FOURTH DIVISION
February 26, 2015

No. 1-14-1339



IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|---|---|---|
| JOEY NAM, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff/Appellant, | ) | Cook County. |
| | ) | |
| v. | ) | No. 12 M3 3521 |
| | ) | |
| ANNA KIM, | ) | Honorable |
| | ) | Sandra Tristano, |
| Defendant/Appellee. | ) | Judge Presiding. |

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Ellis concurred in the judgment.

**ORDER**

¶ 1 *Held*: The trial court's order granting summary judgment in favor of defendant is affirmed. The statutory notice provisions cited by plaintiff do not apply to the facts of this case because plaintiff was not an owner of a vehicle or obligor on the financing contract. The circuit court judge did not abuse her discretion in finding that defendant's equitable affirmative defense was not barred by the doctrine of unclean hands.

¶ 2 Defendant Anna Kim purchased and financed a vehicle. Plaintiff Joey Nam thereafter used and possessed the vehicle and paid the monthly financing installments on the vehicle. Defendant later repossessed and sold the vehicle. Plaintiff filed this lawsuit against defendant claiming that defendant wrongfully repossessed the vehicle. Specifically, plaintiff's amended complaint contained four claims against defendant: breach of contract, unjust enrichment, conversion and replevin. After granting summary judgment in favor of defendant on plaintiff's breach of contract claim (Count I), the trial court granted summary judgment in favor of defendant on the remaining three claims in plaintiff's amended complaint (Counts II, III and IV) on the basis of equity. Plaintiff now appeals the trial court's order granting summary judgment in favor of defendant on Counts II, III and IV.

¶ 3 Background

¶ 4 In an amended complaint filed in the Circuit Court of Cook County, plaintiff Joey Nam alleged that defendant Anna Kim wrongfully repossessed from him a vehicle. According to the amended complaint, plaintiff and defendant entered into an oral agreement on November 18, 2010, whereby defendant agreed to obtain a loan from Acura Financial Services to purchase a 2011 Acura MDX for plaintiff, and plaintiff agreed to make the initial payment and monthly payments to Acura Financial Services in connection with the vehicle. The amended complaint states that defendant financed the vehicle in her name and plaintiff had made payments to Acura Financial Services on the vehicle in the amount of $19,677.26**.** Plaintiff and defendant knew each other because at one time defendant dated plaintiff’s father. On or about October 11, 2012, defendant repossessed the vehicle from plaintiff.

¶ 5 Count I of plaintiff's amended complaint ("breach of contract") alleges that defendant breached the terms of their oral contract when she repossessed the vehicle. Count II ("unjust

enrichment") alleges that defendant was unjustly enriched when plaintiff made payments on the vehicle for over 22 months. Count III ("conversion") alleges that plaintiff was the owner of the vehicle and that defendant wrongfully assumed control of the vehicle and asserted it as her own. Count IV ("replevin") alleges that plaintiff was the owner of the vehicle and that defendant unlawfully detained the vehicle.

¶ 6 Defendant filed an answer to the amended complaint and also filed several affirmative defenses including: rescission for failure of performance of condition, statute of frauds, failure and inadequacy of consideration, and equity favors defendant. Defendant's rescission defense alleged that plaintiff agreed to make timely loan payments of $750.00 per month for sixty months**,** but that "Plaintiff failed to make timely payments, failed to make payments, and paid with checks without sufficient funds." As a result, defendant repossessed the vehicle and began making the monthly payments herself in October 2012. Further, defendant's equity affirmative defense argues that she "did not benefit by taking possession of the car."

¶ 7 On September 18, 2013, defendant filed a motion for summary judgment based on her affirmative defenses. On November, 6, 2013, following briefing and hearing, the trial court granted defendant's motion for summary judgment with respect to plaintiff's breach of contract claim, finding that there was "a material breach of the alleged oral contract for not complying with its terms." The remainder of the motion was denied. There is no transcript of the November 6, 2013 hearing and ruling in the record. On November 22, 2013, plaintiff filed a motion to reconsider the trial court's November 6, 2013 order.

