defined as "to present as a gift; confer." *Random House Webster's College Dictionary*.

information. "Access" connotes only use, not ownership. See *Random House Webster's College Dictionary*, which defines "access" as "the ability or right to enter or use." It is reasonable to conclude that if a similar understanding was intended with respect to the materials described in paragraph 6, the term "supplied" would not have been used. Therefore, I conclude that the trial court's finding regarding the term "supplied" is not clearly erroneous.

Additionally, I would reject plaintiff's argument that defendants' own documents indicate that they conceded that plaintiff retained ownership of the materials. Although defendants referred to its responsibility to "[c]oordinate the organization of GMC archives" in a document which described defendants' services, Mattison testified that defendants never performed this task. With regard to the magazine classified advertisement that stated that Pontiac Historic Services "has access to" Pontiac materials, Mattison never identified it or testified regarding it. In fact, no witness offered any testimony regarding the advertisement. For these reasons, the trial court's finding that defendants owned the vault materials that survived the involuntary dismissal motion is not clearly erroneous.

Further, I would hold that the trial court properly dismissed plaintiff's claims regarding the materials that survived defendants' involuntary dismissal motion. Because defendants owned the materials and plaintiff had no right to possess them, plaintiff's claim and delivery claim failed. MCL 600.2920(1)(c). Plaintiff's conversion claims also failed because defendants could not convert their own property. *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992).

I would affirm.

/s/ Joel P. Hoekstra