STATE OF MICHIGAN

COURT OF APPEALS

BRADLEY SMITH, individually and as trustee of the JOHN J. SMITH REVOCABLE LIVING TRUST, Plaintiffs-Appellees,	UNPUBLISHED March 7, 2013
v	No. 309547 Ionia Circuit Court
FIRSTBANK CORPORATION, Defendant-Appellant.	LC No. 11-H-28493-CZ

Before: BECKERING, P.J., and STEPHENS and BOONSTRA, JJ.

PER CURIAM.

Plaintiffs appeal by right from the trial court's grant of summary disposition to defendant pursuant to MCR 2.116(C)(10). We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

The facts in this secured transactions case are not in dispute. Plaintiffs borrowed funds from defendant's predecessor in 2002; the notes to defendant were secured with pledges of Sparton Corporation stock as well as other collateral. Plaintiffs defaulted on these loans. Eventually, after many modifications and extensions, defendant took possession of the pledged shares of Sparton stock. Shortly thereafter, defendant sold the stock in two private transactions: on January 12, 2010, it sold 602,170 shares to a brokerage firm at $4.84 per share, and on February 19, 2010, it sold 450,000 shares to a brokerage firm at $5.05 per share. The parties agree that the closing price for Sparton stock on the New York Stock Exchange on both sale dates was $6.05 per share. Defendant then released the remaining collateral to plaintiffs and remitted to plaintiffs by cashier's check the excess funds collected in the private sales. The value of the collateral retained by plaintiffs was over five million dollars.

Plaintiffs filed suit against defendant, alleging that the sales violated defendant's contractual duties to plaintiffs because they were "commercially unreasonable" under

Michigan's uniform commercial code, MCL 440.1101 *et seq*.[1] Defendant moved the trial court for summary disposition pursuant to MCR 2.116(C)(10). Defendant argued that the undisputed material facts established that the sales of Sparton stock were commercially reasonable under Michigan law. Plaintiffs responded and asserted that the undisputed material facts compelled the trial court to grant summary disposition to plaintiffs pursuant to MCR 2.116(I)(2). The trial court issued an Opinion and Order granting defendant's motion without a hearing under MCR 2.119(E)(3), and later denied plaintiffs' motion for reconsideration. This appeal followed.

II. STANDARD OF REVIEW

This Court reviews the trial court's grant of summary disposition de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412. The moving party must specifically identify the matters that have no disputed factual issues, and has the initial burden of supporting his position by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); MCR 2.116(G)(4); *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists. MCR 2.116(G)(4); *Coblentz*, 475 Mich at 569. Generally, the existence of a disputed fact must be established by substantively admissible evidence, although the evidence need not be in admissible form. MCR 2.116(G)(6); *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party, *Joseph*, 491 Mich at 206, and all reasonable inferences are to be drawn in favor of the nonmovant, *Dextrom v Wexford County*, 287 Mich App 406, 415; 789 NW2d 211 (2010). If it appears that the opposing party is entitled to judgment, the court may render judgment in favor of the opposing party. MCR 2.116(I)(2); *Bd of Trustees of Policemen & Firemen Retirement Sys v Detroit*, 270 Mich App 74, 77-78; 714 NW2d 658 (2006). 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 could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

Here, the trial court granted summary disposition to defendant on the ground that no genuine issue of material fact existed as to the commercial reasonableness of defendant's sale of shares following plaintiffs' default. The trial court thus dismissed plaintiffs' claims for violation of Michigan's uniform commercial code.

[1] Plaintiffs also made claims for common-law and statutory conversion, but do not challenge the trial court's dismissal of these claims on appeal.

III. THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT DEFENDANT'S SALES OF THE COLLATERAL WERE COMMERCIALLY REASONABLE

Michigan's uniform commercial code, MCL 440.1101 *et seq.*, governs commercial transactions involving goods. See *Farm Bureau Mut Ins Co v Combustion Research Corp*, 255 Mich App 715, 720; 662 NW2d 439 (2003). Article 9 of the uniform commercial code, MCL 440.9101 *et seq*., deals with secured transactions and provides a "comprehensive scheme for the regulation of security interests in personal property and fixtures." MCL 440.9101, cmt 1.