¶ 8 On December 10, 2013, defendant filed a motion for summary judgment supported by an affidavit from defendant. The motion addressed the remaining three counts in plaintiff's amended complaint (Counts II, III and IV) based on defendant's affirmative defense that equity

favored defendant.[1] Defendant's affidavit, which was later amended, states she purchased the vehicle on November 18, 2010 for $48,167.26 and sold the vehicle on August 31, 2013 for $27,000.00. The affidavit further states that plaintiff had agreed to make monthly payments to Acura Financial Services in the amount of $750.00 for the vehicle, but that plaintiff missed several payments, made several late payments and made payments with checks with insufficient funds. As a result, defendant repossessed the vehicle in October 2012 and began making the monthly payments herself. On the date defendant repossessed the vehicle from plaintiff, the balance defendant owed to Acura Financial Services on the financing contract was $28,490.00. The affidavit states that when defendant repossessed the vehicle, it had been damaged by plaintiff and cost her $3,279.50 to repair those damages, and that in repossessing the vehicle she had to pay $247.88 to buy new keys for the vehicle and $174.00 to have the vehicle towed. Attached to defendant's affidavit is a "Motor Vehicle – Simple Interest Retail Installment Contract," which verifies that the total sale price of the vehicle with interest was $48,167.26, and a "Vehicle Purchase Agreement," which verifies that defendant sold the vehicle to Car Max for $27,000.00. Also attached to the affidavit are bills supporting the alleged additional costs plaintiff incurred in repairing the vehicle, replacing the vehicle keys and having the vehicle towed. Based on these facts, defendant argues in her motion that she ultimately lost money with respect to the vehicle and, therefore, she "did not benefit by taking possession of the car, or selling the car."

¶ 9 In response to defendant's motion for summary judgment, plaintiff argued that summary judgment should be denied because: (1) defendant had unclean hands, and (2) defendant received equity from the vehicle after she sold it. With respect to unclean hands, defendant argued that

[1] Defendant states in her motion that she filed the motion because the "court expressed an interest in hearing about the equities of the case[.]"

defendant "offered no justification for failing to give proper notice," "misrepresent[ed] fixtures to the vehicle," and "misrepresent[ed] equity received after the vehicle was sold." With respect to the allegation that defendant received equity from the vehicle after she sold it, plaintiff states that the original sale price of the vehicle was $42,862.08 and that the estimated value of the vehicle at the time it was sold by defendant was only $14,935.08. Based on these figures, plaintiff argued that defendant "took a profit on the car when she sold it for $27,000."

¶ 10 Attached to plaintiff's response is an affidavit. While the affidavit states that the affiant is "Mike Nam," the affidavit is signed by plaintiff, Joey Nam. The affidavit states that plaintiff did not cause the damage to the vehicle that defendant paid $3,279.50 to fix, that the total amount financed for the purchase of the vehicle on November 18, 2010 was $42,862.34, that the deposit price for the vehicle was $3,167.26, and that plaintiff made payments in the amount of $19,677.26 on the vehicle. The affidavit also states that on "10/04/12, I walked outside of my work parking lot and I witnessed the vehicle getting towed *** the Defendant never demanded to turn-over the key, or mention that the vehicle was getting towed for repossession." There are no supporting documents attached to this affidavit.

¶ 11 The trial court set plaintiff's motion to reconsider and defendant's motion for summary judgment as to Counts II, III and IV for hearing on April 2, 2014. On April 2, 2014, following the hearing, the trial court denied plaintiff's motion to reconsider and granted defendant's motion for summary judgment with respect to the remaining counts in plaintiff's amended complaint (Counts II, III and IV). The written order indicates that the motion for summary judgment was granted on the "basis of equity." There is no transcript of the April 2, 2014 hearing in the record.

¶ 12 On May 2, 2014, plaintiff filed his notice of appeal *pro se* requesting that this court reverse the trial court's ruling granting summary judgment in favor of defendant, which was

entered on April 2, 2014. Neither the notice of appeal nor the appellate brief filed in this court by plaintiff reference or make any argument regarding the trial court's ruling granting summary judgment in favor of defendant on Count I based on a material breach in the terms of the alleged oral contract. As such, the only ruling now before us on appeal is the trial court's grant of summary judgment in favor of defendant on Counts II, III and IV.

¶ 13 On appeal, plaintiff argues that the trial court erred in granting summary judgment on Counts II, III and IV because: (1) defendant failed to provide plaintiff with proper notice before selling the vehicle, and (2) defendant should not have succeeded on her equity defense set forth in the motion for summary judgment because she had unclean hands. For the reasons that follow, we affirm the trial court's order granting summary judgment in favor of defendant.

¶ 14 Analysis

¶ 15 Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). Although a plaintiff is not required to prove his case at the summary judgment stage, in order to survive a motion for summary judgment, the nonmoving party must present a factual basis that would arguably entitle the party to a judgment. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335-36 (2002). An affidavit submitted in the summary judgment context serves as a substitute for testimony at trial. *Id*. Therefore, it is necessary that there be strict compliance with Rule 191(a) "to insure that trial judges are presented with valid evidentiary facts upon which to base a decision." *Solon v. Godbole*, 163 Ill. App. 3d 845, 851 (1987). Supreme Court Rule 191(a) states that affidavits submitted in support of or in opposition to summary judgment motions:

> "shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Ill. S. Ct. R. 191(a) (eff. July 1, 2002).

