STATE OF MICHIGAN

COURT OF APPEALS

GMAC, LLC,

Plaintiff-Counterdefendant-Appellee,

v

TYRONE L. SMITH,

Defendant-Counterplaintiff-Appellant.

UNPUBLISHED
September 21, 2010

No. 292418
Wayne Circuit Court
LC No. 08-114706-CK

Before: MURPHY, C.J., and SAWYER and MURRAY, JJ.

PER CURIAM.

In this action arising out of a vehicle lease agreement and an accident involving the leased vehicle, defendant Tyrone L. Smith appeals as of right the trial court's order granting summary disposition in favor of plaintiff GMAC, LLC, and awarding GMAC damages in the amount of $38,403 on its complaint. Smith also appeals the summary dismissal of his counterclaim. We affirm.

In May 2005, Smith leased a Chevrolet Corvette from a car dealer pursuant to a three-year lease agreement, and the lease was immediately assigned to GMAC. In May 2007, two years into the lease, the car was involved in an accident and deemed a total loss. For the next seven months, the vehicle sat on the grounds of a collision shop while Smith's no-fault insurer, Nationwide, engaged in an investigation of the accident and Smith's claim for coverage. In December 2007, Nationwide formally denied coverage, finding that Smith had "made material misrepresentations of fact, committed fraud, and [had] sworn falsely concerning the facts and circumstances of the loss, the damage to the Corvette, [his] injuries, [his] financial condition, [his] alleged inability to work, [and] the extent of loss . . . all for the purpose of fraudulently submitting claims, inflating [his] claims, misleading [the] investigation[,] and wrongfully obtaining insurance proceeds." In February 2008, GMAC sent a letter to Smith, which stated, "Because the vehicle you were leasing from GMAC was destroyed, your lease has ended. The vehicle has been sold and we are providing you with your final account settlement." GMAC asserted that Smith owed $36,030, which included, in part, $12,424 in net remaining base monthly payments and $20,614 in excess mileage / excess wear charges. In its appellate brief, GMAC indicates that the Corvette had been returned to GMAC after the insurance denial and that the vehicle "was sold at auction for salvage value." Smith averred in his affidavit that

GMAC sold the vehicle without providing him any notice of the sale, and GMAC does not appear to dispute this contention.

In its complaint, GMAC alleged that the "vehicle was destroyed" and that Smith had "breached the terms of the Lease, by failing to pay all the sums required pursuant to the Lease." Smith stopped making the monthly lease payments after the accident. GMAC requested entry of judgment in the amount of $36,030. In a counterclaim, Smith alleged counts of breach of lease contract, breach of GAP insurance policy contract, defamation and violation of the fair credit reporting act, and intentional infliction of emotional distress.

GMAC subsequently filed a motion for summary disposition under MCR 2.116(C)(9) and (10) relative to its complaint only, arguing that Smith was in default of the lease agreement pursuant to ¶ 31 of the agreement and particularly the language in that paragraph providing that a default occurs when the lessee "do[es] not pay on time." GMAC also cited additional language in ¶ 31, which provides that, upon default, GMAC has the authority to "[e]nd this lease and require [lessee] to pay the early end charge," along with the authority to "[t]ake the vehicle from [lessee] without demand." Paragraph 37 of the lease agreement addresses early end charges, as referenced in ¶ 31, providing that, unless GAP insurance applies, the lessee will owe any unpaid monthly payments, offset by a "credit for any unearned rent charge and a credit if [GMAC] sell[s] the vehicle for more than residual value." Paragraph 37 sets forth a specific formula for calculating the early end charge, which involves taking the base monthly rental payment times the number of payments not yet due, subtracting any unearned rent charge, subtracting any surplus[1] on the vehicle sale, and adding, if there is no surplus, any early excess mileage and wear charge.[2] GMAC used this formula from ¶ 37 in calculating its damages and argued that it was

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[1] A definition of "surplus" contained in the lease agreement provides as follows: "Unless you get an *appraisal* or gap insurance applies, we will sell the vehicle at wholesale. If we sell the vehicle for more than residual value, the excess will be the surplus. If we sell the vehicle for residual value or less, the surplus will be zero." (Emphasis added.) Smith focuses on the reference to an "appraisal" in this definition in forming his appellate argument, which we discuss below. The residual value of the Corvette, i.e., its estimated value at the end of the lease absent the accident, was $33,114. While there is no information in the record concerning the exact dollar amount that GMAC received when selling the vehicle for salvage value at auction, there certainly was no "surplus," and no credit for a surplus was attributed to Smith for purposes of GMAC's calculation of damages.