At issue in the instant case is the secured party's disposition of collateral after the debtors' default. Defendant, the secured party, was authorized by MCL 440.9609 to take possession of the collateral following plaintiffs' default. The parties agree that plaintiffs defaulted in the instant case, and that defendant was within its rights to take possession of the pledged shares.

MCL 440.9610 governs the disposition of collateral after default, and 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.
>
> (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.

Further, MCL 440.9627 provides guidance for determination of whether the disposition of collateral was commercially reasonable, and provides in relevant part:

> (1) The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner.
>
> (2) A disposition of collateral is made in a commercially reasonable manner if the disposition is made in the usual manner on any recognized market, at the price current in any recognized market at the time of the disposition, or otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

As an initial matter, we do not accept defendant's characterization of plaintiffs' complaint as solely premised on dissatisfaction with the price obtained for the shares. A fair reading of plaintiffs' allegations is that the method of disposal chosen by defendant (i.e., a private sale in bulk with a substantial discount) was unreasonable. Since "method" is explicitly required to be commercially reasonable under MCL 440.9160(2), we conclude that plaintiffs

have raised a valid (although ultimately unpersuasive) challenge to the commercial reasonableness of the sales. Further, the language of MCL 440.9627(1) indicates that proof that a higher price could have been obtained for the collateral does not *preclude* the secured party from establishing commercial reasonableness. Plain and ordinary language of a statute should be enforced as written. See *Velez v Tuma*, 492 Mich 1, 16-17; 821 NW2d 432(2012). Thus, we disagree with defendant's contention that MCL 440.9627 requires "procedural" complaints with the sale of collateral in addition to complaints about the sale price received. Rather, MCL 440.9627(1) simply cautions a court that the mere availability of a higher price is not conclusive of commercial unreasonableness. Moreover, MCL 440.9610(2) provides that "[*e*]*very aspect* of a disposition of collateral, including the method, manner, time, place, and *other terms* must be reasonable." *Id*. (emphasis added).

The trial court noted three reasons that defendant's sale was commercially reasonable: "1) there was permission of [sic] the sale by the Plaintiff, 2) the circumstances surrounding other sales of this stock, and 3) the collateral possible consequence of what a public sale would do to the Sparton stock overall." We agree with the second and third points. We do not find that the record demonstrates that plaintiffs approved the *specific* sales conducted by defendant, to the point of waiver of any challenge to that sale. See *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003) ("[W]aiver is a voluntary and intentional abandonment of a known right."). Here, the record merely shows that plaintiffs were not opposed to a private sale of stock. There was no evidence offered that plaintiffs approved the sale price or approved the bulk sales specifically. To the extent that the trial court relied on any sort of waiver or acquiescence on the part of plaintiffs in making its ruling, that reliance was in error.

However, the trial court correctly noted that the circumstances surrounding previous sales of Sparton stock on the public market, and concerns about what public sales would do to the share price, rendered defendant's choice to sell in private transactions reasonable. Plaintiffs assert that defendant could have sold the shares piecemeal on the public market. However, in 2008, Wachovia sold approximately 400,000 shares of Sparton to satisfy plaintiff Smith's debts. The sale required 18 separate transactions over a two-month period; during that period the share price declined by almost 50 percent. Although plaintiffs opine that the decline in share price was caused by other factors, the fact remains that defendant had access to a relatively recent example of how sales of large amounts of Sparton stock would have to be conducted on the public market, and how such sales would affect the share price. It was not commercially unreasonable for defendant to seek a private sale to avoid this risk; indeed private sales are specifically authorized by MCL 440.9610(2).

