2011 IL App. (1st) 110495-U

SECOND DIVISION
October 11, 2011

No. 1-11-0495

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CHRISTOPHER BATOZECH, Plaintiff-Appellant, v. FORD MOTOR CREDIT COMPANY, LLC, d/b/a Land Rover Captial Group, Defendants-Appellee.	)))))))))	Appeal from the Circuit Court of Cook County 09 L 6740 Honorable Sheldon Harris & Marcia Maras, Judges Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Quinn and Justice Cunningham concurred in the judgment.

ORDER

Held: Trial court's finding that plaintiff failed to prove that his leased vehicle was wrongfully repossessed was not against manifest weight of the evidence. However, defendant failed to prove counterclaim because it did not offer any evidence that plaintiff was obligated under the lease to pay deficiency from vehicle's sale at auction.

¶1 When his leased vehicle was repossessed by defendant and sold at auction, plaintiff Christopher Batozech filed a complaint against defendant Ford Motor Credit Company, LLC, alleging that the repossession violated the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS ch. 505 (West 2010)). Defendant counterclaimed, alleging that plaintiff failed to pay the deficiency pursuant his obligations under the lease after the vehicle was auctioned. At a bench trial, the trial court found against plaintiff and for defendant on all claims

and counterclaims, and entered judgment against plaintiff on the deficiency. We affirm in part and reverse in part.

¶2 I. BACKGROUND

¶3 In 2006, plaintiff was working as a manager at a Ford Land Rover dealership when he signed a written lease with defendant for a 2006 Ford Land Rover as part of a promotional offer to employees of the dealership. At the time, business was good. In 2007, however, business declined and plaintiff began to have trouble making his monthly payments on the lease. During 2007 and 2008, plaintiff was late on nearly every monthly payment. Plaintiff testified at trial that every time he anticipated being late on a payment, he would call defendant and work out an alternative timeline for that payment. For example, when defendant lost his job as a manager in July 2008, he informed defendant and modified the payment schedule until he was employed again. Additionally, the lease was originally due to terminate in August 2008, but due to plaintiff's employment situation, defendant agreed to extend the lease for five months. The record at trial reveals that at different times defendant accepted payments from plaintiff that were up to 62 days past due.

¶4 These facts were essentially undisputed. The contested factual issue at trial instead revolved around conversations between defendant and plaintiff in January 2009. At that time, plaintiff's November and December 2008 payments were significantly past due and the January 2009 bill would be due shortly. Plaintiff had been delinquent on his payments for some time, and defendant introduced evidence showing that it had attempted to contact plaintiff about his bills at least 98 times between August 2008 and January 2009. Almost all of these calls were placed by an automatic dialing system to plaintiff's home, however, and it was disputed whether any messages were ever left for plaintiff at home. Some calls were also placed to plaintiff's cell

phone, and other calls were placed to his number at work and messages were left for him there. Plaintiff seldom, if ever, returned the calls.

¶5 Annotations in defendant's records, which were introduced by plaintiff at trial, demonstrated that by January 6, 2009, plaintiff was 60 days past due on his bills and had not been in contact with defendant for some time, apparently since December 2, 2008. The records reflected that defendant left messages for plaintiff on January 6th at work stating that defendant would initiate repossession of the vehicle if it did not hear from plaintiff by the end of that day. Plaintiff claimed he never received this message. There was no response from plaintiff, so defendant began the repossession process the next day. The repossession request was approved on the 7th and was contracted out to a third party on the 8th.

¶6 On January 8th, plaintiff finally contacted defendant about his late payments. There were several conversations that day, but what was said during those conversations was heavily contested at trial. Plaintiff advised defendant that he would be able to make a double payment on January 15th, his next scheduled payday. Defendant refused to further extend the payment deadline and instead demanded the November and December payments that day.