Where facts contained in an affidavit in support of a motion for summary judgment are not contradicted by counter-affidavit, such facts are admitted and must be taken as true. *Prather v. Decatur Memorial Hospital*, 95 Ill. App. 3d 470, 472 (1981).

¶ 16 At the outset, it must be noted that plaintiff failed to comply with the mandatory procedures for the preparation of appellate briefs, in violation of Illinois Supreme Court Rule 341. See Ill. S. Ct. R. 341 (eff. July 1, 2008). Plaintiff's appellate brief lacks any citation to the record on appeal and also lacks an appendix to the record on appeal. See Ill. S. Ct. R. 341(h)(6), (h)(9) (eff. July 1, 2008). Compliance with Rule 341 is mandatory, and this court has the discretion to strike an appellant's brief and dismiss an appeal for failure to comply with Rule 341. *Holzrichter v. Yorath*, 2013 IL App (1st) 110287, ¶ 77; *Eryzel v. Miller*, 2014 IL App (1st) 120597, ¶ 25; see *Niewold v. Fry*, 306 Ill. App. 3d 735, 737 (1999). However, because we find that plaintiff's lack of compliance with Rule 341 does not entirely preclude our review here, we will not find that these errors are dispositive to our ruling on appeal. Accordingly, despite these deficiencies, we will not dismiss the appeal for failing to comply with Rule 341. See *In re Marriage of Levinson*, 2013 IL App (1st) 121696, ¶ 26.

¶ 17 Failure to Give Notice Before Repossessing the Vehicle

¶ 18 Plaintiff's first argument on appeal is that defendant failed to give him proper notice prior to repossessing the vehicle pursuant to section 3-114 (f-7) of the Illinois Vehicle Code (625 ILCS 5/3-114 (f-7) (West 2012)), and section 9-623(c)(2) of the Uniform Commercial Code (810 ILCS 5/9-623(c)(2) (West 2012)). Although plaintiff did not raise the issue of notice in his amended complaint, he did raise the issue—albeit vaguely—in his response to defendant's motion for summary judgment and it was addressed by the trial court.

¶ 19 The portion of section 3-114 (f-7) of the Illinois Vehicle Code that plaintiff cites deals with the transfer of certificates of title by operation of law and states:

> "(1) Subject to subsection (f-30), if, at the time of repossession by a lienholder that is seeking to transfer title pursuant to subsection (f-5), the owner has paid an amount equal to 30% or more of the deferred payment price or total of payments due, the owner may, within 21 days of the date of repossession, reinstate the contract or loan agreement and recover the vehicle from the lienholder by tendering in a lump sum (i) the total of all unpaid amounts, including any unpaid delinquency or deferral charges due at the date of reinstatement, without acceleration; and (ii) performance necessary to cure any default other than nonpayment of the amounts due; and (iii) all reasonable costs and fees incurred by the lienholder in retaking, holding, and preparing the vehicle for disposition and in arranging for the sale of the vehicle. Reasonable costs and fees incurred by the lienholder

> include without limitation repossession and storage expenses and, if authorized by the contract or loan agreement, reasonable attorneys' fees and collection agency charges." 625 ILCS 5/3-114 (f-7)(1) (West 2012).

¶ 20 We believe that a plain reading of the provisions of the Illinois Vehicle Code cited by plaintiff demonstrates that it does not apply to the facts of this case. The portion of the Illinois Vehicle Code cited by plaintiff addresses the respective rights of a lienholder and owner/customer when the lienholder repossesses a vehicle. Thus, the statute cited is intended to protect parties with ownership or lien interests in collateral. Here, the owner and financer of the vehicle was defendant. The lienholder on the loan was Acura Financial Services. Acura Financial Services, as the lienholder, was not involved in the possession dispute at issue in this case. As such, the parties whose interests are protected under the statutes are defendant (as the owner of the vehicle) and Acura Financial Services (as the lienholder). See 625 ILCS 5/3-114 (f-7) (West 2012) (stating that where a lienholder attempts to take possession of title and the owner has paid at least 30% of the deferred payment price or total payments due, the owner may attempt to reinstate the contract or loan agreement). Because plaintiff was never the owner of the vehicle or a "lienholder seeking to transfer title," this portion of the Illinois Vehicle Code does not apply to him.

¶ 21 Section 9-623(c)(2) of the Uniform Commercial Code states:

> (c) When redemption may occur. A redemption may occur at any time before a secured party:
>
> * * *

> (2) has disposed of collateral or entered into a contract for its disposition under Section 9-610[.]" 810 ILCS 5/9-623(c)(2) (West 2012).

