2013 IL App (2d) 120932-U
No. 2-12-0932
Order filed March 22, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

KEVIN BESCH,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 12-SC-842
	)	
ISUZU MOTORS AMERICA, LLC,	)	Honorable
	)	Joseph M. Grady,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Burke and Justice Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in granting defendant summary judgment on plaintiff's breach-of-contract claim: whether the amount that defendant offered for plaintiff's vehicle satisfied the standard of purchase price minus reasonable depreciation was a factual issue, especially where defendant did not demonstrate how it arrived at its offer.

¶ 2 Plaintiff, Kevin Besch, appeals the trial court's order granting summary judgment to defendant, Isuzu Motors America, LLC. After defendant decided that it could not repair plaintiff's vehicle pursuant to a recall notice, it offered him the alternative remedy of purchasing his car for $3,970. Believing the amount inadequate, plaintiff sued. The trial court granted defendant summary judgment, ruling that plaintiff had refused defendant's offer of an alternative remedy and was entitled

to no other remedy. Plaintiff contends that whether defendant's offer was adequate is a question of fact precluding summary judgment. We agree, and reverse and remand.

¶ 3 Plaintiff purchased a new 2000 Isuzu Rodeo. In 2011, defendant, under the supervision of the National Highway Traffic Safety Administration, issued an urgent safety recall notice that included plaintiff's vehicle. Plaintiff took his vehicle to Biggers Chevrolet/Isuzu, which decided that, because of the condition of plaintiff's vehicle, it could not make the required repairs. Defendant offered to purchase plaintiff's vehicle for $3,970, which it claimed was its Kelley Blue Book value. Plaintiff thought the vehicle was worth more than $3,970. After efforts to resolve the dispute failed, plaintiff filed a *pro se* small-claims complaint seeking $10,000 under a breach-of-contract theory. Plaintiff also sought damages for loss of use of the vehicle, alleging that he was unable to remove it from Biggers' lot.

¶ 4 Defendant moved to dismiss, which the trial court denied. Defendant then moved for summary judgment. The motion denied that defendant had a contract with plaintiff or that it refused to allow him to remove the vehicle from the lot. Attached to the motion was the certified statement of Clode Disinger, defendant's National Operations Manager. Disinger stated that, after defendant realized that it could not repair plaintiff's vehicle, it offered to purchase it for $3,970. This amount was "based on the vehicle's condition and Kelly [*sic*] Blue Book value." Also attached to the motion was a page printed from NADAcars.com. It shows four possible values for a 2000 Isuzu Rodeo, none of which is $3,970.

¶ 5 The trial court denied the motion without prejudice. Defendant refiled the motion and the trial court granted it, giving no reasons for its decision. After plaintiff moved to reconsider, the court

clarified its previous order. The court stated that defendant offered plaintiff an alternative remedy, which he declined, and that plaintiff was entitled to no additional remedy. Plaintiff timely appeals.

¶ 6 Plaintiff contends that (1) defendant's summary judgment motion was improper because it was filed without leave of court; (2) the motion was really a second motion to dismiss; and (3) whether defendant's alternative remedy was adequate is a factual question that should not have been decided on summary judgment. We agree with plaintiff's third contention.

¶ 7 We briefly explain why we reject plaintiff's procedural arguments. He is correct that Supreme Court Rule 287(b) (eff. Aug. 1, 1992) requires leave of court before filing a dispositive motion in a small-claims action. Nevertheless, the trial court's entertaining the motion on the merits, without objection by plaintiff, implicitly granted defendant leave to file it. See *Smith v. Godin*, 61 Ill. App. 3d 480, 482-83 (1978). Plaintiff was able to oppose the motion on the merits and does not claim prejudice from defendant's filing it without leave of court. Similarly, although the motion arguably contained some elements of a motion to dismiss (disputing, for example, whether plaintiff properly pleaded a breach of contract), plaintiff does not claim to have been confused by the nature of the motion and was able to respond on the merits.