¶7 After the conversation, plaintiff contacted acquaintances and attempted to borrow money for the payments but was unsuccessful. Plaintiff called defendant back and again offered to make the payments on the 15th, but defendant again refused. At this point, the evidence submitted by plaintiff and defendant diverges. According to plaintiff, the parties discussed a procedure called Voluntary Early Termination (VET), which was an option under the lease. Under this lease provision, a lessee could terminate a lease of a vehicle before the term expired by tendering the vehicle to a dealership at any point within the last six months of the lease term. The lessee would then only be billed for the remainder of the lease payments, late charges, and

any excessive mileage or wear and tear on the vehicle. According to plaintiff, defendant agreed to VET and agreed to let plaintiff bring the vehicle into a dealership the next day. Plaintiff testified that it was his understanding that defendant would take no adverse action on his account until plaintiff called back the next day with confirmation (via a "verification number") that the vehicle had been returned.[1] It appears that defendant never mentioned during this conversation that it had already initiated repossession of the vehicle.

¶8 According to defendant, the parties did discuss VET, but defendant claimed that it never agreed to hold off on any action on the account. Defendant pointed to its internal notes from the phone conversation, which we reproduce here:

¶9 "tt cust. stated can't pay until 1/15. adv of hold until c/b w/ref number. adv. Of maturity date, adv of VET, stated needs car and can pay next week, adv borrow money, stated can't, adv no guarantee no hold."

¶10 Defendant's corporate representative testified to the meaning of these notes. According to her testimony, the "ref number" referred to a wire transfer reference number through Western Union or MoneyGram, not to a VET confirmation number as plaintiff believed. Defendant argued that it did not agree to hold off on any action on the account prior to the VET, pointing to the statement in the note, "adv no guarantee no hold." In contrast, plaintiff relied on the phrase "adv of hold until c/b with ref number" in support of his argument that defendant did agree to VET. Defendant apparently did not dispute that it failed to mention to plaintiff that it had already initiated the repossession of the vehicle by the time this conversation occurred.

¶11 Only a few hours after this conversation, plaintiff's vehicle was towed from his house by defendant's repossession contractor. At the time of repossession, the lease was scheduled to

[1] Plaintiff was familiar with the VET process due to his lengthy employment as a Land Rover sales representative and manager.

expire the following month but plaintiff was overdue on his payments by 62 days. Plaintiff called defendant the next day and offered to make the remaining payments, but defendant told him that it was now too late and that the matter was in the hands of a different department. Plaintiff called defendant a few more times over the next few months and made the same offer, but defendant consistently declined. Defendant also reported the repossession to credit bureaus.

¶12 Defendant later sold the vehicle at auction, which netted $29,800. Given that the vehicle had been new and worth nearly $56,000 when the lease period began, this represented a deficiency of $23,963.79, which included $702 for the repossession and auction. Defendant sent plaintiff a bill and demanded that he pay the deficiency.[2]

¶13 Rather than pay the deficiency, plaintiff filed the instant complaint against defendant, alleging that defendant's conduct violated the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS ch. 505 (West 2010)). Plaintiff's theory was that defendant violated the Act because defendant had waived its right to receive timely payments by continuously accepting late payments from plaintiff, and therefore defendant had no right to repossess the vehicle for plaintiff's failure to timely pay. Alternatively, plaintiff argued that defendant had no right to repossess the vehicle because it had agreed to hold off on any action on plaintiff's account pending VET. Defendant counterclaimed, alleging that plaintiff was obligated to pay the deficiency balance pursuant to the vehicle lease agreement.

¶14 The case proceeded to a bench trial, at which the trial court held in a brief written order that plaintiff failed to prove that defendant waived its right to timely payment and failed to prove that defendant had agreed to take no action pending VET. The trial court also found that

[2] Interestingly enough, plaintiff's remaining obligation on the lease at the time of the repossession, including back payments and late charges, amounted to only $2,132.84. Given our disposition of this appeal, however, we need not delve into this disparity.

defendant had proven that plaintiff owed the deficiency, and it entered judgment in favor of defendant on both the complaint and the counterclaim in the amount of $42,941.00, plus costs. Plaintiff moved to reconsider and modify the judgment, but this was denied. This appeal followed.