[2] We note that ¶ 37 and the formula contained therein is prefaced by language which indicates that, "[i]f the vehicle is a total loss, see the Gap Protection section," which is ¶ 38 of the lease agreement. Paragraph 38 provides that, if a vehicle is a total loss before the scheduled lease end date and GMAC obtains an insurance settlement, GAP protection applies, but if there is no insurance settlement, as occurred here, there is no GAP protection. Where there is no insurance settlement, and thus no GAP protection, GMAC is entitled to collect "any excess of the residual value over the vehicle's salvage value," which formula was not used by GMAC. However, in such circumstances (no insurance settlement and no GAP protection), and where the lease ends before the last scheduled payment is due, ¶ 38 further provides that GMAC is entitled to "the early end charge that applies when the vehicle is not a total loss," which language necessarily redirects the reader back to ¶ 37.

entitled to summary disposition, where Smith had not stated a valid defense, and where there was no issue of fact that Smith had defaulted under the lease agreement. Smith's argument in response essentially boiled down to a claim that he was entitled to notice that GMAC had obtained possession of the Corvette and notice of any intended sale, so that he could obtain an appraisal; therefore, GMAC had breached the lease agreement and was not entitled to summary disposition.[3]

The trial court agreed with GMAC, granting the motion for summary disposition and indicating, in cursory fashion, that Smith had not made the lease payments and that GMAC was simply exercising remedies available to it under the lease agreement. The order that was entered reflects the court's ruling that GMAC was granted summary disposition on its complaint, and the order also indicates, in handwriting, that Smith's counterclaim was dismissed with prejudice. GMAC's motion for summary disposition did not entail Smith's counterclaim, nor was the counterclaim discussed at the hearing. Smith asserts, without contradiction from GMAC, that after the hearing, GMAC's attorney inquired, off the record, about the status of the counterclaim and that the court, also off the record, casually ordered the dismissal of the counterclaim without any relevant discussion.

Summary disposition may be granted under MCR 2.116(C)(9) when "[t]he opposing party has failed to state a valid defense to the claim asserted against him or her." Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). "If the language of [a] contract is unambiguous, we construe and enforce the contract as written." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). A contract is ambiguous if its provisions are capable of conflicting interpretations. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003). We cannot read words into a contract that simply are not there. *Terrien v Zwit*, 467 Mich 56, 75; 648 NW2d 602 (2002).

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[3] In an affidavit, Smith averred that "[t]he mileage on the vehicle was extremely low and there was clearly no excess mileage," which claim appears substantiated by a photo of the vehicle's odometer taken after the accident. Smith also averred that "GMAC never informed [him] or allowed [him] to inspect the vehicle to determine the actual value of any tear and wear and the extent of the tear and wear." GMAC submitted numerous post-accident photographs of the vehicle to the trial court as attachments to its brief in support of the motion for summary disposition.

On appeal, Smith contends that he had a right to an appraisal under the lease agreement, which right could only be asserted if GMAC gave him notice that it had possession of the vehicle and intended to sell the vehicle. Smith maintains that, absent notice, his ability to mitigate his liability was impaired and he was unable to assess the accuracy of GMAC's damage claims as to excess mileage and excess wear and tear.

We first note that ¶ 38 of the lease agreement, which addresses GAP protection, insurance settlements, vehicles that are deemed total losses, and salvage value, see footnote 2 above, makes no reference to an appraisal. Given Nationwide's determination denying coverage,[4] there was no insurance settlement and thus no GAP protection. Paragraph 37 refers to an appraisal in the context of defining the term "surplus," indicating that GMAC will sell the vehicle at wholesale unless GAP protection applies or the lessee obtains an appraisal.[5] Determining whether there was a surplus is part of the calculation of the early end charge or damages under ¶ 37, which paragraph was relied on by GMAC in assessing damages. Considering that the vehicle was totaled and sold for "salvage value," we question whether the appraisal language in ¶ 37 was even implicated, where the appraisal references are couched in terms of a sale at "wholesale" and the vehicle's "wholesale value." More importantly, ¶ 37 does not indicate that GMAC has to give notice to a lessee that it possesses the lessee's vehicle, nor that it plans to sell the vehicle. There is nothing in the record suggesting that Smith attempted to obtain an appraisal and was rebuffed during the many months the vehicle sat idle, nor that Smith even made an inquiry regarding an appraisal, a possible sale, or possession of the vehicle. A contracting party cannot place obstacles in the way of the other contracting party's attempt to perform the contract, see *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 131-132; 743 NW2d 585 (2007), but there is nothing in the record suggesting that GMAC took affirmative or any steps to prevent Smith from obtaining an appraisal or inquiring about a sale or possession of the vehicle, let alone that GMAC deceived Smith relative to any inquiry.[6]

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[4] Smith's counsel indicated at the summary disposition hearing that Smith was engaged in litigation against Nationwide in the federal district court with respect to the denial of coverage.

