STATE OF MICHIGAN

COURT OF APPEALS

DEARBORN CAPITAL CORPORATION,

Plaintiff-Appellee,

v

FACUNDO BRAVO,

Defendant-Appellant.

UNPUBLISHED
September 22, 2009

No. 284274
Oakland Circuit Court
LC No. 2007-082316-CK

Before: Davis, P.J., and Murphy and Fort Hood, JJ.

PER CURIAM.

In this case involving a dispute under the Uniform Commercial Code (UCC) – Secured Transactions, MCL 400.9101 *et seq.*, we conclude that defendant Facundo Bravo was entitled to an order granting him summary disposition on plaintiff's complaint, where there is no factual dispute that defendant did not receive, nor did plaintiff deliver, notice under MCL 440.9611 relative to the disposition of the collateral (segregated account funds), and where plaintiff was required to comply with the statutory notice requirement under the circumstances presented. Accordingly, we reverse the trial court's judgment and remand for entry of judgment in favor of defendant.

The collateral that had secured the loan made by plaintiff to Uni Boring, i.e., a transfer line referred to as the Lamb Technicon Cylinder Head Automation Machine (cylinder head machine), had been disassembled and was no longer being used in its original capacity by the time of the bankruptcy.[1] Some of the cylinder head machine's components had been scrapped, but other components were converted for use in different Uni Boring lines. The bankruptcy court authorized and approved the sale of Uni Boring's assets to UC Investors, Inc. (UC), free

[1] The parties do not provide documentary evidence regarding the facts prior to the bankruptcy. However, defendant asserted that plaintiff was a subsidiary of the Ford Motor Company (Ford). After the award of the contract between Ford and Uni Boring, the loan for the purchase of cylinder head machine was executed. However, Ford later cancelled the contract for the manufacture of the vehicle thereby negating the need for the use of the cylinder head machine. The briefs submit that a restructuring of the agreement occurred, however, there is no allegation regarding any steps to protect the collateral, the cylinder head machine, in its original form.

and clear of all encumbrances, for $19.3 million. There was evidence that these assets included components that originally came from the cylinder head machine (collateral) and which had been shifted to other lines still in existence at the time of sale.

The following provision is found in the order entered by the bankruptcy court that approved the sale of assets from Uni Boring to UC:

> The sum of $500,000.00 shall be paid at Closing into a segregated account at Comerica to be held pending a determination of the allowed secured amount and whether the alleged secured claim of Dearborn Capital Corporation ("DCC") has priority over the interests of Comerica in the collateral securing DCC's claim. Payment of DCC's secured claim shall be limited to the amount of said segregated funds referenced in this Paragraph 8.C. only, and the value of DCC's collateral (determined in relation to the total Purchase Price for the Purchased Assets other than accounts and inventory) to the extent its secured claim in said collateral is found to be superior to the interests of Comerica, with any funds remaining after said determination and payment to DCC paid to Comerica for the account of Debtor.

Disposition of the $500,000 contained in the segregated account was later resolved by a settlement between our plaintiff, Comerica, and the bankruptcy debtor (Uni Boring). In a bankruptcy order approving the settlement, the court provided:

> A. DCC shall have an allowed secured claim in the amount of $25,000.00, which shall have priority over the interest of Comerica in the collateral securing DCC's claim, and Comerica shall remit to DCC the sum of $25,000.00 from the funds held in [the] segregated account . . . in full satisfaction and payment of DCC's secured claim.
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> B. The $475,000.00 balance of the funds held in [the] segregated account . . . shall be remitted and paid to Comerica under the Financing Order to be applied as Equipment Proceeds . . . .
>
> C. DCC shall have an Allowed Unsecured Claim for the balance of its claims against the Debtor in the amount of $439,655.79.

With respect to plaintiff's agreement to release, for $25,000 of the segregated funds, its security interest in the collateral, which was now in the form of the segregated account,[2] Raymond Riberdy[3] executed an affidavit, opining:

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[2] We reach this legal conclusion for reasons stated below.

[3] Riberdy has over 40 years experience in machinery and equipment, including inspections, appraisal review, purchasing, and sales.