¶ 8 Turning to the merits, plaintiff argues that the federal statute pursuant to which the recall occurred prescribes a specific alternative remedy in cases where the vehicle cannot be repaired. In such cases, the manufacturer shall "refund[] the purchase price, less a reasonable allowance for depreciation." 49 U.S.C. § 30120(a)(1)(A) (iii) (2006). Plaintiff argues that this is not necessarily the same as the Kelley Blue Book value and that, ultimately, a jury should decide the vehicle's value. We agree.

¶ 9 The trial court granted defendant summary judgment. Summary judgment is appropriate where the pleadings, affidavits, depositions, and admissions on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010); *Klitzka v. Hellios*, 348 Ill. App. 3d 594, 597 (2004). In reviewing a grant of summary judgment, we construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the nonmoving party. *Lake County Grading Co., LLC v. Village of Antioch*, 2013 IL App (2d) 120474, ¶12 (subject to revision or withdrawal). "Where reasonable persons could draw divergent inferences from the undisputed material facts or where there is a dispute as to a material fact, summary judgment should be denied and the issue decided by the trier of fact." *Id.*

¶ 10 The assessment of damages is preeminently a jury function. 15 Ill. Law & Prac. *Damages* § 125 (updated Feb. 2013) (citing *Torres v. Irving Press, Inc.*, 303 Ill. App. 3d 151, 156-57 (1999)). The value of plaintiff's vehicle (the purchase price minus a reasonable allowance for depreciation) is essentially the measure of his damages for defendant's inability to repair the vehicle's unsafe condition. Defendant does not explain why it was appropriate for the trial court to decide this issue as a matter of law.

¶ 11 Defendant argues that courts have recognized the Kelley Blue Book as a "valid source" for determining the value of vehicles. However, none of the cases defendant cites holds that it is the only such method or that it is dispositive of the issue of value. Any value published in a source such as the Kelley Blue Book is bound to be an average based on factors such as the vehicle's original selling price and its age. Individual characteristics of a given vehicle may vary that value. Disinger implicitly acknowledged this when he stated that defendant's $3,970 offer was "based on the

vehicle's condition and Kelly [*sic*] Blue Book value." Thus, defendant, while insisting that the Kelley Blue Book value is virtually sacrosanct, apparently used it only as a starting point and made adjustments up or down based on the condition of the particular vehicle.

¶ 12 We do not know for sure how defendant arrived at its offer because, other than Disinger's cryptic statement, its motion and supporting documents give no indication of how defendant arrived at the $3,970 figure. As noted, the motion does not even include the Kelley Blue Book figure that was presumably the starting point. The motion includes a printout from a different website. That printout lists four possible values for plaintiff's 2000 Rodeo, none of which corresponds to the $3,970 offer. Thus, we fail to see how valuing plaintiff's vehicle was so cut and dried that the trial court could decide it as a matter of law.

¶ 13 As plaintiff points out, the trial court appears to have taken the position that *any* alternative remedy was sufficient as a matter of law. The court did not purport to find that defendant's offer was in fact reasonable, but merely held that plaintiff was offered an alternative remedy, which he declined. Plaintiff observes that, taken to its logical conclusion, the court's ruling means that defendant could have offered to purchase plaintiff's vehicle for $1 and he would have been forced to either accept it or forgo any remedy at all.

¶ 14 Defendant argues that plaintiff did not provide any foundation for his $10,000 value. However, defendant gets it backward. As the movant, defendant first had to demonstrate that it was entitled to judgment as a matter of law. *Lake County Grading*, 2013 IL App (2d) 120474, ¶ 12. Only then would plaintiff have to counter with facts entitling him to judgment. In any event, plaintiff's opinion is at least an arguably sufficient foundation, as a property owner is qualified to

give his opinion of the value of his property. *In re Marriage of Anderson*, 409 Ill. App. 3d 191, 199 (2011).

¶ 15 The judgment of the circuit court of Kane County is reversed, and the cause is remanded.

¶ 16 Reversed and remanded.