[5] Paragraph 37 also contains language specifically outlining the parameters of an appraisal, stating:

> You may get a professional appraisal of the vehicle's wholesale value. If you do so within a reasonable time, we will use the appraised value as the sale price when we figure the surplus (if any). The appraiser must be an independent third party. You and we must agree on the appraiser. You must pay for any appraisal. The appraisal will be binding.

[6] While Smith vaguely averred that GMAC did not allow him to inspect the vehicle, he did not specify the circumstances of any effort or request to inspect the Corvette. Moreover, Smith did not aver that he requested an appraisal and was turned down, or that he sought information about a potential sale of the vehicle or the vehicle's whereabouts and was denied information in response.

The law presumes that a party who has executed a contract has read the contract, *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 59; 664 NW2d 776 (2003), in which case Smith is presumed to know that he would not have GAP coverage if Nationwide declined no-fault coverage, that a default would thus occur on stopping the lease payments, that repossession and a sale of the vehicle was a remedy available to GMAC, that he might be able to pursue an appraisal, and that he could be held liable for damages. Smith needed to proceed accordingly. While there might have been a contractual right to an appraisal, Smith did not exercise the right, and he fails to identify any expressed contractual right of notice relative to GMAC's possession and sale of the Corvette. We disagree with Smith's assertion that the only way he could have asserted the right to an appraisal is if GMAC gave him notice of its possession of the Corvette. It would have been very simple for Smith, by himself or through counsel who was handling the matter, to invoke the right as a preemptive move, knowing that GMAC had a contractual right to take the vehicle without demand on default and a right to sell the vehicle. Confining our analysis to the arguments presented by Smith, reversal on this issue is unwarranted.[7]

Smith also refers to remedies available under Article 9 of the Uniform Commercial Code (UCC), MCL 440.9601 *et seq.*, which governs secured transactions, relative to a creditor's failure to provide notice. Smith acknowledges, however, that a different article of the UCC, Article 2A, MCL 440.2801 *et seq.*, governs the lease agreement in this case. We decline Smith's invitation to "adopt by reference the statutory scheme of Article 9 of the UCC and use those statutory provisions to determine what relief is available to a party to whom a lessor denied a contractual right." Again, GMAC did not deny any presumed right to an appraisal; it was never invoked, and there was no contractual right to notice. And we cannot read language into a statute if it is not there, i.e., making the UCC's article governing secured transactions applicable to lease agreements. *AFSCME v Detroit*, 468 Mich 388, 412; 662 NW2d 695 (2003). Smith does not present any arguments under Article 2A of the UCC.

With respect to the summary dismissal of Smith's counterclaim, the full argument made by Smith in his appellate brief is as follows:

> That decision is so blatantly illegal that there is no need to provide further legal argument in support of its illegality. This Court must order the peremptory reversal of the trial court judge.

There is no citation of court rules, statutes, constitutional provisions, or caselaw. The argument is wholly undeveloped, lacking any discussion regarding the nature of the counts contained in the counterclaim, let alone explaining how and why the counterclaim can survive even with the court's ruling in favor of GMAC on its complaint, which we have now affirmed. As our Supreme Court stated in *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998):

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[7] With respect to Smith's ability to assess the accuracy of GMAC's damage claims as to excess mileage and excess wear and tear, this would be information known to Smith, given that he possessed and operated the vehicle for two years and was certainly aware of the extent of the damage associated with the accident for which he sought insurance coverage from Nationwide.

> "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow." [Citation omitted.]

We do not condone the manner in which the trial court summarily dismissed Smith's counterclaim, as it does give rise to due process and notice concerns. See *Al-Maliki v LaGrant*, 286 Mich App 483, 485-489; 781 NW2d 853 (2009). However, Smith's cursory argument on the issue is simply insufficient. Moreover, we fail to see how the counts in the counterclaim can survive given our ruling that the trial court did not err in entering judgment in favor of GMAC on its contract claim.

Affirmed. Having prevailed in full, GMAC is awarded taxable costs under MCR 7.219.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Christopher M. Murray