> … Dearborn Capital could have recovered well in excess of $25,000.00 by implementing commercially reasonable collateral recovery measures related to the [cylinder head machine] and/or its components in 2005, even if the [cylinder head machine] had been disassembled and put to uses, or its components put to uses, in other lines or for other functions in or about 2005, and that if the [cylinder head machine] had been disassembled, its significant components and equipment would be identifiable and subject to both appraisal and sale in or around 2005.

Under the UCC, a security interest in collateral, here initially the cylinder head machine and later some of its components, can continue in identifiable proceeds, which include monies received on sale of the original collateral, thereby making the segregated account created by the bankruptcy court "new collateral," so to speak, subject to plaintiff's security interest, depending to a degree on Comerica's priority in the account and limited to the extent of the value of the components from the cylinder head machine. MCL 440.9102(1)(*l*) and (*lll*); MCL 440.9315; *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 120-121; 602 NW2d 390 (1999).[4] The funds in the segregated account most certainly qualify as "identifiable proceeds" flowing from the sale of Uni Boring's assets to UC, including, specifically, the cylinder head machine's disassembled and reused components. Moreover, the bankruptcy court's order setting up the segregated account utilized language that clearly indicated that the account encompassed security interests previously held in the machinery. And the bankruptcy court's subsequent order approving the settlement stated that plaintiff "shall have an allowed *secured claim* in the amount of $25,000.00." (Emphasis added.)

We now turn to the language of MCL 440.9610 and 440.9611. MCL 440.9610 provides in relevant part:

> (1) After default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing.
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> (2) Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by 1 or more contracts, as a unit or in parcels, and at any time and place and on any terms.

MCL 440.9611 provides in pertinent part:

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[4] Under the UCC, "proceeds" are defined, in part, as "[w]hatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral." MCL 440.9102(1)(*lll*). "Collateral" is defined as including "[p]roceeds to which a security interest attaches." MCL 440.9102(1)(*l*). MCL 440.9315(1)(b) provides that "[a] security interest attaches to any identifiable proceeds of collateral." We also note that MCL 440.9315(3) provides that "[a] security interest in proceeds is a perfected security interest if the security interest in the original collateral was perfected."

(1) As used in this section, "notification date" means the earlier of the date on which 1 of the following occurs:

(a) A secured party sends to the debtor and any secondary obligor an authenticated notification of disposition.

(b) The debtor and any secondary obligor waive the right to notification.

(2) Except as otherwise provided in subsection (4), a secured party that disposes of collateral under section 9610 shall send to the persons specified in subsection (3) a reasonable authenticated notification of disposition.

(3) To comply with subsection (2), the secured party shall send an authenticated notification of disposition to all of the following:

(a) The debtor.

(b) Any secondary obligor.

Given our conclusion that the security interest in the cylinder head machine's components could become a security interest in the segregated fund (new or replacement collateral), and considering that defendant sat in the position of a debtor[5] or secondary obligor, the question that must be answered is whether there was a disposition of the interest in the collateral by way of the settlement, such that defendant was entitled to notice under MCL 440.9611. It is argued that plaintiff did not and could not dispose of the proceeds contained in the segregated account because plaintiff never technically possessed the account or monies therein, where the bankruptcy court's initial order made no final determination on how the $500,000 would be allotted. We agree that the bankruptcy court's initial order only gave rise to the possibility that plaintiff would receive some or all of the $500,000 contained in the segregated account, where the language in the order spoke of a disposition of the account "pending a determination of the allowed secured amount" and whether the alleged secured claim had "priority over the interests of Comerica." This uncommitted order of the bankruptcy court, standing alone, could be viewed as not having given plaintiff possession of anything, and it could likewise be viewed as not definitively establishing a security interest in the segregated account in favor of plaintiff, such that the account could be deemed collateral. However, the argument fails to appreciate the necessary impact of the subsequent $25,000 settlement and the bankruptcy court's order approving the settlement, which effectively constituted a determination that plaintiff had a right to possess $25,000 of the account's funds and that plaintiff therefore had a

[5] This Court has held that, for purposes of the UCC – Secured Transactions, "a guarantor is a 'debtor' and is thereby entitled to notice of sale." *Honor State Bank v Timber Wolf Constr Co*, 151 Mich App 681, 684; 391 NW2d 442 (1986), citing *In re Bluestone Estate*, 121 Mich App 659; 329 NW2d 446 (1982).

