

No. 1-15-1090

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BRANKO ZECEVIC,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 13 M1 145961
)	
ERICK CARTER,)	Honorable
)	Israel A. Desierto,
Defendant-Appellee.)	Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justice Lampkin concurred in the judgment.
Justice Gordon specially concurred.

O R D E R

- ¶ 1 *Held:* Trial court's grant of defendant's motion for partial summary judgment affirmed over plaintiff's claim that there is a genuine issue of material fact as to whether he is a "consumer" under the Illinois Consumer Fraud and Deceptive Business Practices Act.
- ¶ 2 Plaintiff, Branko Zecevic, appeals from an order of the circuit court granting the motion of defendant, Erick Carter, for partial summary judgment of his claim under the Illinois Consumer Fraud and Deceptive Business Practices Act (Act). 815 ILCS 505/1, *et seq.* (West

2010). On appeal, plaintiff contends the trial court erroneously found he had no standing to seek relief under the Act because he was not a "consumer" as defined by the Act.

¶ 3 The record establishes this case arises from defendant's sale of his vehicle to plaintiff, who owned and operated an Illinois car dealership named X-Motorsport, Inc. Defendant had driven to the dealership with the intention of selling his automobile, and negotiated the sale with one of plaintiff's employees. Plaintiff believed defendant misrepresented the type of engine in his vehicle, and initiated the legal action now before us.

¶ 4 The record further indicates plaintiff filed a two-count complaint against defendant on August 15, 2013. In Count I, plaintiff alleged defendant's actions constituted a violation of the Act, and in Count II plaintiff alleged common law fraud. Plaintiff claimed that on August 19, 2010, he purchased a used 2001 Ford Mustang from defendant for \$8,500. Prior to the sale, defendant represented to plaintiff that the Mustang contained a forged internal engine, which is more durable than a regular engine. Plaintiff later discovered the representation was false. Plaintiff alleged that defendant knowingly made the false representation, that plaintiff purchased the Mustang in reliance on defendant's representation, and sustained certain actual damages in connection with defendant's misrepresentation. Plaintiff further claimed his actions in purchasing the Mustang were "akin to all consumers' actions."

¶ 5 Defendant in his answer denied the allegations in the complaint, and also asserted an affirmative defense as to Count I, that plaintiff did not qualify as a consumer under the Act and thus had no standing to seek relief. Defendant claimed he sold the Mustang to an Illinois car dealership named "Titan Auto Sales/X-Motorsports, Inc.," and that the employees of the dealership thoroughly inspected the vehicle, including the engine.

¶ 6 In his response to defendant's affirmative defense, plaintiff denied defendant's allegations and claimed an individual acting as plaintiff's agent only test drove the vehicle, and did not inspect the engine, but relied on defendant's representations as to the type of engine in the automobile. Plaintiff also claimed he had standing through the Act because he purchased the vehicle for his personal use, and that he directed his business to issue a check for \$8,500 to purchase the vehicle on his behalf.

¶ 7 On January 9, 2015, defendant filed a motion for partial summary judgment as to Count I of plaintiff's complaint alleging fraud under the Act. In that motion, defendant asserted there was no genuine issue of material fact with regard to plaintiff's lack of standing to seek relief under the Act, and that he was entitled to summary judgment on this count. In support of his motion, defendant attached an affidavit, in which he stated that on August 19, 2010, he drove his Mustang to Titan Auto Sales in Worth, Illinois, with the hopes of selling it to this dealership. At the dealership, he asked to speak with a salesperson about selling his vehicle, and he met with Peter Kerpionitis, who "in every way appeared to be a dealership salesperson." Kerpionitis was an employee of X-Motorsport, Inc., which maintained an office at Titan Auto Sales. He inspected the vehicle and asked defendant questions regarding the automobile. They then negotiated a purchase price of \$8,500 and defendant tendered to Kerpionitis the title to the vehicle in exchange for a business check from X-Motorsport, Inc. with "X-Motorsport, Inc." labeled very clearly on the front of the check.

¶ 8 In November 2014, defendant requested registration records for the vehicle from the Illinois Secretary of State. The records, which defendant attached to his motion, demonstrated that neither X-Motorsport, Inc. nor plaintiff registered the vehicle. Rather, the records establish that the last two individuals to register the vehicle were defendant on April 23, 2009, and Scott

Ryskamp on September 30, 2010. Defendant also attached a printout from www.carfax.com to corroborate the registration information from the Secretary of State.

¶ 9 In addition, defendant averred that, before trial, he conducted an internet search for "X-Motorsport, Inc.," which directed him to the website www.goxmotors.com where he observed a picture of his 2001 Ford Mustang with the word "Sold" printed under it in bold lettering. He attached the printouts from the website to his motion. Defendant finally attached an affidavit from Ryskamp averring that on September 27, 2010, he purchased the 2001 Ford Mustang from X-Motorsport, Inc., and not from plaintiff personally. He asserted that he paid \$3,800 in cash and \$6,500 via wire transfer directly to X-Motorsport, Inc. in exchange for the vehicle. Finally, Ryskamp averred that defendant's signature was the last signature on the title he received from X-Motorsport, Inc.