¶15 II. ANALYSIS

¶16 On appeal, plaintiff maintains that carried his burden of proof for his claim under the Act under both of his theories. Plaintiff also argues that it was error for the trial court to enter judgment for defendant on the counterclaim because defendant failed to prove that plaintiff was obligated to pay the deficiency under the contract.[3]

¶17 A. Plaintiff's Claim

¶18 Plaintiff based his claim on section 2 of the Act, which prohibits:

> ¶19 "[u]nfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the 'Uniform Deceptive Trade Practices Act', approved August 5, 1965 [815 ILCS 510/2], in the conduct of any trade or commerce ***." 815 ILCS 505/2 (West 2010).

¶20 Repossession of a vehicle can be a violation of the Act when it is accompanied by some unfair, oppressive, or deceptive practice that is relied on by a consumer. See generally, *e.g.*, *Demitro v. GMAC*, 388 Ill. App. 3d 15 (2009) (discussing the elements of a cause of action

[3] Plaintiff also raises another theory, arguing that defendant violated the Act by billing plaintiff for a deficiency that is grossly disproportionate to his remaining obligation on the lease. Given our disposition relative to the counterclaim (see Part II(B)), we do not reach this issue.

under the Act in the context of a vehicle repossession). In this case, plaintiff's theory was that defendant violated the Act by repossessing his vehicle after unfairly leading him to believe (1) that late payments would always be accepted or (2) alternatively, that defendant would allow plaintiff to voluntarily terminate the lease on January 9, 2009.

¶21 The success of plaintiff's first theory depends on whether defendant waived its right under the lease to timely payment. Waiver is "the intentional relinquishment of a known right," and it may be express or implied by a course of conduct. *Ryder v. Bank of Hickory Hills*, 146 Ill. 2d 98, 104-05 (1991). "An implied waiver may arise where a person against whom the waiver is asserted has pursued such a course of conduct as to sufficiently evidence an intention to waive a right or where his conduct is inconsistent with any other intention than to waive it." (Internal quotation marks omitted.) *Id.* at 105. Whether waiver occurred is a question of fact, and we "will not disturb a trial court's finding unless that finding is contrary to the manifest weight of the evidence." (Internal quotation marks omitted.) *Id.* at 105. "A decision is against the manifest weight of the evidence only when the opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence." *Eychaner v. Gross*, 202 Ill. 2d 228, 252 (2002).

¶22 It was unquestioned at trial that defendant had a right to timely monthly payments on the lease, so the dispositive question is whether defendant waived that right. Plaintiff presented a significant amount of undisputed evidence that he had frequently, if not continuously, submitted late payments to defendant, which always accepted the payments. It is a generally accepted principle of contract law that a party may waive its right to timely payments by making a habit of accepting late payments, unless that party makes clear that it intends to enforce future deadlines. See, *e.g.*, *Vogel v. Dawdy*, 107 Ill. 2d 68, 76 (1985) (citing *Lang v. Parks*, 19 Ill. 2d

223, 226 (1960) ("[E]ven though time of payment may be declared of the essence, the vendor's right may be temporarily abrogated by his regular acceptance of prior payments at irregular intervals.")); *City of Chicago v. Chicago Title & Trust Co.*, 205 Ill. App. 3d 728, 735 (1990) ("Where a party accepts late payments it may waive or suspend its right to timely payments and its right to declare a forfeiture unless the buyer is given a definite and written notice of the intention to require strict compliance with the contract in the future." (Internal quotation marks omitted.)). So the real question in this case is whether defendant's acceptance of late payments from plaintiff implies that it affirmatively waived its right to declare plaintiff in default on the lease based on untimely payment.

¶23 In its order, the trial court found that, "[n]otwithstanding the plaintiff's proof that on prior occasions the defendant accepted late payments and withheld repossessing, the evidence is lacking that on the occasion in question the defendant again promised to do so." Although the trial court did not elaborate on this finding, the record reveals why the trial court found that defendant did not waive its right to timely payment through its course of conduct. Plaintiff testified that each time he expected to be unable to meet a payment deadline, he contacted defendant and worked out an alternate payment schedule. Notably, it does not appear that plaintiff ever submitted a late payment without discussing the problem with defendant and obtaining its approval. In contrast to a situation in which a lessee has a history of consistently making late payments and the lender silently accepts them, in this case defendant accepted late payments but did so only after plaintiff asked for an extension in the payment deadline. Indeed, the record reveals that defendant consistently asked plaintiff to pay his bills in accordance with the agreed extensions.