$25,000 secured interest in the segregated account, which secured claim was discharged upon payment of that amount to plaintiff.[6]

Furthermore, we conclude that plaintiff's act of settlement, wherein Comerica received $475,000 from the segregated account and plaintiff received $25,000 in full satisfaction of plaintiff's secured claim, was an act by a secured party that disposed of collateral, i.e., disposed of plaintiff's secured interest in the segregated fund, MCL 440.9610. By analogy, what occurred through the settlement process is no different than if plaintiff had repossessed the cylinder head machine's components themselves and sold them for $25,000. In both instances, the collateral, either the components or the interest in the segregated account holding the proceeds from the sale of the components, would be disposed of, whether by sale or by way of settlement.

Plaintiff, citing *Fodale v Waste Mgt of Michigan, Inc*, 271 Mich App 11; 718 NW2d 827 (2006), contends that there was no "disposition" of collateral, where a disposition must involve a transfer of an interest held by the secured party *and* a transfer of an interest held by the debtor, and where Uni Boring, as the debtor, did not transfer any interest relative to the settlement agreement, having previously fully transferred its interest on sale of the assets to UC. We first note that MCL 440.9610(1) and (2) speaks only of the "secured party" disposing of the collateral. The *Fodale* panel, quoting *Silverberg v Colantuno*, 991 P2d 280, 289 (Colo App, 1998), did state that an examination of the default provisions of article 9 of the UCC leads to a conclusion that the term "disposition" was "'intended to refer to a transfer of some portion of the *creditor's* interest in the collateral *and* a transfer of the *debtor's* interest.'" *Fodale, supra* at 23 (emphasis in *Silverberg*). Here, although Uni Boring had sold its assets to UC for 19.3 million, $500,000 from the sale, which ordinarily would have gone to Uni Boring absent its debts, was placed into the segregated account without any final determination of disbursement by the bankruptcy court; it was a tentative disbursement to either Comerica and/or plaintiff. A final determination of disbursement was made when the settlement occurred, and, while Uni Boring may no longer have had a claim to any of the segregated funds, the order approving the settlement explicitly acknowledged that, along with plaintiff and Comerica, "[t]he Debtor," which was Uni Boring, agreed to the resolution encompassed by the settlement. Ultimately, the settlement and order approving it resulted in a disposition or transfer of plaintiff's interest in the account *and* in a final, definitive disposition or transfer of Uni Boring's interest in the proceeds from the sale to UC. Accordingly, there was a disposition of collateral.

Having concluded that there was a disposition of collateral, MCL 440.9610, there was a need to give notification to defendant under MCL 440.9611; however, there is no genuine issue of fact, for purposes of MCR 2.116(C)(10),[7] that plaintiff did not give any notice to defendant.

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[6] The order approving the settlement indicated that the parties "agreed to resolve the issues as to the amount and priority of [plaintiff's] allowed secured claim."

[7] This Court reviews de novo a trial court's decision on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other

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Defendant repeatedly claims that he never received notice of the disposition as required by MCL 440.9611, and plaintiff presents no evidence, nor even an argument, to the contrary, but simply maintains that no notice was required. An affidavit submitted by defendant from James Lewandowski, a financial advisor for Uni Boring, indicated that Lewandowski met with plaintiff's William Lang and that he informed Lang "that Mr. Bravo's ability to satisfy any potential obligations under the loan agreement [were] premised upon obtaining a reasonable market value for the Collateral." Lewandowski further averred that "[o]nly after the sale of the Collateral was complete did [plaintiff] release any information pertaining to the sale." Additionally, Lewandowski stated that Lang had informed him that plaintiff accepted the $25,000 settlement offer "without performing any due diligence, investigation or inspection regarding the Collateral's market value." The record also includes deposition testimony from plaintiff's president implicitly suggesting that no notice was ever given to defendant or that he had no knowledge regarding whether notice was given. We make these observations because, although not argued by plaintiff, bankruptcy documents, as well as simply defendant's former position with Uni Boring, give rise to a possibility that defendant had notice of the settlement and its approval.[8] Bankruptcy documents indicate that defendant Bravo was a named creditor in