¶ 10 In his response to defendant's motion, plaintiff asserted that defendant had "judicially admitted" in his affidavit that he sold the vehicle to plaintiff personally, and that he was acting as a consumer under the Act because he purchased the vehicle for his personal use, and not for resale. In an affidavit attached to his response, plaintiff averred that he authorized Kerpionitis to act on his behalf to purchase the vehicle from defendant, and that he did not purchase the vehicle with the intent to resell it. He further asserted that in August and September of 2010, X-Motorsport, Inc., an Illinois Corporation, did not possess a license to sell motor vehicles to the general public.

¶ 11 Plaintiff further averred that he sold the vehicle to a person named Salvatore Romano, through Ryskamp, on September 27, 2010, and until that time used the vehicle for his own personal use. When he purchased the vehicle from defendant, he did not intend to resell it to a third party, and only sold the vehicle to Romano because he was able to make a profit. Plaintiff

asserted that X-Motorsport, Inc. issued a check to purchase the vehicle from defendant because at the time he had lent X-Motorsport, Inc. a significant amount of money and the issuance of the check represented a partial repayment of that amount. He finally averred that he told Kerpionitis on August 19, 2010, that he intended to purchase the Mustang for his personal use and that until he sold the vehicle on September 27, 2010, he intended to use it for his own personal use.

¶ 12 Plaintiff also attached to his response an affidavit from Kerpionitis, in which Kerpionitis averred that on August 19, 2010, he acted on behalf of plaintiff in purchasing the Mustang from defendant. Kerpionitis further averred that he represented to defendant that he was acting on behalf of plaintiff with respect to his personal purchase of the vehicle for his personal use. Following the purchase of the vehicle, he observed plaintiff use it solely for his personal use, including driving the vehicle to and from work each day, until he sold it on September 27, 2010.

¶ 13 In reply, defendant claimed that the undisputed fact that plaintiff resold the vehicle to a third party in the ordinary course of his trade or business 39 days after purchasing it from him demonstrates that plaintiff was not a consumer under the Act. He further claimed that regardless of plaintiff's intent when he initially purchased the Mustang, the fact that plaintiff resold it in the ordinary course of his business establishes that he was not acting as a consumer during the initial transaction. Defendant also pointed out that plaintiff never registered the vehicle with the Secretary of State nor did plaintiff obtain a new title for it, and that plaintiff directed his employee, Kerpionitis, to examine and purchase the vehicle at plaintiff's place of business and then paid for the vehicle with a check made payable from his business. Plaintiff then sold the vehicle to a third party and listed the vehicle on the website from his car dealership as "Sold."

¶ 14 In granting defendant's motion for partial summary judgment, the trial court found that plaintiff was not acting as a consumer as defined under the Act. The trial court, in a written

order, stated that the evidence belied plaintiff's assertions, questions plaintiff's credibility, and prevents plaintiff from establishing that a genuine issue of material fact existed. The court also granted plaintiff's motion for voluntary dismissal of the remaining count, common law fraud, without prejudice. This appeal followed.

¶ 15 On appeal, plaintiff repeats many of the same arguments presented to the trial court, and asserts that the pleadings in the record establish that at a minimum there is a genuine issue of material fact as to his status as a "consumer" under the Act, and that the court's grant of summary judgment was therefore improper. In reply, defendant repeats many of the same arguments made in his pleadings below, and contends the trial court properly concluded plaintiff was not a consumer under the Act, and that summary judgment was proper. We observe that in support of his motion for summary judgment, defendant presented objective evidence such as records from the Illinois Secretary of State indicating the chain of title, checks from X-Motorsport, Inc., the affidavit of Ryskamp, and photographs derived from the internet of his vehicle indicating it was sold. In comparison, plaintiff presented a self-serving affidavit in which he did not contest that defendant came unsolicited to his dealership to sell his vehicle, that defendant spoke only to Kerpionitis, or that plaintiff sold the automobile in the ordinary course of his business 39 days later. Plaintiff also presented the affidavit of his employee, who is not a completely objective witness, in response to defendant's motion for summary judgment.

¶ 16 Summary judgment should be granted if the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012); *Thompson v. Gordon*, 241 Ill. 2d 428, 438 (2011). The purpose of summary judgment is not to try a question of fact, but to determine if a genuine question of fact exists (*Thompson*, 241 Ill. 2d at 438), and

in making that determination, the pleadings, depositions, admissions, and affidavits must be strictly construed against the moving party (*Feliciano v. Geneva Terrace Estates Homeowners Ass'n*, 2014 IL App (1st) 130269, ¶ 30). We review the trial court's grant of summary judgment *de novo*. *Thompson*, 241 Ill. 2d at 438.