¶24 Far from demonstrating that defendant waived its right to timely payment, this course of action indicates that defendant *insisted* on timely payment but was willing to modify the payment deadlines for individual billing cycles when plaintiff asked. There does not appear to be any evidence in the record that plaintiff ever paid a bill late without first consulting defendant. Plaintiff himself testified at trial as follows:

¶25 "Q: Did you ever have problems making your payments to [defendant]?"

¶26 A: I did.

¶27 Q: What did you do about it?

¶28 A: I would contact [defendant] and work with them. *** [T]hey understood what was going on, and they worked with me as well and accepted payments late when I could—when I was financially able to make them."

¶29 This evidence supports the trial court's finding that defendant did not waive its right to timely payment.

¶30 Plaintiff relies almost exclusively on *Margolin v. Franklin*, 132 Ill. App. 2d 527 (1971), in which we upheld the circuit court's finding that the defendant car dealership had waived its right to timely payment on a vehicle purchase because it had accepted late payments from the plaintiff. See *id.* at 530-31. Although the facts in this case are similar to *Margolin*, plaintiff fails to recognize that *Margolin*'s procedural posture is crucially different. Whereas in *Margolin* the trial court had found as a matter of fact that the defendant had waived its right to timely payment, in this case the trial court found that no waiver occurred. As we noted above, the standard of review for issues of fact such as this is deferential, and we may only reverse if "the opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence." *Eychaner*, 202 Ill. 2d at 252. Although plaintiff presented evidence that

could support a finding that defendant waived its right to timely payment, there was also evidence presented from which the trial court could determine that defendant periodically accepted late payments from plaintiff yet did not waive its right to timely payment. The trial court's finding that no waiver occurred is therefore not against the manifest weight of the evidence. *Cf. Ryder*, 146 Ill. 2d at 108-09 (affirming trial court finding of no waiver where defendant bank had consistently demanded payment but allowed plaintiff additional time to make payments).

¶31 Plaintiff's alternative theory is that defendant agreed not to take any action on his account pending VET. This theory depends on factual findings about the content of the conversation that occurred on January 8th, so we review the trial court's findings on this point as well under the manifest-weight-of-the-evidence standard. The trial court found the following facts:

> ¶32 "[O]n January 8, 2009, plaintiff was in arrears having failed to comply with a previously extended cure date of December 8, 2008 and attempted to get the defendant to agree to a further extension. The defendant refused to agree to any further extension. Most importantly, the defendant expressly told plaintiff during their telephone conversation of January 8, 2009 that there was 'no guarantee' that the repossession would be held off."

¶33 We cannot say that the trial court's finding that there was no agreement was against the manifest weight of the evidence. Although plaintiff points to evidence in the record that indicates that there was an agreement to allow the VET and to not take any adverse action on the account, there was also ample evidence in the record suggesting the opposite conclusion. Plaintiff's arguments on appeal essentially ask us to reweigh the evidence and substitute our

judgment for the finder of fact, but this is something that we cannot do. See *Studt v. Sherman Health Systems*, 2011 IL 108182, ¶ 50. The manifest-weight standard of review is "grounded in the reality that the circuit court is in a superior position to observe the demeanor of the witnesses, determine and weight their credibility, and resolve conflicts in their testimony." *In re Marriage of Baumgartner*, 237 Ill. 2d 468, 487 (2010). The trial court's finding on this issue was supported by evidence and was not arbitrary or unreasonable, and it is therefore not against the manifest weight of the evidence.

¶34 Because plaintiff failed to prove that the repossession of his vehicle was wrongful, he cannot prove that defendant's conduct violated the Act. The trial court's judgment in favor of defendant on the complaint is therefore affirmed.