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documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

[8] The general definitional statute of the UCC, MCL 440.1201, which has been applied to the notification-of-disposition provision in article 9 by this Court, *Luhellier v Bolline Constr, Inc*, 157 Mich App 131, 134-136; 403 NW2d 522 (1987), contains the following definitions:

> (25) A person has "notice" of a fact when he or she has actual knowledge of it; he or she has received a notice or notification of it; or from all the facts and circumstances known to him or her at the time in question he or she has reason to know that it exists. A person "knows" or has "knowledge" of a fact when he or she has actual knowledge of it. " Discover" or "learn" or a word or phrase of similar import refers to knowledge rather than to reason to know. The time and circumstances under which a notice or notification may cease to be effective are not determined by this act.
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> (26) A person "notifies" or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person "receives" a notice or notification when 1 of the following occurs:
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> (a) It comes to his or her attention.

(continued…)

the proceedings and that he was represented by counsel. The order approving the settlement provided that it was being entered "after notice to all parties entitled to Notice pursuant to the Court's Order Limiting Notice[.]" The order limiting notice is not included in the record; therefore, we cannot say whether defendant had notice in the bankruptcy proceedings relative to the settlement. Given the documentary evidence indicating that defendant had no notice[9] and the inconclusive record on whether the bankruptcy proceedings or defendant's position with Uni Boring may have provided defendant with notice, along with considering plaintiff's complete lack of argument on the matter, we find that, as a matter of law, defendant was not given the required notice under MCL 440.9611.

The effect of a notification failure was explored in *Honor State Bank v Timber Wolf Constr Co*, 151 Mich App 681, 684; 391 NW2d 442 (1986), wherein the "sole issue . . . on appeal [was] whether the failure of a secured creditor to give notice to the debtor or guarantor of the sale of collateral completely bars the creditor from recovering a deficiency judgment." This Court answered the question by holding that a secured creditor's failure to give notice of the disposition of collateral, as required by the UCC, operates as an absolute bar to the recovery of a deficiency judgment. *Id.* at 685-689. The ruling in *Honor State Bank* was reaffirmed by this Court in *Asset Acceptance Corp v Robinson*, 244 Mich App 728, 737-738; 625 NW2d 804 (2001) ("failure to provide notice . . . bars recovery of any deficiency"). Moreover, the panel in *Asset Acceptance Corp* made clear that issues concerning the commercial reasonableness of the secured party's disposition of the collateral are irrelevant if indeed notice was not given, stating:

> The trial court . . . held that the issue of notice was irrelevant in that defendant failed to present any evidence that the sale was commercially unreasonable. Specifically, defendant failed to provide any foundation for his valuation of the vehicle, and failed to indicate the manner in which he surrendered the car to the original creditor. The court noted that plaintiff presented documentary evidence that demonstrated that the vehicle had been abandoned and not surrendered as alleged by defendant. This Court holds that the trial court's determination that defendant failed to demonstrate that the sale was commercially unreasonable does not overcome the potential lack of notice. As noted by the *Honor State Bank* Court, the notice provisions are in place to protect the debtor. The creditor, on the other hand, is in a position to exercise a high degree of control over the relationship. *Honor State Bank*, *supra*, 687-688. Thus, we hold that the case should be remanded for trial on the issue whether defendant received the statutorily required notice of sale. [*Asset Acceptance Corp*, *supra* at 738.]

(…continued)

> (b) It is duly delivered at the place of business through which the contract was made or at any other place held out by him or her as the place for receipt of such communications.

[9] Defendant was also adamant at oral argument that notice had not been effectuated.

Accordingly, it is unnecessary to determine here whether the settlement was commercially reasonable, as there is no dispute that the statutorily required notice was not given. Therefore, plaintiff's complaint seeking to enforce the guaranty in order to obtain the deficiency between the $25,000 and the loan balance fails as a matter of law. Thus, we reverse the trial court's judgment and remand for entry of judgment in favor of defendant.