¶ 22 Again, we believe that a plain reading of this portion of the Uniform Commercial Code cited by plaintiff demonstrates that it does not apply to the facts of this case. The portion of the Uniform Commercial Code cited by plaintiff addresses an owner's right to redeem collateral from a secured party or lienholder. The collateral in this case was the vehicle. Again, plaintiff was not an owner of vehicle or a party with a secured interest in the vehicle. As such, his interests are not protected by the portion of the Uniform Commercial Code that he cites to in his brief. See 810 ILCS 5/9-623(c)(2) (West 2012) (stating that a debtor, any secondary obligor, or any other secured party or lien holder may redeem collateral at any time before a secured party has disposed of collateral or entered into a contract for its disposition after default.). Moreover we note that defendant repossessed the vehicle several months before it was sold. Plaintiff does not allege that he attempted to redeem the vehicle in compliance with section 9-623(b) of the Uniform Commercial Code. See 810 ILCS 5/9-623(b) (West 2012) (in order to redeem collateral, "a person shall tender: (1) fulfillment of all obligations secured by the collateral; and (2) the reasonable expenses and attorney's fees described in Section 9-615(a)(1)."). As such, because the statutes cited by plaintiff do not give him any rights, his arguments with respect to notice are unpersuasive.

¶ 23 Unclean Hands

¶ 24 Plaintiff also argues that the trial court erred in granting summary judgment on the basis of equity because defendant had unclean hands. The doctrine of "unclean hands" precludes a party from taking advantage of his own wrong. *State Bank v. Sorenson*, 167 Ill. App. 3d 674,

680 (1988). "The doctrine of unclean hands applies if a party seeking equitable relief is guilty of misconduct, fraud, or bad faith toward the party against whom relief is sought and if that misconduct is connected with the transaction at issue in the litigation." *Zahl v. Krupa*, 365 Ill. App. 3d 653, 658 (2006). Whether the doctrine should be applied is left to the sound discretion of the trial court. *Long v. Kemper Life Insurance Co.*, 196 Ill. App. 3d 216, 219 (1990) (The application of the doctrine is a matter for the trial court's discretion, which we will not disturb on appeal absent an abuse of that discretion.). An abuse of discretion occurs when no reasonable person would adopt the same view as the trial court. *McGill v. Garza*, 378 Ill. App. 3d 73, 75 (2007) (abuse of discretion occurs when a ruling is arbitrary or unreasonable and no reasonable person would reach the same conclusion).

¶ 25 To be clear, plaintiff makes no argument that the trial court's decision to grant summary judgment on defendant's equitable affirmative defense was incorrect. Instead, plaintiff argues that defendant should have been barred from asserting her affirmative defense based on equity because she was guilty of unclean hands. Plaintiff argues that defendant's hands were unclean in the matter because "defendant did not deal in faithfully prior to selling the vehicle to Car Max on 8/31/13" and, as a result, she "received approximately $7,500.00 equity in the sold car."

¶ 26 First, even though plaintiff disputes the fact that he damaged the vehicle and disputes the costs of that damage, even if we were to assume that plaintiff did not cause the damage to the vehicle, defendant still lost money in this transaction. It is undisputed that: (1) defendant was the owner and financer of the vehicle; (2) defendant purchased the vehicle for $48,167.26 on November 18, 2010; (3) defendant repossessed the vehicle in October 2012 after plaintiff was late on several payments and missed several payments; (4) at the time defendant repossessed the vehicle, there was still $28,490.00 owing on it; and (5) defendant sold the vehicle on August 31,

2013 to Car Max for $27,000.00. Thus, even if we assume plaintiff did not cause any damage to the vehicle, defendant still lost money on the vehicle when she repossessed it and sold it, making defendant's argument of unclean hands unpersuasive.

¶ 27 The trial court found that the doctrine of unclean hands did not bar defendant's affirmative defense based on equity and granted summary judgment in favor of defendant on the basis of equity. Based on the undisputed facts of this case, we cannot say that the trial court's finding that defendant's affirmative defenses were not barred by the doctrine of unclean hands was arbitrary or unreasonable such that no reasonable judge would reach the same conclusion. See *McGill*, 378 Ill. App. 3d at 75. Accordingly, we must affirm the trial court's ruling granting summary judgment in favor of defendant.

¶ 28 While we recognize that plaintiff deems it unfair that he paid over $19,000.00 for a vehicle that defendant ultimately sold to a third party, we note that plaintiff used the vehicle for almost two years during the time he made payments and there was no allegation that any agreement was ever made between plaintiff and defendant that plaintiff would gain any type of equity in the vehicle as he made such payments. To the contrary, at all times defendant's name was on the financing agreement as the buyer and owner of the vehicle.

¶ 29 Conclusion

¶ 30 For all the reasons above, we affirm the trial court's April 2, 2014 order granting summary judgment in favor of defendant.

¶ 31 Affirmed.