¶35 B. Defendant's Counterclaim

¶36 Plaintiff also appeals from the judgment in favor of defendant on its counterclaim. Defendant's counterclaim alleged that plaintiff failed to pay the deficiency that resulted from the sale of the vehicle at auction when it was repossessed. Defendant alleged that this obligation arose from the lease agreement, but plaintiff argues on appeal that defendant failed to introduce evidence at trial that plaintiff was obligated under the lease to pay the deficiency.

¶37 Defendant's counterclaim was based on the written contract, and damages for breach of contract are ordinarily limited to placing the nonbreaching party in the position he would have been had the contract been performed. See *Wilmette Partners v. Hamel*, 230 Ill. App. 3d 248, 261 (1992). Defendant claimed that the lease required plaintiff to pay the entire deficiency from the auction sale of $23,963.79. Defendant concedes in its brief on appeal that its claim against plaintiff for the deficiency was based on specific terms of the contract.

¶38 However, defendant did not enter the lease into evidence or present any evidence that would otherwise prove that plaintiff was obligated to pay the deficiency. It appears that defendant relied entirely on a single stipulation as its proof that plaintiff owed the deficiency. The following exchange occurred during a discussion about admitting the deficiency bill into evidence:

¶39 "[Defense counsel]: Are you stipulating the payments that are shown on the statement of account?

¶40 [Plaintiff's counsel]: Stipulating to the—we have as Plaintiff's Exhibit No. 4, which are shown the balance and the amounts there.

¶41 [Defense counsel]: So she [the corporate representative] doesn't need to testify about that?

¶42 [Plaintiff's counsel]: No.

¶43 THE COURT: What's that stipulation now?

¶44 [Plaintiff's counsel]: Plaintiff Exhibit No. 4, your Honor, shows the initial unpaid adjusted capital cost of $8,784.30 after a variety of charges, balance now due according to that is $23,963.70. We're stipulating that those amounts are calculated correctly, *not that they're owed*, that they're calculated correctly.

¶45 THE COURT: All right. Exhibit No. 4 is received into evidence without objection." (Emphasis added.)

¶46 At the close of the evidence, defense counsel referred back to the stipulation:

¶47 "THE COURT: Okay, Plaintiff rests. Does the Defendant rest?

¶48 [Defense counsel]: Your Honor, I do have a counterclaim and I assume that we've covered that with the stipulation of the accuracy of the demand letter.

¶49 [THE COURT]: Okay. *** Do you have a counterclaim on the deficiency?

¶50 [Defense counsel]: Yes sir.

¶51 THE COURT: 23,963.79.

¶52 [Defense counsel]: Which is the amount set for in Exhibit 4 *which has been stipulated to*." (Emphasis added.)

¶53 Contrary to defense counsel's assumption, the record is clear that the stipulation only encompassed whether the deficiency amount was correctly calculated. We have scoured the record and it does not appear that plaintiff ever stipulated that he was liable to pay the deficiency, nor does it appear that defendant ever introduced the lease into evidence or elicited any testimony that one of plaintiff's obligations under the lease was to pay an auction deficiency in the event that he breached the lease and the vehicle was repossessed. Indeed, defendant's corporate representative conceded on the stand that she was not familiar with the provisions of plaintiff's lease.

¶54 Given that defendant's claim against plaintiff depended on the terms of the contract, it was defendant's burden to prove what those terms were in order to prevail on its counterclaim. Because defendant failed to present any evidence that plaintiff was obligated to pay the deficiency under the contract, the trial court's finding to the contrary was against the manifest weight of the evidence. See *Eychaner*, 202 Ill. 2d at 252. Although the trial court's error is understandable given defense counsel's representations that defendant's counterclaim had been

proven by the stipulation, it was still erroneous because it was not based on the evidence. Judgment for defendant on the counterclaim was therefore improper and must be reversed.

¶ 55 III. CONCLUSION

¶ 56 For the reasons above, we affirm the judgment in favor of defendant on the complaint but we reverse the judgment in favor of defendant on the counterclaim. Because we reverse the judgment on the counterclaim, we do not reach plaintiff's final alternative contention that the amount of damages awarded to defendant was not based on the evidence.

¶ 57 Affirmed in part and reversed in part.