We do wish to briefly address some arguments made by plaintiff that are not covered by our discussion above. Plaintiff relies on some of the following language in the personal guaranty to assert that it was entitled to seek repayment from defendant without repossessing and disposing of the collateral:

> Facundo Bravo . . . hereby unconditionally guarantees to [plaintiff] . . . that [he] will fully, promptly and faithfully perform, pay and discharge all of [Uni Boring's] present and future obligations . . . and agrees (a) without [plaintiff] first having to proceed against [Uni Boring] or liquidate other collateral or security, to pay on demand all sums due and to become due to [plaintiff] from [Uni Boring] and all losses, costs, attorneys' fees and expenses which [plaintiff] may suffer by reason of [Uni Boring's] default, (b) to be bound by and on demand to pay any deficiency established by a sale (with or without notice) of collateral or security, and (c) to pay reasonable attorneys' fees if this Guaranty is placed with an attorney for collection.

Under this language, as acknowledged by defendant, plaintiff did in fact have the ability to first proceed directly against defendant to recover the balance owing on the debt following default; there was no need for plaintiff to first repossess or dispose of the collateral. However, as correctly argued by defendant, plaintiff did not choose such a course of action, deciding instead to first pursue a claim against the collateral (segregated account) and making a recovery of $25,000 upon disposition through the mechanism of a settlement. Proceeding as it did, plaintiff became legally obligated to comply with the UCC's provisions governing secured transactions, notably MCL 440.9610 and 440.9611. We note that the above-quoted passage from the personal guaranty refers to a "sale (with or without notice)," but this language was not enforceable under the UCC in the circumstances presented. MCL 440.9602 provides in relevant part:

> Except as otherwise provided in section 9624, to the extent that they give rights to a debtor or obligor and impose duties on a secured party, the debtor or obligor may not waive or vary the rules stated in the following listed sections:
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> . . .
>
> (g) Sections 9610(2), 9611, 9613, and 9614, which deal with disposition of collateral.

Therefore, any language in the personal guaranty that could be read as waiving or varying the rules governing notification of a collateral disposition, MCL 440.9611, would have no force or effect unless the exception in MCL 440.9624 was applicable. MCL 440.9624(1) provides that "[a] debtor or secondary obligor may waive the right to notification of disposition of collateral under section 9611 only by an agreement to that effect entered into and authenticated *after default*." (Emphasis added.) The personal guaranty was not executed *after* the default;

therefore, MCL 440.9624 has no application. For these same reasons, plaintiff's reliance on the following language from the personal guaranty is also misplaced:

> [Plaintiff] may renew, extend, modify or transfer any obligations of [Uni Boring] . . . or of co-guarantors, may accept partial payments thereon or settle, release, compound, compromise, collect or otherwise liquidate any obligation or security therefor in any manner and bind and purchase at any sale without affecting or impairing the obligation of [defendant] hereunder.

Plaintiff contends that this language allowed it to settle its secured claim against Uni Boring in the manner that was undertaken. This argument suggests that the UCC's requirements on the disposition of collateral need not have been observed simply because the personal guaranty allowed plaintiff to reach a settlement with Uni Boring and others. First, the contractual language does not expressly preclude application of the UCC's provisions regarding the disposition of collateral.[10] Second, to the extent that the contractual language in the personal guaranty suggests that there is no need to comply with the UCC regarding commercial reasonableness and notification relative to the disposition of collateral, the language would be invoking a waiver of, or varying the rules in, MCL 440.9610 and 440.9611, which is not permissible for the reasons stated above.

In sum, we hold that defendant was entitled to an order granting him summary disposition on plaintiff's complaint, where there is no factual dispute that defendant did not receive, nor did plaintiff deliver, notice under MCL 440.9611 relative to the disposition of the collateral, and where plaintiff was required to comply with the statutory notice requirement under the circumstances presented. Accordingly, we reverse the trial court's judgment and remand for entry of judgment in favor of defendant.

Reversed and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction. Defendant, having fully prevailed on appeal, is entitled to and awarded taxable costs pursuant to MCR 7.219.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Karen M. Fort Hood

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[10] In other words, although there may have been a right to settle, there is no contractual language indicating that settlement could be made in a commercially unreasonable manner and without notice.