¶ 17 Plaintiff contends the affidavits and other pleadings on file establish that he was acting as a consumer in this transaction, or, at least, that there is a genuine issue of material fact as to his consumer status. Thus, plaintiff contends summary judgment is inappropriate.

¶ 18 The Act provides that a consumer is "any person who purchases or contracts for the purchase of merchandise not for resale in the ordinary course of his trade or business but for his use or that of a member of his household." 815 ILCS 505/1(e) (West 2010). A person under the Act is "any natural person or his legal representative, partnership, corporation (domestic and foreign), company, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee[,] or cestui que trust thereof." 815 ILCS 505/1(c) (West 2010). As applied here, plaintiff has standing to bring a claim under the Act only if he purchased the Mustang from defendant for his personal use, not for resale in the ordinary course of his trade or business. *Brown v. Veile*, 198 Ill. App. 3d 513, 519 (1990), citing Ill. Rev. Stat. 1973, ch. 121 ½ ¶ 261(f), now 815 ILCS 505/1(e) (West 2010).

¶ 19 When viewing the evidence in a light most favorable to plaintiff, the non-moving party, the record establishes that on August 19, 2010, defendant drove to plaintiff's car dealership, X-Motorsport, Inc. for the purpose of selling his vehicle. One of plaintiff's employees, Kerpionitis, met with defendant, examined the automobile, and eventually purchased it from defendant with a business check from X-Motorsport, Inc. Plaintiff did not register the vehicle with the Secretary of State or obtain a new title for the Mustang at any time prior to reselling the vehicle.

Subsequently, 39 days after purchasing the vehicle, plaintiff sold the Mustang to a third party for profit. The vehicle was listed on the website for plaintiff's business and labeled as "Sold."

¶ 20 The trial court found under these circumstances that plaintiff did not act as a consumer as defined under the Act, and that he failed to establish that a genuine issue of material fact exists as to that point. We agree, and find that plaintiff is not a "consumer" under the Act where he purchased the vehicle and resold it in the ordinary course of his trade or business (*Veile*, 198 Ill. App. 3d at 519), and that summary judgment in this case was proper. *Thompson*, 241 Ill. 2d at 438.

¶ 21 Plaintiff, nonetheless, contends defendant admitted he sold the vehicle to him personally when defendant stated in his affidavit that he sold the automobile "to Plaintiff" and in his motion where he stated it was "undisputed that Plaintiff purchased the vehicle on August 19, 2010." In viewing these statements in context, we do not find they constitute judicial admissions as urged by plaintiff. *Williams Nationalease, Ltd. v. Motter*, 271 Ill. App. 3d 594, 616-17 (1995). Instead, defendant's references to selling the vehicle to "Plaintiff," when viewed in reference to the manner in which the transaction was conducted, indicates his belief that "plaintiff" is representative of his business, the car dealership to which defendant sold his Mustang. Plaintiff's contention, therefore, fails to create a genuine issue of material fact necessary to avoid summary judgment in this case. *Thompson*, 241 Ill. 2d at 438.

¶ 22 Plaintiff also contends that the trial court improperly raised questions as to his credibility. While determinations of witnesses' credibility are inappropriate on summary judgment (see *Gulino v. Economy Fire & Casualty Co.*, 2012 IL App (1st) 102429, ¶ 25; *Merca v. Rhodes*, 2011 IL App (1st) 102234, ¶ 46), it does not necessitate the reversal of the trial court's decision in this case. When reviewing the propriety of the trial court's determination on summary

judgment we do so *de novo*. *Coole v. Central Area Recycling*, 384 Ill. App. 3d 390, 396 (2008).

Thus, we do not give deference to the trial court's rationale, but instead examine the pleadings anew to consider whether a genuine issue of material fact exists. *Id.* We may affirm a trial court's grant of summary judgment on any basis appearing in the record. *Id.* As we are reviewing the issue anew, the trial court's alleged error here in assessing plaintiff's credibility would not itself warrant reversal of the grant of summary judgment, and thus we decline to address its merits. See *id.* (trial court's weighing of credibility on a ruling for a motion for summary judgment alone is not a basis for reversal); *Dowd & Dowd, Ltd. v. Gleason*, 284 Ill. App. 3d 915, 925 (1996) (reversed in part on other grounds, *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460 (1998)). Accordingly, we find the trial court did not err in granting partial summary judgment in favor of defendant.

¶ 23 Therefore, we affirm the judgment of the circuit court of Cook County.

¶ 24 Affirmed.

¶ 25 JUSTICE GORDON, specially concurring.

¶ 26 I concur in the judgment only.