Plaintiffs further argue, however, that even if defendant's choice to conduct a private, bulk sale was reasonable, the manner in which it conducted the private sale was not. Plaintiffs allege that defendant never attempted to gain a higher price for the shares, but rather simply told the brokerage firm the minimum price it needed to be made whole. Although the share price sold at or near the minimum required for defendant to be made whole, this mere fact does not, pursuant to MCL 440.9627, establish commercial unreasonableness on the part of defendant. Further, the record does not support this contention. An email from Rick Barratt, agent of defendant, to Oberon Securities indicated that, in addition to requesting that Oberon bring them a buyer, defendant was "holding these shares in the bank's brokerage account with our investment

banker and have also directed them to bring similar type offers to us as well." In addition, defendant's Chief Executive Officer testified in his deposition that "discounts in large transactions, in thinly traded stocks, were common" and that he was advised by employees of Oberon securities that selling a "block this large would require a discount of 15 to 20 percent."

The evidence thus does not support the contention that defendant did not seek multiple offers or seek to get the best price for the stock. Rather, the evidence shows that defendant, after the request of Oberon, received one offer for Smith's stock, at a discount. Rather than risk public sales and a repeat of what happened in 2008, defendant made the sale. In fact, plaintiffs' contention that defendant did not attempt to garner the best sale price it could is contradicted by the fact that defendant was able to sell the second block of shares (the shares pledged by the trust) for 21 cents more per share, notwithstanding that the closing price for Sparton was exactly the same on the day of both the first and second sales.

The instant case is distinguishable from *In Re Holden*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued September 24, 1991 (Docket Nos. 89-CV-73381, 89-CV-73391) (1991 US Dist Lexis 19710).[2] In *Holden*, the debtors defaulted on a loan secured by an interest in a partnership, the principal asset of which was approximately 400,000 shares of stock in HBO & Company (HBO), a public company. Slip op at 1. Although the case presents other issues, of particular relevance in distinguishing it from the instant case is the fact that, after taking possession of the shares, the secured party sold 412,000 shares of HBO *to himself* in a private transaction, at market price of 25 cents less per share than the market price at the time. Slip op at 2. The bankruptcy court determined that the private sale was unreasonable "because the stock was sold privately in a single block below market price and because the court felt that [the secured party] had not made a good faith effort to sell the stock at the best price." *Id.* The district court agreed, holding that the secured party acted commercially unreasonably by "failing to give notice of the private sale under 9-504(3)" and further that the secured party's "lax effort to secure the highest price for the stock constituted a lack of good faith under § 1-204 of the Code." Slip op at 3.

Here, plaintiffs do not argue that they were not provided with reasonable notification of the sale. Plaintiffs in fact admit that they received notice of the sales, and the record contains documentation of notices given on January 5 and January 18, 2010. Therefore, the ground upon which the *Holden* court specifically stated it found the sale commercially unreasonable is not present in this case. Further, we do not find that the defendant asserted a "lax effort to secure the highest price for the stock" so as to violate the requirement of good faith and fair dealing imposed by the uniform commercial code. MCL 440.1203; see also *Fodale v Waste Mgt of Michigan, Inc*, 271 Mich App 11, 35; 718 NW2d 827 (2006). In *Holden*, the secured party himself bought the shares below market-price. Slip op at 3. There is a substantial difference between a secured party offering a discount to an independent buyer in order to make the transaction, and a secured party giving *themselves* a break on price; the latter implicates good-

[2] Decisions from lower federal courts, although not binding on this Court, may be persuasive. See *Abela v General Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004).

faith concerns considerably more than the former. No such concern is present in the instant case. As noted above, the trial court was presented with evidence that defendant had valid reasons for choosing a private sale, and made efforts to obtain a reasonable price for the shares. In fact, the method chosen by defendant allowed plaintiffs to retain over five million dollars of collateral, as well as a net surplus on the sale of plaintiffs' stock that plaintiffs acknowledge was paid to them. Although plaintiffs speculate that public sales would have resulted in a higher price, or that the private buyer could have been induced to pay a higher price, speculation and conjecture are insufficient to allow an opposing party to survive a motion for summary disposition. *Ghaffari v Turner Constr Co (On Remand)*, 268 Mich App 460, 464; 708 NW2d 448 (2005).

Affirmed. As prevailing party, defendant may tax costs pursuant to MCR 7.219.

/s/ Jane M. Beckering
/s/ Cynthia Diane Stephens
/s/ Mark T. Boonstra